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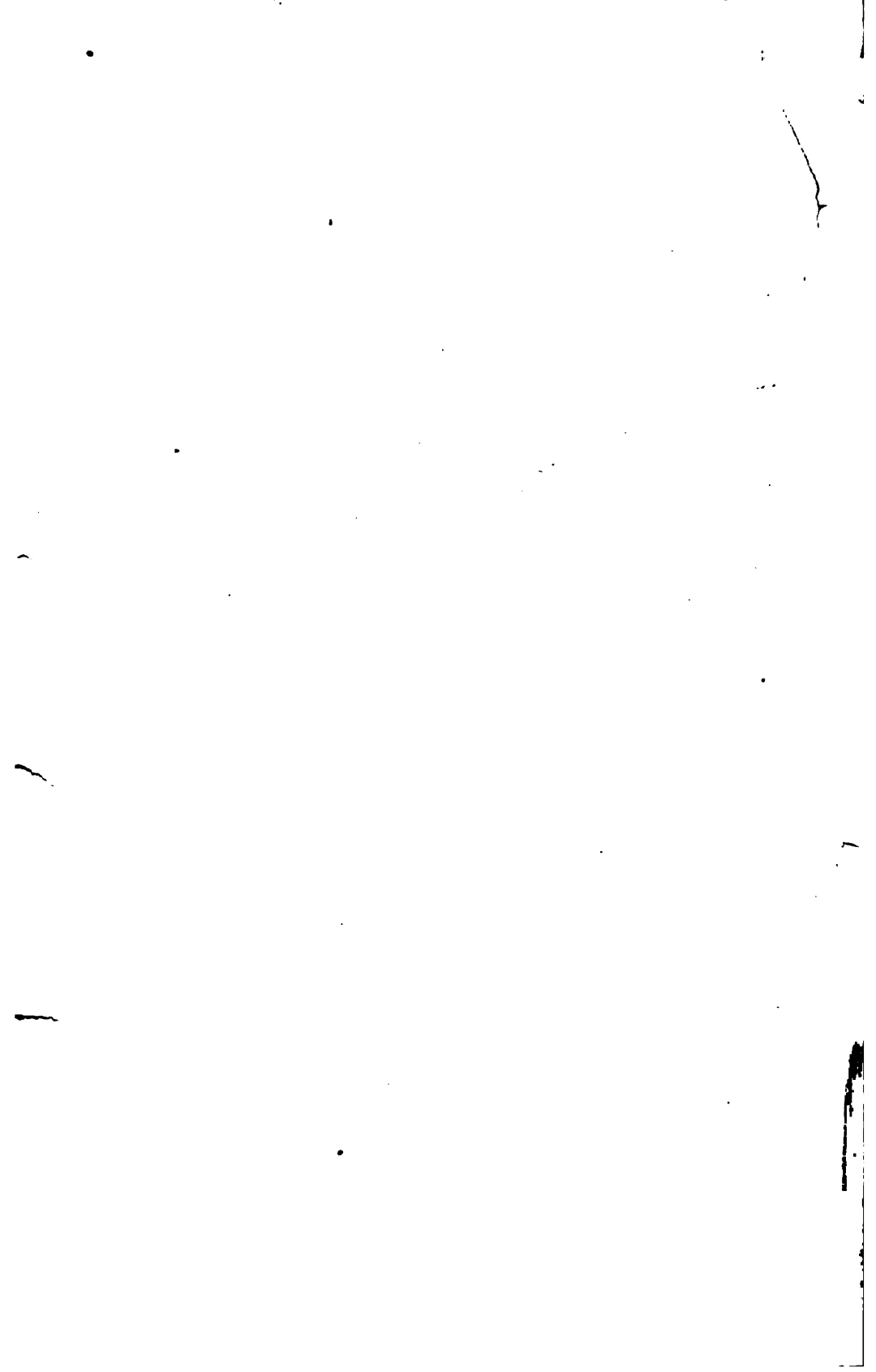
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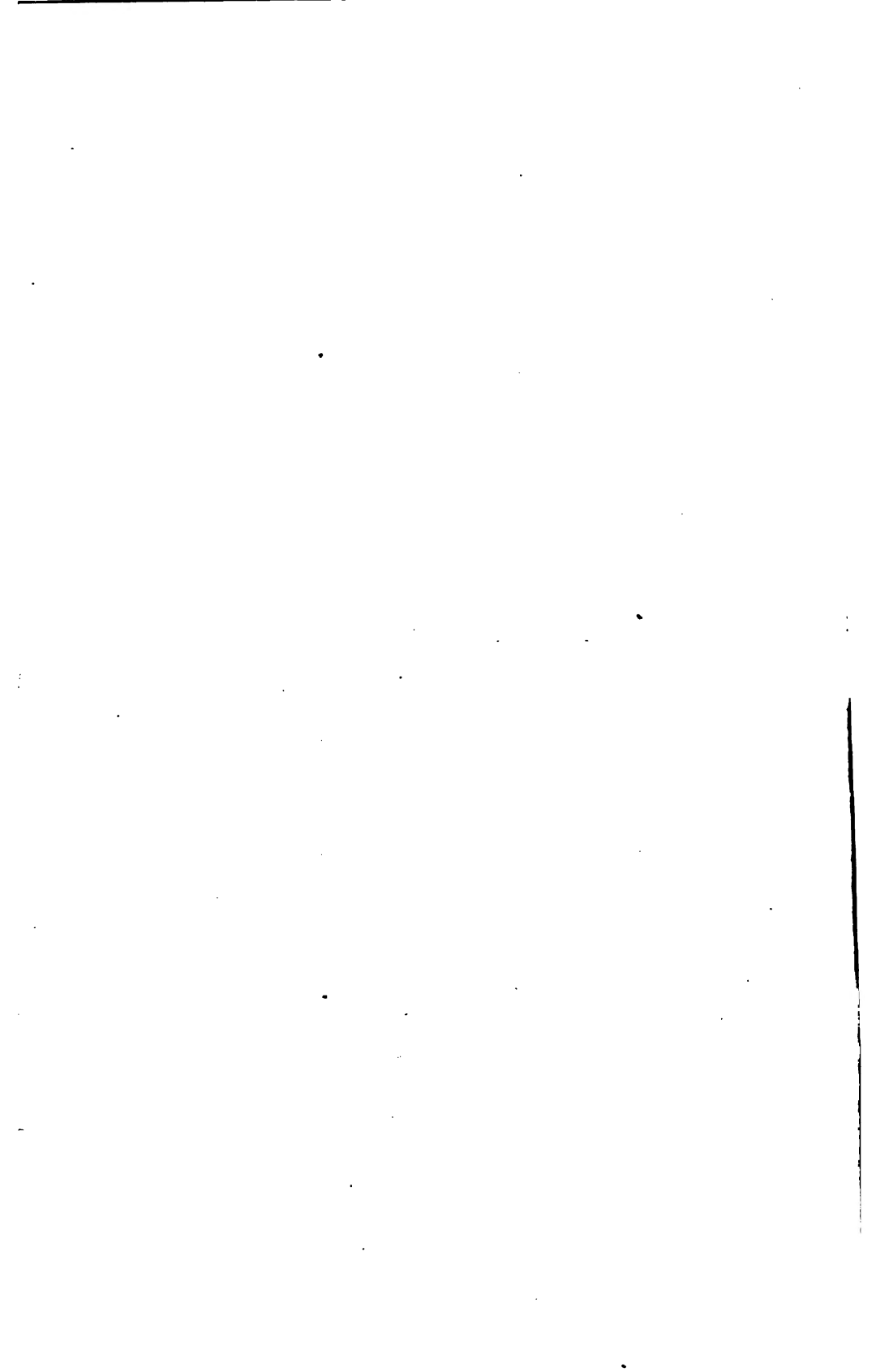
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LOUISIANA

Annual Reports.



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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
LOUISIANA.

VOL. 39—FOR THE YEAR 1887

HENRY DENIS,
REPORTER.

NEW ORLEANS:
F. F. HANSELL & BRO., PUBLISHERS.
1888.

Rec. June 1, 1888.

JUDGES OF THE SUPREME COURT,

DURING THE TERM OF THESE REPORTS.

CHIEF JUSTICE :

EDWARD BERMUDEZ, LL. D.

ASSOCIATES :

FELIX P. POCHÉ,

ROBERT B. TODD, LL. D.

THOMAS C. MANNING, LL. D.

CHARLES E. FENNER,

LYNN B. WATKINS.

ATTORNEY GENERAL :

MILTON J. CUNNINGHAM.

CLERKS OF THE COURT :

GEORGE W. DUPRÉ, New Orleans.

ROBERT J. WILSON, Monroe.

L. SUMPTER TAYLOR. Opelousas.

PETER J. TREZEVANT, Shreveport.

IN MEMORIAM.

SUPREME COURT OF THE STATE OF LOUISIANA, }
Minutes of Monday, November 7, 1887. }

The Court was duly opened.

Present, their Honors EDWARD BERMUDEZ, Chief Justice, and FELIX P. POCHÉ, ROBT. B. TODD, CHAS. E. FENNER, LYNN B. WATKINS, Associate Justices.

The minutes of Tuesday, May 31, 1887, were read and approved.

And, thereupon, the Hon. ROBERT H. MARR, in terms appropriate to the occasion, and eulogistic of the deceased, reminded the Court of the death of the Hon. THOMAS COURTLAND MANNING, formerly Chief Justice of this Court, and moved the adjournment of the Court, out of respect to the memory of the eminent deceased, without transacting the regular business of the day. The motion was appropriately seconded by Hons. E. T. MERRICK, Judge E. D. WHITE and HENRY C. MILLER, Esq., and it was ordered by the Court, on motion, that the following proceeding of a meeting of the members of the bar, be spread upon the minutes of this Court:

At a meeting of the members of the bar of New Orleans, held in the rooms of the Supreme Court of the State of Louisiana, on Monday, the 7th of November, 1887, Judge R. H. Marr was called to the chair, and Judge Walter H. Rogers was appointed secretary. The following committee on resolutions was appointed: Thomas L. Bayne, Henry C. Miller, Judge E. D. White, James McConnell, Henry J. Leovy, Percy Roberts.

The committee reported the following resolutions, which were unanimously adopted:

RESOLUTIONS.

The members of the New Orleans bar have learned with deep sorrow of the death of the Hon. THOMAS COURTLAND MANNING, who for three years was Chief Justice, and under two commissions, Associate Justice of the Supreme Court of Louisiana, and who, at the time of his death, was Minister of the United States to the Republic of Mexico, and they desire to express, in some appropriate way, their exalted appreciation of him as a citizen and a jurist. Therefore be it

Resolved, That by the acceptance of the high office of Chief Justice under the circumstances which then obtained, which put at imminent risk his liberty, fortune and life, he evinced moral and physical cour-

age and sterling patriotism, which commended him to the admiration and affection of every citizen of Louisiana.

Resolved, That while never occupying position as a political officeholder, he was, throughout his manhood, in the highest sense of the expression, a public man, taking an active personal part in all matters that concerned the public weal, and by his commanding force of character and mind and unselfish zeal, influencing affairs to wise and patriotic ends.

Resolved, That while exercising the functions and administering the discipline of his great office on the bench, he bore himself with such impartial consideration and such patient attention to every member of the bar who appeared in argument before him, that he impressed ineffaceably on the affectionate remembrance of that bar.

Resolved, That in performing the onerous duties devolving on him as a member of our Supreme Court he displayed an invincible industry, a devotion to business and a capacity for great labor, which won the admiration of his brethren on the bench and the members of the Louisiana bar.

Resolved, That in the opinions delivered by him as the organ of the Supreme Court are exhibited a clearness of apprehension, a power of analysis, a breadth of view, the inculcation of high standards of conduct and literary ability so exalted in degree, that he is entitled to high rank as a moralist, scholar and jurist.

Resolved, That the cordial sympathy of the bar be extended to the family of the deceased, and a copy of these resolutions be transmitted to them by the chairman of this committee, and that the chairman present these resolutions to the Supreme Court, and ask that they be spread upon the minutes.

Replying on behalf of the Court, his Honor, the Chief Justice, said :

The Chief Justice of the previous court, whose public career has lately terminated in the Ministership in Mexico, and whose recent loss both bar and bench deeply regret, was a high-toned gentleman, an accomplished scholar and a jurist of acknowledged distinction.

In the dispensation of its munificence, Providence had heaped upon him, physically and mentally, choice favors, with which not many mortals are gifted.

He had an imposing appearance and deportment, which at first sight announced that he was no ordinary man, and which repelled familiarity and demanded respect.

Endowed with large self-esteem, he was self-reliant, distant and somewhat exclusive.

He was a profound thinker, an eloquent and forcible speaker, a happy and elegant writer, mastering an unusual power of language.

He was a lawyer of extensive and varied acquirements, of undisputed merit, occupying a pre-eminence at the bar, at which he knew few equals.

He served under three different commissions on the Supreme Bench, over which, from January, 1887, to May, 1880, he presided with unsurpassed dignity.

He furnished evidence during his judicial career of a powerful and far-reaching mind, of prompt perceptive faculties, of a rare power of analysis and consideration and most remarkable industry.

He was not noted for a special blind admiration of certain branches of the civil law, as it prevails here, but he nevertheless would yield to their behests, and sternly apply and enforce the law, as he found it, in proper cases.

There was no litigation, however intricate, which his dissecting intellect could not unravel and reduce to its simplest expression, and no apparent discordance between text and exposition which he could not reconcile and bring to work harmoniously, so as to lead plausibly to ultimate satisfactory conclusions on the merits of the controversy.

Originally a strict constructionist, he became, in the course of time, in proper instances, a liberal expounder, realizing that, although well grounded technicalities must be considered, still there was some way of bridging over difficulties, so as to prevent them from obstructing the administration of justice.

He thought, with many, that the letter kills, while the spirit vivifies.

At times, in contentions where there seemed to be law against law, and equity against equity, and much to be said on both sides, he delighted to prepare clashing and mystifying views, admirable for acuteness, lucidity and plausibility.

THOMAS COURTLAND MANNING has impressed his name upon the political and judicial annals of the country in such luminous characters that time, whatever changes it may otherwise operate, will never completely obliterate.

Let respect be to his memory and peace to his ashes.

The clerk will transmit to the family of the deceased a record of the proceedings of this day. The business of this day is continued to to-morrow.

The Court stands adjourned until to-morrow at the usual hour.

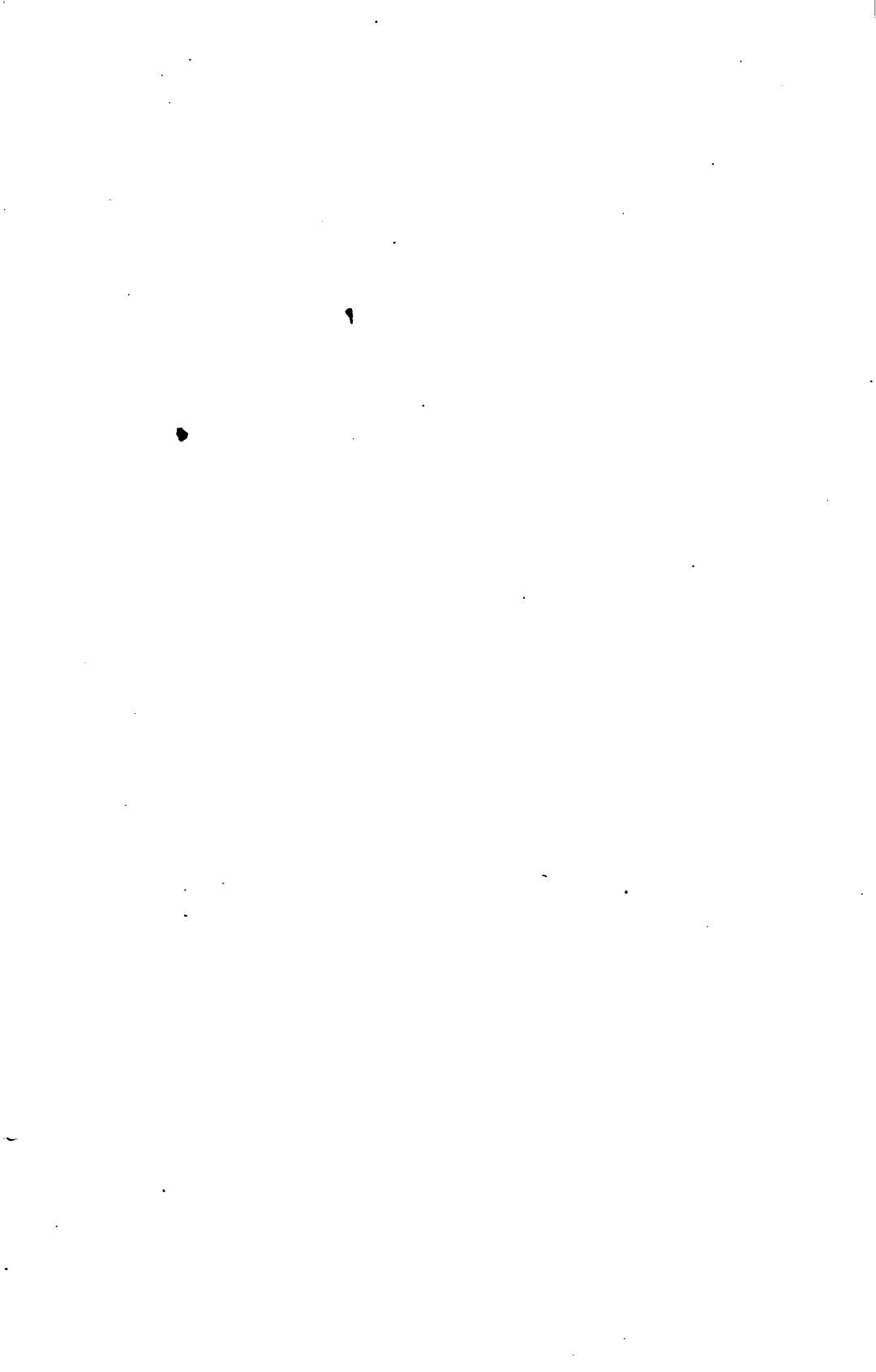


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CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT OF LOUISIANA,
AT NEW ORLEANS.
IN
JANUARY. 1887.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice.*

HON. FÉLIX P. POCHÉ,

HON. ROBERT B. TODD,

HON. CHARLES E. FENNER,

HON. LYNN B. WATKINS,

} *Associate Justices.*

No. 9795.

THE WORLD'S INDUSTRIAL AND COTTON CENTENNIAL EXPOSITION VS.
THE NORTH, CENTRAL AND SOUTH AMERICAN EXPOSITION.

ON INTERVENTION AND THIRD OPPOSITION OF SAM'L M. TODD ET AL.

Persons engaged to do the current manual or menial work to keep the grounds and the buildings on the same in proper order, have no privilege for the payment of wages which may be due them, which outranks that of the vendor for the discharge of the price of sale due him

The appropriation of a sum of money, the proceeds of the judicial sale of effects, on which such persons have no privilege, is unauthorized, and is error in the judgment passing on the third oppositions of such claimants.

An appellee who prays for the reversal of the judgment appealed from, on its merits, waives thereby the right of asking a review by the appellate court of a decree in favor of appellants, overruling a plea of misjoinder filed by the plaintiff to their third opposition.

Exposition vs. Exposition.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Gus. A. Breaux for Plaintiff and Appellee.

B. R. Forman for Intervenors and Third Opponents, Appellants.

E. M. Hudson for the Receivers.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This controversy involves questions of conflicting privileges claimed by a vendor and by laborers, etc.

The suit is brought by the plaintiff to recover of the defendant a balance due, as the price of certain buildings, machinery and other effects put on the Exposition grounds in this city by plaintiff, as lessee or occupant.

Pendente lite an order was obtained for the sale of those effects, which had been sequestered.

A number of parties claiming to have kept the buildings and machinery in repair and preserved them from destruction, intervened, asking to be paid in preference to plaintiff as vendor.

Exceptions of *misjoinder* and other defenses were filed to the third oppositions. The exceptions were overruled.

On the merits the court rendered judgment in plaintiff's favor for \$86,439 27, with vendor's privilege, in favor of O'Rourke, Ferguson, Bradburn, Richardson and Nelson together for \$342, and of a number of opponents for \$2634 50, to be paid *pro rata* out of \$514 45 realized by effects, not found to have been sold by plaintiff, and the court dismissed the interventions of the other opponents not named in the judgment. The sale made by the sheriff, under the order of court, realized \$79,211 10.

O'Rourke, Ferguson, Bradburn, Richardson and Nelson have neither appealed nor asked an amendment of the judgment; but Sam'l M. Todd and others named in the motion have appealed.

The plaintiff and appellee has answered the appeal, asking the reversal of the judgment on the merits for reasons specified. It is questionable whether the appeal taken by the opponents has brought up, for review, the decree overruling the exceptions, which was in their favor, anterior to and distinct from the judgment on the merits; but if it did, appellee had not asked for its reversal, and probably cannot question its correctness. The omission amounts to a waiver.

We are therefore relieved from passing upon it, and are required to test that of the judgment on the merits as far only as it affects the appellants.

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Those portions of it which were rendered in favor of O'Rourke, Ferguson and the other three, and from which no appeal was taken, cannot therefore be revised.

Neither are we concerned with the *quantum* which the judgment allows to the opponents named in it and which does not seem to be disputed.

The only question submitted for adjudication is, whether the opponents have a privilege entitling them to be paid *anterior* to the vendor.

The district judge declined to recognize such privilege, but ordered them to be paid out of \$514 45, the proceeds of effects, which he found had not been sold by the plaintiff.

In order to determine the question before us, it is necessary that the character of the parties appellant, who pretend to outrank the vendor, be first ascertained.

They represent themselves to be laborers and mechanics, engaged in keeping the buildings and machinery in repair, preserving from destruction by their labor the things out of which alone the plaintiff could be paid. They occupy the attitude of salvors.

The plaintiff, on the other hand, claims that the appellants are part of quite a large number of employees engaged to do the current simple manual or menial work at the Exposition, such as cleaning the grounds, sweeping and washing the floors, oiling the machinery, lighting the lamps, stopping leaks on the roofs, and similar matters, such as might be required by the ordinary course of things or some emergency.

The district judge so found, and an examination of the record does not enable us to differ in that conclusion.

The appellants refer to several articles of the Civil Code and to a number of decisions expounding and applying them; but, as they are neither servants nor domestics, nor artisans for labor on movables in their possession, nor livery stable keepers, nor feeders of slaves, nor warehouse keepers, nor workmen employed in constructing, rebuilding or repairing buildings; nor furnishers of supplies,—we are at a loss to perceive on what they predicate their claim for any privilege, particularly one outranking the vendor, who is allowed by law the first of all privileges, unless in carefully specified exceptional cases. Among these is not to be found that of the appellants, who must be viewed as ordinary employees engaged to keep a place in running order.

The only article in the Code under which the appellants could have claimed shelter, but to which they have not even referred, is Article 3267 (3234), which provides how the vendor, the workmen, and furnishers of materials, who have constructed or repaired, or provided

Exposition vs. Exposition.

supplies, on a movable object unpaid for, shall be paid. That article places them apparently on an equal footing, with preference over the other privileged creditors of the debtor, even those for the funeral expenses; but not those incurred to procure the sale of the thing.

But, as this article applies only to the workmen and furnishers whom it mentions, it does not shield the appellants who are neither in the sense of the law.

The appellants, however, confidently point to Article 175 of the Constitution, which ordains the passage of laws to protect laborers on buildings, roads, railroads and other similar works against the failure of contractors and sub-contractors to pay their current wages when due and to make the corporations, company or individual for whose benefit the work is done, responsible for their ultimate payment.

They, besides, point to Act 134 of 1880, p. 183, passed in furtherance of that article and which enacts that laborers, workingmen, on buildings, streets, railroads, canals and ditches, and other similar works, when their services are engaged by the proprietor, or by his agent, upon any of the said works, shall have a first privilege upon the buildings, or other works upon which their labor has been bestowed.

Both the constitutional provision and the legislation in execution of it, have for their object to protect laborers against the failure of contractors to pay them, by making the obligee responsible and burdening the building or other work on which the labor was bestowed.

It cannot be pretended in this case that the opponents have constructed, rebuilt or repaired any of the buildings and other objects sold, and it is apparent that neither the convention nor the legislature ever intended to bring employees of the class to which appellants belong, within the purview of those provisions.

The district judge rendered judgment in favor of appellants, decreeing that the sum of \$514.15, realized from the sale of effects in the architect's room and the property of defendants, be divided *pro rata* among the intervenors named in the judgment.

Of this, the plaintiff and appellee complains, in asking for the reversal of the *entire* judgment.

Even if the appellants are entitled to a privilege, it is surely not that of lessors and it cannot be perceived how they can be allowed to satisfy their claims out of the proceeds of effects, on which they are recognized to have no privilege and which are declared to belong to the defendant and not subject to the vendor's lien. It was error to consecrate those proceeds by the judgment, to the payment *pro rata* of the claims of the opponents.

Pasteur et al. vs. Lewis and Lynd.

It is, therefore, ordered and adjudged, that the judgment appealed from be amended by striking therefrom that portion of it which appropriates the sum of \$514.15 to the payment of appellants, and that thus amended the judgment remain undisturbed and be affirmed with costs.

No. 9762.

FRANCIS J. PASTEUR ET AL. VS. R. N. LEWIS AND WM. LYND.

Where in a motion for an appeal the return day is left in blank and the judge on his own motion fills up the blank with an illegal return day, the irregularity will not be imputed to the fault of the appellant.

State courts have the right to examine collaterally into the alleged defects of judgment rendered by United States courts of original and limited jurisdiction, when such judgments are made the basis of litigants' titles. But the inquiry must be restricted to an examination to ascertain whether the court which rendered the judgment had jurisdiction and whether it exercised that jurisdiction according to the forms of proceeding established by law.

The inquiry into the facts must be restricted to test the verity of allegations as to domicile or citizenship, necessary to give jurisdiction. Want of jurisdiction may be shown either as to the subject-matter or the person, or in proceedings *in rem* as to the thing. 18 Wallace, 457, Thompson vs. Whitman.

No inquiry can be made as to the correctness of the judgment upon the merits.

In dealing with such questions, arising out of proceedings instituted under the Act of Congress, providing for the confiscation of property used for insurrectionary purposes, State courts must be guided by the rules of Common law as expounded by the Supreme Court of the United States, and not by local laws, unless the latter harmonize with Federal jurisprudence.

In a Common law proceeding *in rem* for the condemnation of property seized under the statute, the monition published is a citation on all interested persons, who are thus made parties to the action—and after a default there is no necessity for a jury trial. 11 Wallace, 303; 20 Wallace, 110. Alien enemies have the right to appear and defend their rights in a court of justice when cited therein. 93 U. S., 283.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

J. P. Childress, Merrick & Merrick and Albert Voorhies for Plaintiffs
and Appellants.

Bayne & Denègre for Defendants and Appellees.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

TODD, J. The ground of this motion is that the appeal was made returnable to this Court on the first Monday in June, 1886, a day when the Court was not in session in this city. It is charged that the return

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in that of the Supreme Court of the United States, that such an inquiry must be restricted to the right of ascertaining whether the court which rendered the judgment had jurisdiction, and whether it exercised that jurisdiction according to the forms of proceedings established by law.

The same rule applies to all inquiries of this nature, whether between courts of the same State, or between State courts and Courts of the United States.

In the case of Lowry vs. Erwin, 6 Rob. 203, this Court, in dealing with an exception which denied the right of a State court to question, under any circumstances, the validity of a judgment of a Court of the United States, used the following language: "We admit that neither this tribunal nor the inferior courts can revise a judgment of the United States Court, upon the merits. We cannot say whether it was rendered upon proper evidence or is correct in itself; but we do say and have so decided recently that when the proceedings of the Federal Courts are set up as the basis of title between persons litigating in our courts, that then we will look into their proceedings, for the purpose of seeing whether they have jurisdiction or authority to render such judgment or decree." Garrard vs. Reed, 5 Rob. 506.

Under that principle the court considered evidence to prove the real domicile of a party, contrary to the allegations on which the Federal Court had rested its jurisdiction.

But on a writ of error in the Supreme Court of the United States, the right of making that inquiry was denied to the State court, and the following principle was announced: "If the record contains proper averments of citizenship to give a Circuit Court of the United States jurisdiction, a title made by the marshal under the judgment cannot be attacked collaterally by proof that the averments of citizenship were not true, and so that the court had not jurisdiction." Erwin vs. Lowery, 7 Howard 178.

Subsequently, however, this rule received a very material modification at the hands of that exalted tribunal, in the case of Thompson vs. Whitman, 18 Wallace 457. The rule as modified stands thus: "The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

"Want of jurisdiction may be shown either as to the subject-matter or the person, or in proceedings *in rem* as to the thing."

The status of the person, when it involves the question of jurisdic-

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tion, can therefore be inquired into collaterally, even when the pleadings contain the averments necessary to vest jurisdiction.

Guided by these principles, which go to as great an extent as plaintiffs could possibly contend for, we propose now to discuss the three grounds of nullity which they plead to the judgment of condemnation and forfeiture which is held up by defendants as the basis of their title.

Their attack may be summarized thus :

1. Want of jurisdiction, because the court tried the questions of fact without a jury—the seizure having been made on land, and not falling within admiralty practice.
2. That the owners, who were minors residing within an insurrectionary district, were debarred all hearing in the premises.
3. Defective description of the property seized.

I.

On the question of jurisdiction, we premise by stating that we do not understand plaintiffs to question the competency of the Circuit Court in the premises, or its jurisdiction of the thing seized in a proceeding admitted to have been *in rem*.

The record shows that the seizure was made in all respects in compliance with the provisions of the Act of Congress of the 6th of August, 1861, and with the forms of proceeding required by Federal jurisprudence in such cases.

Section 2 of the Act reads: "Such prizes shall be condemned in the District or Circuit Court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken and proceedings first instituted."

This section has been uniformly construed by the Supreme Court of the United States, to mean that in cases where property is captured at sea or on water, such as navigable streams, the course of admiralty may be strictly observed; but as to seizures on land, the proceeding must be at common law and *in rem*. 6 Wallace, 764, Union Insurance case; same, 769, Armstrong's foundry; 8 Wallace, 511, Morris Cotton; 11 Wallace, 303, Miller vs. United States; 20 Wallace, 109, Confiscation cases.

But plaintiffs' contention, as we understand it, rests on that very distinction, and is to this effect, that the whole proceeding was made to conform to admiralty rules, when it should have been at common law, and that the court was incompetent to try the questions of fact without a jury.

The two questions of fact involved were: 1st. The allegations that

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the property had been used for insurrectionary purposes since the publication of the President's proclamation required by the Act of Congress of the 6th of August, 1861. 2d. The consent of the owners to such use of their property.

The process of substituted citation was by monition, posted and published in a newspaper, calling on the owners or other parties interested to show cause why the condemnation should not be made final. Nearly two years after such notice, no appearance having been made, a default was entered against the owners, and the libel adjudged and taken *pro confesso*.

Just such a proceeding has several times been recognized by the Supreme Court of the United States as a proceeding *in rem* at common law, and the default as thus entered as dispensing with a trial by jury.

In Miller's case, 11 Wallace 303, the Court said: "The third assignment is that as the proceedings related to seizure on land the case was one of common law jurisdiction, and there should have been a trial by jury; and we are referred to Union Insurance Co. vs. United States, Armstrong's Foundry, and other kindred cases. But in this case there was a default. After default there was no fact to be ascertained. The province of a jury in suits at common law is to decide issues of fact, when there are no such issues there can be nothing for a jury to try. The assignment is therefore without merit. None of the cases cited go further than to hold that issues of fact on the demand of either party must be tried by jury."

The fact that the proceeding began by a libel, and that citation was substituted by a monition, did not divest it of its character of a common law proceeding, or remove the case from the common law, to the admiralty, jurisdiction of the court.

In a precisely similar case the Supreme Court of the United States held: "No doubt in cases of seizure upon land, resort should be had to the common law side of the court, and such in substance was, we think, the case here. Everything necessary to a common law proceeding *in rem* is found in the record. An information was filed, (called a libel of information, it is true, but still an information), * * * a monition was issued, a default was taken, and, after consideration of the evidence, condemnation was adjudged. What was lacking in this to a common law proceeding *in rem*? The principal lack alleged is that there was no jury trial. But in courts of common law no jury is called when there is no issue of fact to be tried." 20 Wall. 110. Confiscation cases.

The principles of those two decisions afford a complete refutation to

the double argument that the proceeding was in the admiralty jurisdiction of the court, and that the failure of ordering a jury trial was a fatal defect.

The question of jurisdiction is thus settled in favor of the validity of the judgment assailed here by plaintiffs.

II.

The argument on their second proposition is in substance that, as they were then residing out of the State of Louisiana, and in an insurrectionary district, they could not be reached by a monition, and that even if thus notified, they were forbidden by the President's proclamation of non-intercourse, from appearing and pleading in the court which had seized their property.

The first part of this argument finds its answer in the very nature of a published monition in a common law proceeding *in rem*, which is a citation on, and which makes parties to the suit, all persons who could have asserted a right to or in the property libelled. 4 La. 85, *Bandue's Syndicate vs. Nicholson*; *McVeigh vs. United States*, 11 Wall. 266; *Window vs. McVeigh*, 93 U. S. 283.

The second part of the argument is answered by the two last decisions quoted, in which an alien enemy was recognized the right of pleading in a court in which he had been cited by process of monition. The Court said: "It is alleged that he was in the position of an alien enemy and hence could have no *locus standi* in that forum. If assailed there he could defend there." 11 Wall. 267.

So with the plaintiffs in this case, who could not have been denied a hearing if they had appeared in court at any time before the judgment of condemnation was pronounced. That judgment was not rendered before the 30th of November, 1865, and we take judicial cognizance of the historical fact that for several months previous, free communication had been opened between the city of New Orleans and the States of Mississippi and Georgia, where plaintiffs were severally sojourning at the time that the monition was published.

III.

The alleged deficiency of the description of the property libelled is surely not a point of attack which can be considered collaterally. The plainest text of the rule which we have considered as established excludes that complaint from our consideration. This leaves but the point made on the community rights of plaintiffs' mother.

A very plain answer is suggested to that contention. If, at the time that the proceedings were instituted, plaintiffs had acquired any rights

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to the property which they could have successfully set up before the Circuit Court, they were included in the monition as published.

It contained no names, but called on all parties who had any interest in and to the property libelled to appear and defend their rights. Hence it would have included these plaintiffs or their mother. Therefore, the default when rendered concluded them under their alleged rights which even therefore and for that reason were included in the condemnation.

If such rights were not included in the proceedings, it is simply and only because they did not exist; and in that case plaintiffs have no complaints to urge or maintain in this proceeding.

We have read with interest the learned disquisition on the rights of married women to an interest in the community existing between the spouses under the laws of Louisiana presented by plaintiffs' counsel, but we find no warrant for an attempt on our part to inject any of the principles of civil law in a discussion involving exclusively a legislation emanating from the war power of the Government of the United States. To properly construe such a law, and to legally apply its intended effects, reference must be made exclusively to that system of laws and jurisprudence to which the law-maker looked as the only channel of its execution.

Hence we have deemed it our bounden duty in the determination of the issues which we considered to be within our judicial grasp, in this controversy, to seek for our land-marks among the decisions of the Supreme Court of the United States.

Under their guidance, we learn that proceedings, under the legislation which we are considering, were in the strictest sense of the term, common law proceedings *in rem*, in which the property captured or seized was the principal factor, and in which the person or personal rights of the owner were entitled to no further attention or consideration than was required to prove the owner's consent to the use of his property for insurrectionary purposes.

In the case of *Kirk vs. Lynd*, 106, U. S. Reports, p. 316, the case to which we referred in the beginning of this opinion, and in which the court dealt with the very judgment now under discussion, we find the following language: "All private property used, or intended to be used, in aid of an insurrection, with the knowledge or consent of the owner, is made the lawful subject of capture and judicial condemnation, and this, not to punish the owner for any crime, but to weaken the insurrection. The offense for which the condemnation may be decreed is one that inheres in the property itself, and grows out of the

fact that the property has become, or is intended to become, with the approval of its owner an instrument for the promotion of the ends of the insurrection. * * * The property is the offending thing, and condemnation is decreed because its owner has voluntarily allowed it to become involved in the offense. * * * Property captured in war is not taken to punish its owner any more than the life of a soldier slain in battle is taken to punish him. The property as well as the life is taken only as a means of lessening the warlike strength of the enemy."

In rendering the judgment of condemnation, the court must have been satisfied from the proof adduced, that the libelled property had been used for insurrectionary purposes with the knowledge or consent of its owner.

In dealing with a collateral attack on the judgment thus rendered, we have no warrant to ascertain whether it rested on sufficient evidence, or whether the court took into consideration the alleged community rights of Mrs. Pasteur, or those of her children after her death. Our inquiry is limited; it cannot be extended to an examination of the judgment as to its correctness under the evidence.

We, therefore, conclude that the proceedings assailed have withstood plaintiffs' attack, and that in this suit at least, the defendant cannot be disturbed either in their ownership or in their possession.

After reaching that conclusion, and as we glance over the field of discussion, we find no little relief in the thought that our researches must have followed the same channel which had been traced by the Supreme Court of the United States, in their decision to which we have just referred.

As the parties were not the same, and the issues presented were not *all* the same, the judgment in that case was not a legal bar to the discussion of the issues which were presented to us. As stated, the salient issue in the case of *Kirk vs. Lynd*, was the nature of the title which the forfeiture had conveyed, unaccompanied, as in this case, by an attack on the validity of the proceedings. But it is, nevertheless, certain that the Supreme Court of the United States could not have been induced to decide that the purchaser had acquired a title to the fee under the condemnation, if the record, (the same which has been filed here), had disclosed fatal defects patent upon its face. Of necessity and in justice, the Court, before judicially determining the effect of the judgment of forfeiture, must have ascertained that there was a judgment valid in law, rendered by a competent court, having and exercising vested and legal jurisdiction in the premises. This is pre-

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cisely what was done, as shown by the following summary of the case which we extract from the opinion of the Court. After stating that the condemnation must be pronounced by the appropriate judicial tribunal, and that thence flows a complete title, the Court said:

"The title acquired by the purchaser in this case was of that kind. The property bought had been seized under the authority of the statute as property used in aid of an insurrection against the United States with the consent of its owner. The fact of hostile use with the owner's consent was established, and the requisite sentence of judicial condemnation was entered. In this way the title of the United States by capture was perfected. That title as against the owner and his heirs was the fee. The defendants below, who are the defendants in error here, have succeeded to that title."

It is true that the law is a harsh one, but it was a war measure, and the mission of courts is to expound the law, and not to avert its rigorous effects.

In this case, however, there is no feature of unjust hardship to the expropriated owners.

The property sold for \$53,500, of which \$48,978.47 were paid over to the mortgagee with a vendor's lien, whose claim amounted then to \$101,013.80.

The fact was apparent to, and acknowledged by, R. M. Pasteur who intervened in one of the sales made under the title thus acquired, and ratified the same with full knowledge of all the facts.

The judgment appealed from is therefore affirmed with costs.

Rehearing refused.

No. 9777.

E. A. DESLONDE VS. WM. O'HERN.

A judgment for possession of premises leased can be extinguished by agreement. The agreement is a new obligation. The obligation to deliver the premises resulting from the judgment is extinguished by the substitution of an obligation to pay the rent due and remain in the premises to the end of the lease.

When a lessor sues for possession of premises, and a dissolution of the lease, and a judgment is rendered in his favor, the covenant of the lessee to pay rent ceases to exist. Rent is the compensation for the occupancy of the property. The lessor is not entitled to his property and the rent for the same.

When a lessor, after he has obtained a judgment cancelling the lease, voluntarily receives from the tenant all the rent due according to the terms of the lease and waives his right to issue a writ of ejectment, his act in receiving the rent recognizes the lease as still in

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force, and in lieu of possession accepts a specific performance of the contract of lease. One may have a legal right, yet waive it by becoming reconciled to his debtor.

When a judgment cancelling the lease is rendered, the parties thereto are placed in the same position they occupied before the lease was signed. By voluntarily accepting all the rent due, and rent in advance, the old lease was either reinstated, or there was a new lease from month to month.

When a writ of ejectment illegally issues without probable cause, malice will be inferred.

When a lessor, in illegally issuing a writ of ejectment was actuated by malice, he is liable to a lessee for damages, as a recompense for an outrage upon his rights and feelings as a citizen and a man.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

Fred. D. King and W. W. Handlin, for Plaintiff and Appellee :

A judgment for possession of premises leased can be extinguished by agreement. The agreement is a new obligation. The obligation to deliver the premises resulting from the judgment is extinguished by the substitution of an obligation to pay the rent due, and remain in the premises to the end of the lease. C. C. 2181, 2190, 2186.

When a lessor sues for possession of premises, and a dissolution of the lease, and a judgment is rendered in his favor, the covenant of the lessee to pay rent ceases to exist. Rent is the compensation for the occupancy of the property. The lessor is not entitled to his property and the rent for the same. *Sigur vs. Loyd*, 1 A. R., p. 422; 6 A. R., p. 2; C. C. 2729, 2700, 2045, 2040, 2046, 2041.

When a lessor, after he has obtained a judgment cancelling the lease, voluntarily received from the tenant all the rent due according to the terms of the lease, waives his right to issue a writ of ejectment, and execute the judgment for possession, his act in receiving the rent recognizes the lease as still in force, and in lieu of possession accepts a specific performance of the contract of lease. One may have a legal right, yet waive it by becoming reconciled to his debtor. *Chevallier vs. Borie*, 3 L. R., p. 300.

When a judgment cancelling the lease is rendered the parties thereto are placed in the same position they occupied before the lease was signed. By voluntarily accepting all the rent due, and rent in advance, the old lease was either reinstated, or there was a new lease from month to month. In either event, the lessee could not be ejected until there was a new breach of the contract, notice to vacate and another suit. 1 A. R., p. 422.

Where a writ of ejectment illegally issues without probable cause, malice will be inferred. 37 A. R., 881; 33 A. R., 292.

When a lessor, in illegally issuing a writ of ejectment, was actuated by malice, he is liable to a lessee for exemplary damages, as a recompense for a gross outrage upon his rights and feelings as a citizen and a man, as an example to deter others from similar conduct in the future, and for the purpose of punishing the lessor for his bad motives and intentions. 37 A. R., 874; 34 A. R., 1158; 7 A. R., 448; 12 R. R., 680; 13 L. R., 274.

A verdict of a jury on a question of fact should have great weight with the court, unless the evidence clearly shows they were manifestly in error. 22 A. R., p. 31; 20 A. R., 455; 6 L. R., 455.

F. Michinard, for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. This is a suit for damages growing out of the acts of the

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defendant described in the petition, and which will be set forth hereafter. The amount claimed is \$2500. There was judgment in favor of the plaintiff for \$100; the defendant has appealed and the plaintiff prays to amend the judgment by increasing the same to the amount demanded—\$2500.

The facts relating to the controversy and which we think are borne out by the evidence, are briefly these:

On the 1st of October, 1884, the defendant leased to the plaintiff a dwelling-house situated in this city, for twelve months, at a rental of forty dollars per month, aggregating for the entire year \$480. Of this sum he paid \$320 in advance, before the contract of lease was signed, and for the balance he executed his eight promissory notes for twenty dollars each, the first payable on the 1st of December, 1884, and the remaining ones respectively on the first of each month following.

There were clauses in the contract to the effect, that if these rent notes were not promptly paid at maturity, the lease was to be null and the money paid on account of it to be forfeited, and that on failure to pay one of the notes, the whole of them were to be demandable.

Deslonde paid the note falling due in December, but failed to meet those maturing in the three months following.

On the 15th of March, 1885, O'Hern, the lessor, brought suit to have the lease dissolved and to evict Deslonde, the lessee, from the premises, and obtained judgment to that effect on the 23d of April following.

During the pendency of this suit, 9th of April, he brought suit on two of the notes due January and February, accompanied by a writ of provisional seizure, under which the furniture of Deslonde was seized and a keeper placed in charge of the premises.

Soon after the judgment of eviction was rendered, Deslonde, through his attorney, proposed to O'Hern—the latter's attorney also being present—that he would pay all the costs and all of the notes if he were permitted to remain on the leased premises till the expiration of the lease. This was agreed to by O'Hern, and Deslonde then paid him the two notes sued on, agreed to pay the costs to the sheriff, and appointed the next day to settle the rest of the notes outstanding. The parties met according to appointment and Deslonde paid the March, April and May notes, and at the same time offered to pay the remaining two notes for June and July, but O'Hern stated (quoting his own language) "that he could not get them at present, and that anyhow they were not due." After this payment was made O'Hern demanded that Deslonde pay also his attorney's fee. The latter replied he "would do so

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provided it was part of the compromise." He consulted his attorney immediately with respect to this last demand, and was informed by him that the attorney's fee was no part of the costs, and that he was in no way liable for it under the agreement or compromise.

For some days after this conversation between plaintiff and defendant, the plaintiff, it appears, was confined to his house by an attack of rheumatic gout, and on the 8th of May, the first day he was able to get out, he called at the sheriff's office for the purpose of paying the costs that he had consented to pay under his agreement with O'Hern referred to. He found that the sheriff had in his hands a writ of *fi. fa.* for these costs, and also a writ of ejectment issued under the judgment, evicting him from the leased premises. The costs which he had agreed to pay, amounting at the time to \$12.50, had been augmented by the costs of issuing the writs of *fi. fa.* and ejectment to \$19—but, he never-the paid the bill. His remonstrances, and those of his counsel against the execution of the writ of ejectment proving ineffectual, Deslonde was compelled to resort to an injunction to restrain its execution. This injunction accompanied the action for damages before referred to, and is the case now before us on appeal.

It was tried in the lower court before a jury, who returned a verdict in favor of the plaintiff Deslonde for \$850. A new trial was granted and it was again tried, this time before the judge, and judgment rendered for \$100 damages against the defendant. It has been stated above that when Deslonde paid the rent notes of March, April and May, on the 2d of May, he at the same time offered to pay likewise the June and July notes, (which included all the notes), but was told by O'Hern that he did not have them with him, and they were not then due.

On the 5th of June Deslonde wrote to O'Hern, offering to pay the note for that month at any time and place he (O'Hern) would designate, but received no answer, and the note was not presented.

In the next month (July) he deposited with a notary the amount of the two notes (June and July), and requested him to make a tender of the same to O'Hern.

The notary went to the residence of O'Hern, but finding him absent, tendered the money to his son or grandson, whom he found in the house, and who told the officer, in answer to an inquiry, that he represented O'Hern in his absence, but he declined to receive the money.

These are all the facts bearing on this controversy. There is a conflict of testimony in regard to some of them, but the above statement

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represents our conclusions in relation to them, after a thorough examination of the evidence.

To summarize: It is shown that O'Hern leased to Deslonde a dwelling-house for one year for \$480, or \$40 per month. That he was paid in advance \$320—equivalent to eight months' rent; that in the month of December following date of contract (October 1), he was paid \$20 more; that notwithstanding these payments he was sued for installments of the rent, and had the furniture of the lessee seized under a writ of provisional seizure; that he also sued to have the tenant evicted, and obtained judgment against him ordering his eviction; that he agreed not to execute this judgment and to permit the lessee to remain on the premises if he (Deslonde) would pay costs and the entire rent; that the lessee did pay all costs and also the entire rent except \$40 thereof, and offered to pay this, and would have done so but that the lessor declined to produce the rent notes and refused to accept subsequent offers of payment; that in violation of his agreement, and in spite of the willingness manifested by the lessee to comply with that agreement to the very letter, and in utter disregard of Deslonde's rights, O'Hern persisted in the execution of his writ of ejectment, and in his determination to evict the lessee from his premises, until Deslonde compelled him to desist therefrom by a writ of injunction.

In all these proceedings the conduct of O'Hern was harsh and without the slightest justification. It can only be explained on the hypothesis that he was determined to wrest the property leased from the lessee (Deslonde) and at the same time force him to pay the rent.

If O'Hern stood upon his judgment of eviction, then that judgment dissolved the lease, and debarred him from claiming rents falling due after that time; but whilst O'Hern was thus engaged in harassing Deslonde with his writs—which was in May, and the lease did not expire till October—the entire rental of the year had been paid except for a single month.

There was such an entire lack of justifiable cause for O'Hern's acts and proceedings against Deslonde that the law would impute them to being prompted by malice. 33 Ann. 292; 37 Ann. 881.

It seems that the jury in the court below and the judge likewise reached the conclusion we have announced touching the conduct and acts of the defendant and as being of a character to render him liable for damages, but the judge, by his decree, evidently limited the damages to the actual pecuniary loss or expense sustained by the plaintiff from the acts and proceedings complained of. He made no allowance for the trouble, mortification, mental anxiety and distress caused

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thereby to the plaintiff, which this Court in the case of *Byrne & Co. vs. Gardner*, 33 Ann. 6, held to be actual damages, although of that nature that could not be precisely measured or determined by money or a money value, and that they were of that kind of damage, the estimate of which is left largely to the discretion of the judge or jury, under art. 1934 of the Civil Code.

We think the judge erred in thus restricting the liability of the defendant. To a man of average sensibility, under the circumstances attending this case, the expense or pecuniary outlay to which he was subjected by the acts complained of, would doubtless seem of little significance when weighed with the inconvenience, mental suffering and humiliation experienced by the plaintiff from the causes stated, aggravated as they must have been, by the serious domestic trouble which, according to the evidence, was weighing upon him at the time.

These considerations induce us to grant the prayer for the amendment of the judgment, and to increase the same by the additional sum of \$250 to that awarded by said judgment, making the entire amount \$350.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be amended by increasing the sum therein adjudged by the further sum of \$250, making the total of this decree \$350; and as thus amended, the same be affirmed at the cost of appellant in both courts.

No. 9804.

THE STATE OF LOUISIANA VS. ELLICK WALKER.

A new trial will not be granted for matters which the accused, not having availed himself thereof at the proper time, is presumed to have waived.

Counsel for accused having withdrawn from his case on the day of trial and the case having been subsequently called for trial and proceeded with without request for counsel or application for continuance or any objection of any kind by accused, he cannot, after conviction, require a new trial on the ground that he was taken by surprise and was ignorant of his rights. The judge committed no error in allowing the trial to proceed, and defendant's application for new trial, having no basis of legal error, is addressed simply to the discretion of the judge.

The latter being better qualified than this Court to determine whether the interests of justice required a new trial, the exercise of his discretion will not be interfered with.

A PPEAL from the Twenty-second District Court, Parish of St. James. *Duffel, J.*

M. J. Cunningham, Attorney General, and *J. L. Gaudet*, District Attorney, for the State, Appellee :

In the absence of record that the defendant requested the court to assign counsel, or ap-

39	19
46	930
39	19
48	654
49	1001
39	19
104	229
39	19
107	49

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plied for a continuance on the ground of the absence of counsel of record, the mere fact that the trial proceeded without the aid of counsel to defendant, does not constitute error. 36 Ann. 91.

An accused is not entitled to a new trial on account of the absence of witnesses at the trial, though duly summoned where it appears that no postponement was asked, because of their absence and where he consented to go to trial without them. 36 Ann. 923.

Newly discovered evidence tending to impeach or discredit witnesses, who have testified in the case, affords no legal ground for setting aside the verdict and granting a new trial. 34 Ann. 346; 35 Ann. 46; State vs. Gauthreaux, 38 Ann.

A motion for a new trial on the ground of newly discovered evidence must be supported by other testimony in addition to the affidavit of the accused. His alone will not suffice. 36 Ann. 980.

Sims & Poché for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The only error assigned is in the overruling of a motion for a new trial. The grounds of the motion are substantially the following:

Defendant, under prosecution for inflicting a wound less than mayhem, states in his motion and affidavit that he was released upon an appearance bond signed by Mr. Damaré, his employer, who had promised to secure the services of Messrs Sims & Poché as his attorneys; that he had consulted these attorneys and had told them that Mr. Damaré would call on them and become responsible for the fee; that Mr. Damaré, through inadvertance, failed to see them; that, on the day when his cause was assigned for trial, Messrs Sims & Poché appeared in court and announced that, no arrangement having been made as promised, they withdrew from the case; that, immediately there after the case was called for trial; that defendant was taken completely by surprise by the withdrawal of his said counsel, but, being an ignorant laborer, not knowing his legal rights in the premises, supposed that he was remediless, and hence submitted to the progress of the trial; that he was thus unexpectedly deprived of the benefit of counsel without fault on his part and was tried without such assistance and in the absence of important witnesses whom he had directed to be summoned and whose absence he was not aware of until the State had closed its evidence.

The judge overruled the motion for the reason assigned by him, "that defendant had had a fair trial, and that the verdict was supported by the evidence, and that defendant went to trial without objection."

Upon the foregoing statement of facts which is not disputed by the judge and is sustained by evidence made part of the bill, it is clear

that if defendant had applied for a continuance to enable him to employ counsel and to secure the attendance of his witnesses, or had requested an assignment of counsel, and such requests had been refused, such refusal would have been error and defendant's title to relief would be clear, under the principles announced in the recent case of *State vs. Simpson*, 38 Ann. 83.

But the Constitution, article 8, only guarantees to accused persons "the right to have the assistance of counsel;" and the statute, R. S., sec. 992, only provides that "every person shall be *allowed* to make his full defense by counsel, and the court shall, immediately upon his *request*, assign to him such counsel as he shall desire."

This Court has repeatedly held that when accused has no counsel, or when his counsel is absent, and when he makes no application for assignment of counsel or for continuance on any ground, but goes to trial without objection, the judge commits no error in permitting the trial to proceed, and, after conviction, defendant cannot assign such defects as legal ground for new trial. *State vs. Kelly*, 25 Ann. 381; *State vs. Doyle*, 36 Ann. 91; *State vs. Viana*, 37 Ann. 606; *State vs. Simien*, 36 Ann. 923.

It follows therefore that, there appearing no legal error in the proceedings, the application for new trial on such grounds is not founded on any basis of legal right, but is addressed solely to the sound and legal discretion of the judge.

We confess that under the facts herein, which we have stated in their fullest strength, the appeal for a favorable exercise of such discretion was a strong one; but we have no reason to doubt that the esteemed judge *a quo* so considered it and gave it all the weight to which it was entitled. He had a minute acquaintance with all the facts and circumstances of the case which the record necessarily fails to convey to us, and was therefore far better qualified than ourselves to determine whether the interests of justice required, or would be advanced by, the granting of a new trial. It would be nothing less than rashness for us to substitute our discretion for his and to reverse his ruling.

We have given very serious thought to the subject and have concluded that such a course would furnish a precedent unsound in principle and liable to abuse, under which the accused in any case might go to trial without counsel and, after taking his chances for acquittal, might, on conviction demand a new trial on the ground that he desired counsel and was ignorant of his right to have one assigned to him. There is no warrant of law and no precedent in jurisprudence impos-

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ing upon the judge the duty of informing an unrepresented accused of his right to have counsel and of asking him whether he desires it, before proceeding with the trial. On the contrary, the several cases heretofore quoted negative the existence of such duty, and every person is presumed to know the law.

The principle is well settled that a new trial will not be granted for matters which the accused, not having availed himself thereof at the proper time, is presumed to have waived. *State vs. Hernandez*, 4 Ann. 379; *State vs. Price*, 6 Ann. 691; *State vs. Benjamin*, 7 Ann. 47; *State vs. Holmes*, 7 Ann. 567; *State vs. Kentuck*, 8 Ann. 308; *State vs. Maxent*, 10 Ann. 743; *State vs. Fuller*, 14 Ann. 667.

It is equally well settled that this Court will not interfere with rulings of inferior judges on applications for new trial, not based on grounds of legal error, but addressed to the discretion of the judge.

The motion for new trial also embraces a ground of newly discovered evidence but the affidavit as to its character is too vague to support relief and is not sustained by the affidavits of the newly discovered witnesses. The ground is without merit and is not even argued in this Court.

Judgment affirmed.

DISSENTING OPINION.

TODD, J. The Constitution guarantees every accused a fair trial.

In this case, the accused, an ignorant laborer, had spoken to counsel to defend him, and the counsel did appear for him in some proceeding in the case. When the case was called for trial the counsel announced, for reasons assigned by him, that he withdrew from the case. The trial, however, was proceeded with instantaneously, and the accused, without counsel and without witnesses, was convicted. Of course, under these disadvantages, any other result could scarcely be expected.

In his affidavit for a new trial these facts are stated, and the further statement made that he was completely taken by surprise by the withdrawal of his counsel, and believed he was without remedy.

There is no reason to doubt that the accused fully believed that the counsel to whom he had spoken, and supposed he had employed, had made the necessary preparations for his trial, and that through him his witnesses had been summoned, and we can well imagine how an accused of average intelligence, in such a crisis, finding himself unexpectedly without counsel and about being hurried into a trial without his witnesses, would be overwhelmed with surprise and consternation,

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and rendered comparatively helpless. In such a state of mind, even if he knew he had a right to ask for a postponement of the trial and for the appointment to him of counsel, of which this defendant was doubtless wholly ignorant, as he swears—so great would be his confusion as to render him incapable of demanding anything of the court under such circumstances. I think that the trial judge, in the cause of justice, should either have postponed the trial to enable the accused to find that he was entitled to be represented by counsel or to have so informed him on the spot.

I do not think it always compatible with justice to sustain a conviction resting mainly, if not solely, upon no other foundation than that one is presumed to know the law—a violent presumption when applied to a certain class of our people.

For these reasons I do not consider that the trial of the accused was a fair one, and I therefore dissent.

No. 9755.

KNOOP, HANNEMAN & CO. ET AL. VS. J. A. BLAFFER ET ALS.

1. An action under R. S. 301, to enforce against the directors of a bank liability for having furnished false statements of the affairs of the bank to the State Treasurer, is *ex delicto* and prescribed by one year.
2. An action, under R. S., Sec. 300 and 301, to enforce the liability of the directors of a banking corporation for the debts of the bank, on the ground that they had participated in, or assented to, the bank making loans and discounts, whilst in an insolvent condition, is one *ex quasi delicto*, and prescribed by one year.
3. The act which gives use to a *quasi* contract, is a lawful one, and is permitted. That which gives use to a *quasi* offense is unlawful, and is prohibited.
4. Prescription cannot be eked out by inference, nor extended from one cause to another by analogy; neither can the legal interruption of prescription be so extended.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

Henry Denis for Plaintiffs and Appellants.

T. J. Semmes & Legendre for Defendants and Appellees.

Braughn, Buck, Dinkelspiel and Hart on the same side.

The opinion of the Court was delivered by

WATKINS, J. Plaintiffs filed this suit on the 29th of January, 1886, against the defendants as directors of the Mechanics and Traders' Bank of New Orleans, organized under the banking laws of this State, claiming that, on the 19th of March, 1879, and before, they were de-

30	28
47	90
30	28
4108	187
30	28
110	438
30	23
121	814

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positors therein for large sums, for which they are indebted to them *in solido*.

They allege that, on the 19th of March, 1879, said bank was declared insolvent, its charter forfeited, and liquidating commissioners were appointed to close its affairs; and at that date their respective deposits were due and not been withdrawn.

They further allege "that, on January 1, 1878, the said bank did not have on hand an amount in specie equal to *one-third* of all its cash liabilities at that date, exclusive of its circulating notes; and did not have on hand for the other *two-thirds* of its cash liabilities an equal amount in specie, specie-funds, bills of exchange, on discounted paper maturing within ninety days and not renewable; that, at no time since the 1st of January, 1878, has the bank had on hand an amount in specie equal to one-third of its cash liabilities, exclusive of its circulating notes, nor has it had at any time in hand, for the two-thirds of its cash liabilities an equal amount of specie, specie-funds, bills of exchange or discounted paper maturing within ninety days and not renewable; that all these facts were to the knowledge of the said defendants, and each of them, while and during the time they were acting as directors of the said bank; that *in violation of law*, on every legal day since the first day of January, 1878, up to the 19th of March, 1879, the said bank made loans and discounts, and that each of said defendants, *as directors of said bank, participated in or assented to each of said loans and discounts, knowing that said loans and discounts were made in violation of the law* contained in sections 300 and 301 of the Revised Statute of the State of 1870; that by *said violation of law* the said directors and defendants herein rendered themselves *individually liable for all debts and obligations* of the said Mechanics and Traders' Bank."

They further allege that said directors in 1878 and 1879 furnished to the State Treasurer statements of the condition, assets and liabilities of said bank for publication, and which were published, and "that in every one of those statements the said * * directors *wilfully misstated* the condition of the bank, representing same to be solvent, when, in truth and fact, the said bank was and had long before been hopelessly insolvent," and that said directors caused and assented to said statements being published, and knew that the items thereof were falsely stated, and that by said false statements they gave the bank credit and reputation for solvency, when it was entitled to none; and that, had they known the true condition of the bank, they would have withdrawn their deposits.

They aver that by their *tortious conduct, concealments and misstatements* the said directors have made themselves liable *in solido* unto them for the various amounts due them by said bank," of about \$50,000.

The defendants plead in the lower court the prescription of one year to the cause or causes of action set out in plaintiffs' petition ; and from a judgment sustaining the plea plaintiffs have appealed.

In this Court defendants tender an additional plea of prescription of six months under the provision of R. S., 986,

I.

On the face of the petition, the demands of the plaintiffs, in so far as they are founded on the alleged false statement furnished to the State Treasurer, and the concealment from depositors of the alleged insolvent condition of the bank by defendants as its directors, the plea of prescription of one year is undoubtedly good.

The conduct and acts of the directors are charged to have been wrongful, wilful and tortious, and for the resulting damage suffered the plaintiffs asks judgment *in solido*.

II.

The plea, predicated on the charge that while in a condition of insolvency to the knowledge of the directors, the bank made loans and discounts with the acquiescence and participation of said directors, and in violation of law, is not free from difficulty.

This suit was brought under the provisions of Secs. 26 and 27 of Act 348 of 1853, it being an act "to establish a general system of free banking in the State of Louisiana." They were embodied in Secs. 300 and 301 of the Revised Statutes.

Under Sec. 2 of that Act, banking corporations created under its provisions were authorized to discount bills, notes, and other evidences of debt ; to receive deposits ; to buy and sell gold and silver bullion and foreign exchange ; to loan money "and to exercise all incidental powers necessary to carry on said business."

Section 26 declares : "Every banker or banking company, doing business under this act, is required, in addition to securities for circulation deposited with the Auditor, to have on hands, at all times, in specie, an amount equal to one-third of their other cash liabilities ; and for the other two-thirds of said liabilities, an amount equal in specie, specie-funds, bills of exchange, or discounted paper, maturing within ninety days, and not renewable." R. S. Sec. 300.

Section 27 provides : "If at any time the specie, specie-funds, and short paper held by such banker or banking company, should fall be-

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low the proportions to cash liabilities prescribed in the preceding section, and shall remain so for a space of ten days, *it shall not be lawful thereafter for such banker or banking company to make any loan or discount whatever*, until its or their position is re-established according to the terms of the preceding section.

"A violation of this provision shall be held to be an act of insolvency and the Auditor shall cause the necessary steps to be taken for the liquidation of the affairs of such banker or banking company as in cases of insolvency; and every director or manager of a banking company, who may participate in or assent to such violation, shall become individually liable for all its debts and obligations."

In effect the statute declares that if a banking corporation shall permit its specie, specie-funds and short paper to fall below the standard fixed, and to so remain for a period of ten days, *"it shall not be lawful"* for said corporation to make any loan or discount whatever, until its position is re-established and its affairs are put in line again.

*"A violation of this provision" is per se an act of insolvency on the part of the corporation, and its effect upon any director of said corporation "who may participate in or assent thereto," is to make him "individually liable for all * * the debts and obligations" of the corporation.*

The statute under consideration conferred the power upon such corporations as might be organized under it, *"to name and appoint such managers and directors to administer the affairs of the corporation as they may think necessary and proper."* R. S. Sec. 277.

No additional or more specific duties or responsibilities were therein prescribed for directors than had heretofore existed, in respect to private corporations generally, other than those indicated in R. S. sec. 301.

Under the general law, *"no stockholder shall ever be held liable or responsible for the contracts or faults of the corporation, in any further sum than the unpaid balance due to the company on the shares owned by him."* R. S. 690.

This provision certainly includes the directors of a corporation.

Thus, it is perfectly clear that, by the *"free banking law"* of 1853, the legislature intended to place additional restrictions around corporations that should be created under it, and to impose upon persons who might be chosen to direct and administer their affairs a greater responsibility.

Hence it denominated any violation of the quoted provisions an *unlawful act* on the part of the corporation, and declares that the assent thereto or acquiescence therein by any director, should make him liable for all the debts and obligations of the corporation.

It is, therefore, a *violation of law* that fixes his liability. The *extent* of his liability is the *amount* of the debts and obligations of the bank; but the debts and obligations are those of the corporation. If the debts and obligations of the corporations were, at the same time, the debts and obligations of its stockholders and directors, the statute did not *increase* their responsibility, and failed in the accomplishment of its beneficent purpose.

The serious question there is, what is the *liability* sought to be imposed upon the directors, and not what are the *debts* sought to be collected.

That there are *just such debts* and obligations in favor of plaintiffs as depositors in the Mechanics and Traders' Bank, as set out in their petition, is conceded by defendants for all the purposes of their pleas of prescription.

The plea under consideration is placed under R. C. C. 3536, which is to the effect that actions for damages "resulting from offenses or *quasi* offenses," are prescribed by one year. R. C. C. 2315 *et seq.*; 25 Ann. 414, Lizardi vs. The New Orleans, Canal and Banking Company; 20 Ann. 151, Williams vs. Grevier; Id. 214, Jennings vs. Gasselin; Id. 323, Millspough vs. City; 23 Ann. 162, Harvey vs. Waldon; 32 Ann. 220, Caillonet vs. Franklin.

Does the *liability* sought to be enforced grow out of an offense or a *quasi* offense? Did it result from any *act* of the defendant directors, whereby damage was caused the plaintiffs, and which they are obliged to repair on account of their *fault*? R. C. C. 2315. Did it result from the negligence of the directors, or through their imprudence or want of skill? R. C. C. 2316.

Or was it occasioned by the *act* of persons for whom they are answerable? R. C. C. 2317, 2320.

But the plaintiffs contend that their action arises *ex quasi contractu*, and not *ex delicto*.

To determine its true interpretation, we must contrast the articles of the Civil Code relating to contracts and *quasi contracts*.

Article of the Code, 2293, declares: "*Quasi* contracts are the *lawful* and purely voluntary *acts* of a man, from which there results any obligation whatever to a third person."

Article 2294 provides: "That all acts from which there results an *obligation without an agreement* in the manner expressed in the preceding article, form *quasi* contracts. But there are two principal kinds which give rise to them, to-wit: The transaction of another's business, and the payment of a thing not due." C. P. 30.

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In the present case, it is not claimed that defendants entered into any specific covenant, or agreement, with the plaintiffs, in any event to become liable for the debts and obligations of the bank. Thus there was no contract. It is not contended that the directors, of their own accord, undertook the transaction of any business for the plaintiffs; nor is it contended that the directors unduly received plaintiffs' money that was deposited in the bank, or that they, through inadvertance or mistake, delivered over their deposits to the directors, instead of delivering them to the officers of the bank. On the contrary the plaintiffs in their petition declare that the bank made loans and discounts "*in violation of law*," and "that the directors of said bank participated in and assented to each of said loans and discounts, *knowing* that said loans and discounts were made *'in violation of the law.'*"

All "personal actions are grounded on one of the four causes which give rise to personal obligations. The causes are contracts, or *quasi* contracts; offenses, or *quasi* offenses." C. P. 28.

"Personal actions arise from offenses, as when one has become liable to another for the injury he has inflicted on him by some *crime* or *offense*, such as theft or slander." C. P. 31.

"Personal actions arise from *quasi* offenses, when the ground of action is the *injury done to another by one of those faults* which are not considered as *real crimes or offenses*."

These different articles of the two codes have frequently passed under judicial investigation with the substantial result of placing the cases examined, in reference thereto, under one or the other of them, according to their respective features, without making any plainer the words of the text.

This Court in a recent case had occasion to examine and interpret the law under consideration; i. e., the Rev. Stats., secs. 300, 301.

We refer to Lacombe vs. Milliken, 36 Ann. 367, in which the Court say: "The action is founded on sections 300 and 301, R. S. Two *other* grounds for the infliction of a *penalty* are alleged in the petition." etc.

In Kent's Commentaries the rule is laid down: "If a statute inflicts a *penalty* for doing an act, the penalty implies a prohibition, and the *thing is unlawful*, though there be no prohibitory words in the statute.

* * * The rule is now settled that, the statutory prohibition is equally efficacious, and the *illegality* of the breach of a statute the same, whether a thing be prohibited *absolutely or under a penalty*. 1st vol., p. 467.

The statute of 1853 contains a prohibition against the corporation doing certain acts. It prohibits it from making any loans or discounts

during the period of time it is out of line and declares that the same "*shall not be lawful.*"

It inflicts upon the corporation the penalty of insolvency; and upon the directors participating therein the penalty of being made liable for all the "debts and obligations" of the bank."

The defendants are not, by the Statute, declared liable for injury suffered by plaintiffs through "a crime or offense committed; but for that inflicted by a fault, which is not considered as a real crime or offense." C. P. 31, 32; R. C. C. 2315.

Their liability, as stated, has been incurred by reason of their failure to perform a lawful act, and also for their participation in an *unlawful act*. This was a fault, a wrong-doing, though not denounced by the Statute as a crime or misdemeanor.

Plaintiffs' action is one *ex quasi delicto* and not *ex quasi contractu*.

In *City of New Orleans vs. Southern Bank*, 31 Ann. 566, the Court said: "The marked distinction between a *quasi contract* and an offense or *quasi offense* is that the act which gives rise to a *quasi contract* is a *lawful act*, and is therefore *permitted*; while the act which gives rise to an offense or *quasi offense* is *unlawful* and therefore *forbidden*.

The court sustained the defendant's plea of prescription of one year, and so did the judge *a quo*, and we think he was correct in so doing.

III.

But the plaintiffs' counsel claims that the prescription was legally interrupted by the suit of *Lacombe vs. Miliken*, 36 Ann. 367.

This suit was filed and service accepted by defendants on the 29th day of January, 1886, and that suit was finally decided by this court in April, 1884.

More than one year had elapsed between the decision of the one and the institution of the other suit.

Even if that were not conclusive against the plaintiffs' petitions in that regard, we cannot consider that suit as having the legal effect of an interruption. It was held in that case that "the liability of the directors is not in favor of the bank, or its liquidators, but in favor of the creditors of the concern, who may, or may not, at their option, enforce it, for their separate benefits." The plaintiffs, in that case, were without a cause of action, and this is the first appearance of the creditors of the bank.

Prescription is *stricti juris*, and cannot be eked out by inference, nor extended from one cause to another by analogy; neither can the legal interruption of prescription.

Knoop, Hanneman & Co. et al. vs. Blaffer et als.

Under the views herein expressed it is unnecessary that we should pass upon the plea of prescription of six months, urged by defendants. Judgment affirmed.

ON APPLICATION FOR REHEARING.

Plaintiffs present an earnest argument in favor of their application, and on account of the great importance of the case, we will supplement the opinion complained of.

I.

They insist that we have misconstrued the banking law of the State and have limited their claim to the amount of the deposits as the measure of damages.

It was not the purpose or intention of the opinion to thus limit the operation or effect of the banking laws. We simply held that the liability of directors, under the state of facts presented, was one arising *ex delicto* and not *ex quasi contractu* as contended.

The liability sought to be enforced in this instance happened to be for the *debts* of the bank, i. e., the plaintiffs' deposits. We had no occasion to place any such restriction upon the liability of directors, in reference to *damages* or other obligations incurred by the corporation, as supposed.

II.

We are not disposed to recede from the views expressed in reference to *quasi contracts*.

Counsel insist that "it is not from the violation of the banking law that the *quasi* contract results;" but that it results "from the lawful act of accepting the directorship of the bank, and receiving the deposits. The liability itself flows *first* from the *quasi* contract, and *then* from the violation of law."

The manifest fault of this argument is that the directors of the bank are taken for the bank itself.

The opinion quotes from the statute itself the enumerated duties of the directors of banking corporations, and also the section of the Revised Statutes which defines the liability of the stockholders of corporations generally, for the purpose of making it *plain* that it was *not* one of the duties of directors to *receive, or have the care of deposits* of the bank. For this reason they did not enter into any contractual relations in reference to funds deposited in the bank.

The illustrations given are not apposite, for the reason that tutors, executors, administrators and agents are entrusted with the funds, under specific provisions of the law; and if they misappropriate them

they are liable under those laws. The same is true of the *negotiorum gestor*. In each of those relations exists a trust to be performed.

But the directors of a bank are in no sense the trustees, agents or *negotiorum gestores* of the depositors of the bank, and incurred no contractual obligations, or relations under the banking law. By assenting to, or acquiescing in the loans and discounts made by the corporation, while in an insolvent situation, those directors violated the *penal* provisions of the statute, and subjected themselves to the payment of its "debts and obligations."

III.

While it is true that the opinion does not *in terms* decide "whether a contract did, or did not, arise from the statute itself, by the fact of the parties acting under it, and, therefore, accepting the stipulations of such statute, made by law, in favor of the creditors of the bank;" it does in effect, by holding that the liability of the directors, under the facts presented, arose *ex delicto* and not *ex quasi contractu*.

Counsel insist that "when parties act under a statute which creates specific rights, obligations and liabilities, the Statute itself becomes a contract between the parties, and their acting under it shows their implied acceptance of its stipulations."

Applying this principle of law and precept of jurisprudence to the banking law under consideration, and we find, as stated in the preceding paragraph, that it imposed no duty upon the directors in reference to funds deposited with the corporation; and by undertaking the discharge of their duties as such, which are exclusively administrative in their character, they incurred no contractual obligation toward the depositors. The penalty that the law imposes upon directors who impliedly assent to any violation of the law by the corporation operates as merely a safeguard for the protection of depositors, on the happening of a contingency that may arise necessitating its enforcement.

But that liability is *not contractual*. We fail to perceive any analogy between the case as stated and that suggested by counsel of a municipal corporation issuing bonds, in pursuance of an enabling law, and securing their payment by tax levies. In such case the law is considered as read into the contract, and it cannot thereafter be changed to the prejudice of the holders of such bonds, until same are fully paid. The tax levies are the trust of the creditor. The duty is specifically imposed upon the corporation, and their acts cannot be recalled to the prejudice of third persons.

Knoop, Hanneman & Co et al. vs. Blaffer et als.

IV.

Counsel complains that no attention was given to the grounds on which *he* particularly *relied* as interrupting prescription urged by defendants, viz: the acknowledgment of the bank's liability in the account of the liquidating commissioners, filed on the 9th of February, 1880, and upon which plaintiffs are placed as creditors.

As the opinion in effect declared, this court held in *Lacombe vs. Milliken*, 36 Ann. 369, that liability accrues, *not* in favor of the *bank* in liquidation, which is a *debtor* to its creditors, but in favor of those creditors, hence that suit did not have the effect of interrupting prescription, it being a suit by the commissioners of the bank, and they without any cause of action.

The correctness of this view the plaintiffs' counsel inferentially admits.

Now, we submit—and so decide—that it follows, as a necessary corollary from that argument, that the account and tableau of distribution was but an acknowledgment, or admission of the *debts* of the bank, to and in favor of the plaintiffs and other *creditors*. The commissioners had no more authority to *admit the liability of the directors on their account than they did to sue them for its recovery*.

They take this incorrect premises from which to argue that, if the directors are liable *ex delicto*, they are liable *in solido* under R. C. (C. 2324, as wrong-doers, with the corporation.

But defendants are not proceeded against under that article, but *explicitly* and *distinctly* under the banking law, and for the enforcement of a particular liability thereunder, for the *debts of the bank*.

It is sufficient answer to say that the statute declares that directors "shall become *individually* liable for" the debts and obligations of the bank. The statute does not give such a liability *the character or quality of solidarity*, and we will not.

The case cited by counsel (*Morgan vs. Metayer*, 14 Ann. 612) only involves an ordinary *contract* of two debtors *in solido*, one of whom became insolvent, and acknowledges the debt on his *bilan*. We regard it as inapplicable.

In conclusion we have only to say that we adhere to the conclusion first announced, and the rehearing is therefore denied.

Rehearing refused.

No. 9790.

THE STATE EX REL. THE DAILY STATES VS. JAMES D. HOUSTON,
TAX COLLECTOR.39 33
49 1784

The costs of advertising real estate for sale to pay taxes due thereon, under the provisions of Act 82 of 1884, are entitled to be paid with preference by the tax collector out of the first collections realized in the enforcement of the act, unless where the State has failed to give an absolute title, or, that given has been duly annulled.

Tax collectors have no right to refuse such payment, when the State has not made default, or the title given has not been annulled.

Tax collectors cannot be subjected to responsibility for carrying out the positive mandates of valid laws.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Thos. C. W. Ellis for the Relators, Appellees.

Blanc & Butler for the Respondent, Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from a judgment directing him to pay to the plaintiff the sum of \$3666.24, out of \$21,276 which he has in his possession and which are the proceeds of certain sales of property advertised by plaintiff for sale, for the payment of State taxes due.

There is no dispute as to the amount claimed for services rendered and as to the existence of the fund. They are admitted.

The plaintiffs ground their demand for payment out of said fund on section 7 of Act 82 of 1884, p. 107, which is to the effect, that the total amount of costs and expenses incurred in *advertising* and putting up for sale immovable property for State taxes due prior to December 31, 1879, shall be *paid by preference by tax collectors*, out of the first collections made in enforcing the law, and before any distribution of the proceeds for the discharge of State and municipal taxes, directed by a previous section (5).

The defendant, however, resists payment for the reason, that section 4 of the same act compels him to retain the entire proceeds of all sales, made under the statute, until it is finally determined that the State has conveyed absolute title to the purchasers at such sales.

After declaring the effect of a tax sale and how the purchaser shall be put in possession, the section invoked concludes in the following terms ;

"In case the State shall fail to give the purchaser an absolute title to the property sold, or if said title shall be duly declared null and void

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for any cause, the amount paid by the purchasers to the State for such property shall be refunded by the tax collector to the purchaser."

This section must be construed with the other parts of the act and also with a previous statute to which it refers, viz: Act 96 of 1882, p. 140, sec. 74, which requires that the tax collectors for the parish of Orleans (one of whom defendant is) shall make *monthly* settlements with the Auditor and pay into the State treasury the sums collected for account of the State.

Taken together, the two acts, as far as they have an application to the instant case, simply mean in substance: That the property on which certain taxes are due, shall be advertised for sale; that, in cases of adjudication, a deed shall be made by the tax collector; that the cost of advertising and putting up for sale shall be paid by preference by the tax collector out of the first collections made in enforcing the act; that this payment is paramount to any other; that the tax collector shall, within the time required by law (*one month*) for the settlement of tax collections, file a statement of the sales effected by him under the act; that the tax collector shall not pay over to the State the proceeds of sale, where the State has failed to give to the purchaser an absolute title, or where the title given has been duly declared null and void; that, in such cases, the tax collector shall refund to the purchaser the amount paid by him for such property.

It is not at all strange that the act does not state expressly how long the proceeds shall remain in the hands of the tax collector, for the obvious reason that the act of 1882, to which that of 1884 refers as to *time*, requires a *monthly* settlement and payment by tax collectors, under penalties in cases of failure or default.

The two statutes taken together can therefore mean only, that the tax collector shall pay *by preference* the expenses of sale, out of the first collections, *unless* in the cases in which the State has failed to make a title, or in which the title given has been duly annulled.

There is no pretence here that the State has thus been in default, or that the title made has been in any solitary case annulled.

It was well said by counsel for plaintiff that section 4 never intended that the tax collector should keep in his own possession the moneys collected from tax sales, withholding from the officers and printers entitled to their costs for bringing the property to sale and withholding from the State its revenues *ad græcas calendas*, on the suggestion that in the hereafter, litigation might arise to annul these titles.

The district judge likewise well observed that "it would be unreasonable to suppose that the legislature intended that such payment (of

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costs and expenses) should be withheld until the possible claims of purchasers, based upon possible evictions by judgments, should become prescribed."

Placing a different construction on the act would indeed be to read out of it sections 5 and 8 and the reference to the statute of 1882, requiring monthly statements, and to constitute State tax collectors, on flimsy pretences, sub-treasurers with authority to collect certain revenues of the State and to retain the same to no end of time.

Tax collectors cannot be subjected to responsibility for carrying out the positive mandates of valid laws, irrespective of the protection in warranty by the State for moneys paid over by them into the public treasury.

We conclude that the district judge decided correctly.

It is therefore ordered and decreed that the judgment appealed from is affirmed with costs.

No. 9811.

30 35
45 1108

JOHN CHAFFE & SONS ET AL. VS. SAMUEL F. WALKER.—EDWIN BATES & CO. INTERVENORS.

A judicial mortgage takes effect from the date of the recordation of the judgment in the mortgage book of the parish, where the immovables of the debtor are situated, and this rule applies to cases where the judgments are rendered in a country parish at the same term of court.

Article 555, C. P., has no bearing on the question, and does not conflict with the articles of the Civil Code on the subject of judicial mortgages.

A PPEAL from the Tenth District Court, Parish of DeSoto.
Hall, J.

E. W. Sutherlin for Plaintiffs and Appellants.

Bayne & Denègre on the same side :

A judicial mortgage results from recording a judgment by confession. A debtor may confess judgment in favor of his creditor, and by this confession consents to the immediate signing of the same by the judge, and waives the delay for a new trial. The recording of such a judgment operates as a judicial mortgage, and this is true in the several judicial districts of the State, as it is in the parish of Orleans, or in the parish of Caddo, which constitutes the First Judicial District mentioned in Art. 555 of the Code of Practice. 11 Ann. Rep. 100; 12 Ann. Rep. 431.

The delay for motions for new trial and for appeal may be waived, such delays are personal to the debtor, and he may waive them by non-action or by special agreements. 15 Ann. Rep. 478, and Martin's Rep., New Series, 234.

The rank of all mortgages in this State is determined by actual registry, and the articles of the Civil Code in the chapter and section relating to mortgages and judicial mortgages

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defines how such mortgages are created and the order of their rank. Civil Code, 3287 3322, 3342; 29 Ann. Rep. 323; Succession of Dickson, 37 Ann. Rep. 797.

J. C. Pugh and Kennard, Howe & Prentiss for Intervenor and Appellees:

All judgments rendered, signed and recorded during the same term of the district court in the country parishes take effect as judgments, and operate as judicial mortgages, from the last day of the term of the court at which they are rendered. C. P. 555; 29 Ann. 518; 35 Ann. 285.

The opinion of the Court was delivered by

TODD, J. The plaintiffs and intervenors are judgment creditors of the defendant.

Their judgments were rendered at the same term of the district court of DeSoto.

The judgments in favor of the plaintiffs (John Chaffe & Sons, and Nelson McStea), were recorded in the mortgage record book of said parish on the 3d of April, 1883, and that of the intervenors on the 20th of the same month.

The only question for our determination is whether the judicial mortgages in favor of these parties (plaintiffs and intervenors), operate concurrently on the property subject to the mortgages, or are the plaintiffs' mortgages, being first of record, entitled to precedence.

From a judgment decreeing that they were of equal rank, and operated concurrently on the property, the plaintiffs have appealed.

The judgment of the lower court is based on the construction given by the judge to art 555 of the Code of Practice, which reads:

"All judgments rendered * * * shall be considered as having effect only from the last day of the term, whatever may be the day on which they shall have been signed." The judge concluding that as a judicial mortgage results from the recordation of a judgment, that it only becomes operative when the judgment goes into effect.

The counsel for the plaintiffs contends that the question when a judicial mortgage takes effect or becomes operative is in no wise dependent on that article or any other provision of the Code of Practice, but is to be determined entirely by the articles of the Civil Code on the subject of the registry and rank of mortgages.

This precise question is for the first time before this court for adjudication. We are pointed to the decisions—29 Ann. 518; 35 Ann. 285—as conclusive of the point. These decisions are to the effect only that prescription against judgments begins to run from the last day of the term at which they are rendered; which we do not consider as determining the question.

The articles of the Civil Code referred to bearing on this point are as follows :

Art. 3322. "The judicial mortgage takes effect from the day on which the judgment is recorded in the manner hereafter directed."

Art. 3323: "If there be an appeal from the judgment, and it is confirmed, the mortgage relates back to the day when the judgment was recorded."

Art. 3329: "Among creditors, the mortgage, whether conventional, legal or judicial, has force only from the time of recording it"

Art. 3358: "The creditors whose inscriptions have been made on the same day possess a concurrent mortgage, and no distinction is made between the inscription made on the morning or that made in the evening * * * ."

If it were not for the article of the Code of Practice above quoted, not the slightest doubt could exist that the judicial mortgage is in force from the day on which the judgment is recorded, and that only those can have concurrent mortgages who have recorded their judgment on the same day, so plain, positive and unambiguous are the declarations of the Civil Code in the above articles on this subject.

After a thorough consideration of the question, and an examination of all the authorities in any way bearing on it, we have reached the conclusion that there is not a real conflict in the articles of the two Codes, and that the articles last above cited are not controlled or affected by the article of the Code of Practice quoted and relied on by the counsel for the intervenors.

It is to be considered that the Code of Practice is intended and designed to establish rules of civil procedure. Thus it defines what actions are, how they are prosecuted until they culminate into judgments, what those judgments are, and how they may be enforced or executed, and treats of all matters germane thereto. On the other hand, the Civil Code treats of legal rights that give rise to actions and the different kind of contracts and obligations, and the manner in which they are created and preserved, and other kindred subjects. It is easily perceived that the whole subject of mortgages,—how created and in what manner to be registered and the purpose of registry, etc.,—belongs exclusively to the latter Code.

This Code declares, as shown above, that the inscription of a judgment in a certain book, and in an office designated, gives rise to or creates a mortgage. It is not the judgment *per se* that constitutes the mortgage, but its inscription in the mortgage as prescribed; for the Code of Practice, art. 545, provides that :

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Definitive judgments, though entered on the docket of the judgments of the courts, shall not affect the property of the person against whom such judgments have been rendered ;" but it is added, "that such judgment must be recorded at the office of mortgages in order to give the party a judicial mortgage." From which latter clause it is plainly inferable that such final or definite judgment, *when* so recorded, does give a judicial mortgage.

But it is contended that there is no judgment ; that it does not come into existence until the last day of the term of the court at which it was rendered. It seems paradoxical to say that a judgment which the law terms final and definite, which is signed by the judge, that when it is thus rendered and signed, and is final, definite and conclusive between the parties, that it still has no existence ! C. P., 539, 546.

When a judgment is thus rendered and signed "it becomes the property of him in whose favor it is given, and the judge cannot alter it except in the mode prescribed by law." C. P. 548.

There is another article to be found under the head of "appeals" that throws additional light on the true intent and meaning of article 555 touching the expression therein "that judgment shall be considered as having effect only from the last day of the term."

It is article 575, one clause of which provides (quoting) : "That in the country parishes no execution shall issue in cases where an appeal lies until ten days after the adjournment of the court by which the judgment was rendered, within which delay a party may take a suspensive appeal."

When we consider that in other articles the judgment when rendered is termed a definitive or final judgment, that it constitutes *res adjudicata* between the parties, and moreover construe all the articles together including the one last quoted (575), the conclusion is inevitable that nothing was meant by article 555 other than that the judgment did not become executory, and its payment could not be enforced until the time stated ; and that the two articles taken together relate exclusively to the execution of judgments and appeals therefrom ; and were designed to make ample provision for suspensive appeals and to facilitate the exercise of the right of appeal, by together declaring appealable judgments inexigible not only until the last day of the term but for ten days thereafter. It is to be noted moreover that with regard to devolutive appeals, the right of appeal is for one year, not from the last day of the term, but "from the day the final judgment was rendered."

In appealable cases, a suspensive appeal renders the judgment ap-

pealed from as ineffectual and inoperative during the pendency of the appeal and until affirmed by the appellate court as the temporary suspension provided by art. 555 C. P., from the date of its rendition till the last day of the term, yet no one would seriously contend during that period of suspension—often lasting for years—that its recordation during that term would be without force and effect.

Yet there is just as much reason to declare it inoperative for the one period as the other.

There is another consideration that is strongly confirmatory of these views and favors the conclusion that Article 555, C. P., in no manner affects the question of judicial mortgages, but that that question is entirely regulated by the provisions of the Civil Code. It is this:

In all sales under execution of judgments, the recorder of the parish is required to furnish the sheriff a certificate of mortgages; the object of which is to show what incumbrances are on the property, to establish the rank of the mortgages and privileges, and to regulate the distribution of the proceeds of sale. Of course this officer makes out the certificate from the mortgage book in his office; that alone is relied on for information.

Now if the rank of the judicial mortgages was not to be determined solely by the respective dates of the record of the judgments, then the certificate furnished would be calculated to mislead and deceive. In fact according to the theory of the intervenors' counsel, the certificate thus made out from the mortgage record would be false on the face of it, and that the recorder at least so far as relates to judicial mortgages should not have consulted his record, but should have examined the records of the court rendering the judgment to ascertain the last day of the term thereof, and be controlled by the knowledge thus derived in making out his certificate! It might happen that the judgment under which the property is being sold was rendered in a distant parish from the place of sale, and then the officer would have to search the court records of that parish to discover the vital fact that was to guide him in making out his mortgage certificate. And sometimes it might be the case that the judgments were rendered in several parishes, and then investigations would have to be made in the court records of all these parishes to obtain the requisite information for a mortgage certificate!

It is needless to say that the law imposes no such unreasonable and herculean tasks upon the recorders. They are required to make out their mortgage certificates from the mortgage records in their offices, and this requirement is essentially a legal declaration that the amount

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of judicial mortgages, the rank of such mortgages, their respective dates, and everything relating to them is to be established by such records and they alone are to be consulted.

Our conclusion is that the judicial mortgages of the plaintiffs became operative from the date of the inscription of their judgments in the mortgage book—the 3d of April, 1883—and that they prime the mortgage of the intervenors inscribed on the 20th of the same month and year.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, in so far as it decrees that the judicial mortgages of the plaintiffs and intervenors operated concurrently on the property subject to the mortgages or its proceeds, be annulled, avoided and reversed; and it is now ordered, adjudged and decreed that the judicial mortgages of the plaintiffs have precedence over that of the intervenors, and that the plaintiffs are to be first paid out of the proceeds of the same, that the intervenors pay costs of their intervention in both courts, and that the judgment in other respects be affirmed.

CONCURRING OPINION.

FENNER, J. I do not consider that Art. 555 of the Code of Practice, has any application. Its sole and avowed object is to regulate the effect of judgments.

Now, in many States of the Union and formerly in this State, it was one of the effects of a judgment that, from its simple entry on the docket of the court, it operated a lien or mortgage upon the property of the debtor. If that were still the case, there would be less difficulty in holding that Art. 555 would defeat such effect until the last day of the term. But the Code of Practice has obliterated this as an effect of judgments, by declaring that "they shall not hereafter affect the property of the person against whom such judgments were rendered, all laws to the contrary notwithstanding. Such judgments must be recorded at the office of mortgages, in order to give the party a judicial mortgage, pursuant to the provisions of the law." Art. 545.

The "provisions of law" referred to are those found in the Civil Code, which are thus recognized and adopted by the Code of Practice, except that the latter controls and corrects the loose language of Art. 3321, which says that "the judicial mortgage is that resulting from judgments," etc, because the Code of Practice expressly declares that no such mortgage shall result from judgments.

Reading Art. 545, C. P. and Arts. 3321 and 3322, C. C. together, the clear and obvious meaning is that a judicial mortgage is that resulting

from the recording of a judgment, and "takes effect from the day on which the judgment is recorded in the manner hereafter directed."

Now, plaintiffs present here a judgment for money, rendered and signed by the judge and recorded in the manner directed by law on April 3, 1883, and he claims that a judicial mortgage resulted from that record and took effect from the day of record.

Intervenors say: "No; under Art. 555, C. P., the judgment must be considered as having effect only from the last day of the term, and therefore your mortgage takes effect, not from the date of record as expressly directed by Art. 3322, C. C., but only from the last day of the term of the court; and inasmuch as our judgment, though only recorded on April 20, 1883, took effect concurrently with yours, our judicial mortgage is equally concurrent with yours."

This contention of intervenors would introduce an element of uncertainty and confusion in our mortgage records utterly hostile to the whole spirit and intention of our legislation on that subject.

With regard to the rank of mortgages resulting from the inscription of country judgments, the examiner could no longer be guided by the plain land mark set by the Code of the date of record, but would be sent under a roving commission to ascertain what was the last day of the term of court at which the judgment was rendered. Such inscriptions are often made in parishes distant from that where the judgment was rendered. They last for ten years and may be indefinitely prolonged by re-inscription. Thus, a party in the parish of Plaquemines finding an inscription of a judgment rendered twenty years ago in the parish of Ouachita might be confronted with the necessity of ascertaining what was the last day of the term at which it was rendered.

This, in my judgment, is utterly untenable, and the plain alternative presented is, either that the inscriptions of these judgments took effect from their respective dates, or they did not take effect at all; and the recorder erred in admitting them to record without a certification that the term of court had expired, which, under intervenors' theory, could alone give effect to the judgment and, as an inevitable corollary, to its inscription.

Now, although Art. 555 is an original article of the Code of Practice, it is not disputed that under the express authority of Art. 546, C. P., judgments in the country parishes have been habitually signed and recorded before the last day of the term, as was done by all parties in this very case, and our jurisprudence furnishes no precedent of any question having ever been raised as to such inscriptions taking effect from the date when made according to the express provision of Art. 3322, C. C.

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The plain solution of these difficulties is found in the proposition that the validity and effect of the inscription of judgments are governed, not by the Code of Practice, but by the Civil Code; and that, under the latter, we are not concerned with any questions concerning the *effect* of judgments or when they have effect, but simply with the inquiry whether the judgment recorded *existed* as a final judgment within the meaning of C. C., art. 3321; for, if it did so *exist*, whatever its effects, the record thereof, under the unambiguous language of the code, created a judicial mortgage effective from the date of inscription.

Art. 555, C. P., must be construed with other articles in the same section, and the language thereof, that "judgments shall be considered as having effect only from the last day of the term," finds important limitations.

Thus, under art. 546, the judgment was properly and validly signed by the judge before the expiration of the term; under art. 539, it was a definitive or final judgment; under articles 547 and 558, the judge could not, in any manner, alter or amend it; and under art. 548 it had become the property of the party in whose favor it was rendered and entirely beyond the control of the judge.

It follows that, notwithstanding the language of art. 555, the judgment did have many and most important effects from the moment of signature; and, in my opinion, it had all the effect necessary to constitute it a final judgment within the meaning of the Civil Code, entitled to be recorded and to operate as a judicial mortgage from the date of inscription.

I am satisfied that Art. 555 refers to effects independent of, and subsequent to, the creation and existence of the judgment, and that those effects alone, such as execution, delays for appeal, etc., are deferred to the last day of the term.

While this construction gives advantage to the diligent or fortunate suitor, such advantage is not hostile to the spirit of the law. The opposite construction gives advantage to the fraudulent debtor, who, after condemnation by final judgment, would be left a considerable period, during which he might dispose of or establish mortgages on his property, while the hands of his judgment creditor would be tied. I think he gets a sufficient advantage in the postponement of the execution, and, until the law-maker repeals or amends the present articles of the Civil Code, I shall not consent to its extension.

While it is true that, in case of conflict between the Civil Code and Code of Practice, the latter prevails; yet the two must be reconciled when possible, and only in case of irreconcilable conflict would any

court be justified in disregarding unambiguous provisions of the Civil Code.

I, therefore, concur in the decree.

DISSENTING OPINION.

POCHÉ, J. At the April term of 1883 of the district court of DeSoto plaintiffs and intervenors respectively obtained moneyed judgments against the defendant Walker.

Plaintiffs' judgments were rendered, signed and recorded in the mortgage office on the 3d of April, and the judgment in favor of intervenors was rendered, signed and recorded on the 20th of the same month. That term of the court was adjourned on the 2d of May following.

Plaintiffs claim priority of mortgage because the judicial mortgage should date from the day of inscription of their judgments. Intervenors contend that the respective mortgages resulting from the judgments thus rendered are concurrent, because the effect of the judgments only began from the last day of the term, or from the 2d of May, 1883.

The latter views were sustained by the district judge.

That contention finds ample support in article 555 of the Code of Practice, which reads as follows: "All judgments rendered, except in the first judicial district, shall be considered as having effect only from the last day of the term, whatever may be the day on which they shall have been signed."

Under the very terms of the article, if read in the judicial mortgage under discussion, it is certain and clear that judgments rendered by the district court of DeSoto at that term could have had no effect before the 2d day of May, which was the last day of that term, *whatever be the day on which they had been respectively signed*, in other words; that a judgment signed on the 3d of April, as well as that which was signed on the 20th following, should both be considered as having effect only from the 2d of May following.

It is not disputed that the article 555 applies to all parishes in the State except the parish of Orleans.

But it is argued that the article of the Code of Practice cannot have the effect of determining rights, but merely of establishing rules of procedure, and that the case falls under the provisions of article 3329 of the Civil Code, which reads:

"Among creditors, the mortgage, whether conventional, legal or judicial, has force only from the time of recording in the manner here-

after directed." And it is contended that, as the two provisions are conflicting, the article of the Code, which is intended to create a right, must have precedence over the Code of Practice, which treats only of rules.

But the whole subject of judgments as to the manner of obtaining, rendering, signing, executing, and in other respects, of controlling them, is confessedly a question of procedure, which our law has properly and logically relegated to the Code of Practice: hence the question of regulating the effect of judgments most undoubtedly falls within its province.

Now, article 3321 of the Civil Code defines the judicial mortgage as one "resulting from a judgment." But the definition of a judgment must be looked for in the Code of Practice, and to that Code also must inquiry be directed to discover the mode by which a judgment may become, or operate as, a judicial mortgage. Hence, article 545 Code of Practice, provides: "Such judgments must be recorded at the office of mortgages, in order to give the party a judicial mortgage pursuant to the provisions of the law." The first part of the article contemplates that, without the formality of recording, the judgment shall not affect the property of the party cast. Article 3323 Civil Code is to the same effect.

The consequence of operating as a mortgage is, therefore, one of the first effects, if not the most important, which the Code attributes to a judgment. Then comes the provision that judgments shall have no effect in certain parishes before the last day of the term of the court at which they shall have been rendered, without regard to the day on which they shall have been signed. How then can it be logically argued that, notwithstanding such a direct prohibition, judgments may have the most important legal effect before the period of gestation determined by the law itself.

Article 3329 and others of the Civil Code contain no provision necessarily conflicting with the rule settled in the Code of Practice. The object of Art. 3329, as indicated by the title of the section in which it is contained, is to determine the "rank in which mortgages stand with respect to each other," and to that end it provides that all mortgages shall have force as among creditors only from the time of recording the same. But nothing in that article, and no other language in the Code, can be construed as fixing the time at which a judgment must be recorded, or the juncture at which a judgment takes effect. That rule has been left to, and can only be found in, the Code of Practice. It is there declared that in certain parishes the judgment can have no legal

effect before the last day of the term, and logically one of the effects contemplated by the law-maker must have been that which results from the recordation of the judgment.

While the article does not in terms forbid the act of recording the judgment before the last day of the term, it unmistakably means that no legal effect can flow from such recordation before that day, and that is the time of recording which the Civil Code contemplates; it does not refer to an idle or too hasty recordation, but to a legal formality, followed by legal effects. Hence, the two articles are not antagonistic, but they harmonize; the one fixing the rule, the other applying legal consequences thereto. Hence it is that in construing other laws which have certain effects to be determined by the finality of judgments, the Court has held that, in the country parishes, judgments were not final in that sense before the last day of the term at which they were rendered.

In the case of *Broussard vs. Dupré*, 29 Ann. 518, where the Court had to determine, in a suit to revive a judgment, the period at which the prescription of ten years should begin to run, held that it must be computed from the last day of the term and not from the date of the signature of the judgment. The Court said: "But the general provision that all judgments rendered in the courts of this State, other than those of the first judicial district, take effect only from the last day of the term of the court at which they are rendered, fixes the time when the judgment is complete and indicates the starting point when prescription begins to run against them."

The same views prevailed in the case of *Boyd vs. LaBranche*, 35 Ann. 285. Any other construction is equivalent to a declaration that a statute which in terms provides that certain judgments shall have no effect before a specified time, really means that they may have certain effects before that time. Such a doctrine clashes with the familiar rule that "a construction which would render useless important expressions of the law cannot be adopted; effect must be given to them all if possible." 9 M. 635; 4 N. S. 322, 380; 2 R. 236; 3 L. 365; 16 L. 577; 14 Ann. 419.

Article 546 of the Code of Practice may also be invoked as authority for the contention that all judgments rendered in the country parishes at the same term must be understood as standing on the same footing as regards their legal and practical effect; it reads: "The judge must sign all definitive or final judgments rendered by him, but he shall not do so until three judicial days have elapsed, to be computed from the day when such judgments were given; provided that here-

after (except in the parish of Orleans) all motions for new trials in causes, shall be made and determined, and all final judgments signed before the adjournment of the court for the term at which such causes were tried, and whether those judicial days shall have elapsed or not."

No other conclusion can be drawn from a proper construction of the several articles in our Code of Practice bearing on the question than that in country parishes, the corresponding effect of all judgments must be tested by considering the term at which they were rendered and signed, and not the particular day on which they may have been signed.

To reach any other conclusion is equivalent to an entire alteration of article 555 and other articles of the Code of Practice.

After a most laborious search, embracing an examination of every volume of our reports, I have been unable to find any case involving the proper construction of the article 555 of the Code of Practice, save and except the two cases hereinbefore referred to; from the 29th and 35th Annuals.

A careful perusal of these two decisions will show that the clear doctrine therein announced singularly clashes with the views of the majority of my associates in the instant case.

In the first of these cases, Broussard vs. Dupre, 29th Ann. 578, Chief Justice Manning, as the organ of the court, uses the following emphatic language: "Judgments rendered in the courts of the country parishes have effect only from the last day of the term, whatever may be the day on which they shall have been signed. C. P. art. 555.

"The prescription of ten years will not apply to this suit for revival, unless the time be reckoned from the day when the judgment was signed. The defendant urges that the day when it was signed is the day of its rendition, but that is obviously inaccurate, because a judgment is rendered' always before it is signed, and in some of the country parishes the excellent practice prevailed and now prevails of signing all judgments rendered during the term on the last day thereof and not before.

"The judgment of 1867 had effect only on and from the 18th of February of that year (the last day of the term). It could not have been used as a judgment until that time, and that must be the day when it commenced its existence, so to speak, as a judgment."

Had the court conceived the idea that the registry of the judgment at any time before the last day of the term, would have fixed the date of the judicial mortgage as taking effect on that day, it would cer-

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tainly not have said that the judgment could not be used before the last day of the term, as a judgment.

The same views prevailed in the case of *Boyd vs. LaBranche*, 35 Ann. 285.

I feel justified in maintaining that the interpretation thus given to the article of the Code, coupled with the plain language of its provisions, has acquired the force of the rule of "*stare decisis*."

I suggest that the argument resting on the inconvenience of the law cannot be invoked to defeat its plain and unambiguous meaning.

The construction herein adopted opens the door to wrongs of greater consequence than the inconveniences sought to be averted.

It places within the reach of an insolvent debtor, who is sued at the same term of the court by several creditors, the means of giving an undue preference to one or more of them by confessing judgment in their favor, and refusing the like advantage to others, whereas a different construction would cure the evil, by placing all the judgments rendered at the same term on the same footing.

The judge himself who may desire to favor one or more of several litigants suing an insolvent debtor, may accomplish the mischief by signing some judgments at the expiration of the three judicial days, and by withholding his signature of the others until the last day of term.

I therefore dissent from the opinion and decree of the majority in this case.

Bermudez, C. J., concurs in this dissenting opinion.

No. 9739.

JOHN A. MORRIS ET AL. VS. J. L. LALAURIE ET ALS.

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106	76

1. In all judicial partitions by licitation, or in kind, the liens, privileges and mortgages, such as are established by the Civil Code, which are recorded against the share of one of the co proprietors or co-heirs, by the mere fact of the partition, attach to the share of property or proceeds allotted to him, and are of right dissolved as to the shares of the other heirs or co-proprietors.
2. The foregoing rule is inapplicable to a licitation of property held in joint ownership, when it is adjudicated to a party having previously no interest in it. Such an adjudication is not in legal intentment a partition, but a sale, and does not affect the rights of the mortgage creditors.
3. Taxes are not debts in the ordinary acceptation of the term, but contributions required of the citizen for the support of the government, and their assessment does not constitute a technical judgment, against which set off can be pleaded; nor are they contracts

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between party and party, either express or implied. The assessment and collection of taxes is a legal proceeding, but not judicial process.

4. All licenses or taxes assessed in the years 1870 and 1877 inclusive are a lien and privilege on the property of the person assessed, "any alienation thereof or incumbrance thereon notwithstanding," until some are paid; and shall be paid "by preference to all mortgages and incumbrances."
5. A sale of property, against which liens, privileges and mortgages exist and are recorded in favor of the State for taxes or licenses, remain undisturbed thereby, and are not extinguished against the property, and not transferred to the proceeds of sale. This is true, whether it be a judicial sale or extra-judicial.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

W. S. Benedict and Henry Benschaw for Plaintiff and Appellant:

1. In partitions by judicial sale, any one interested in giving or receiving a clear title, or in having the proceeds distributed, may have the property freed from incumbrances, and the mortgages referred to proceeds. 35 Ann. 528, 531.
2. By such sale the property passes disincumbered and mortgages are transferred to proceeds. 37 Ann. 321; 28 Ann. 714.
3. Such sale shifts the liens or mortgages from the property to its proceeds. 27 Ann. 127.
4. Purchaser cannot be compelled to pay the price before he is tendered an unincumbered title. 27 Ann. 127.
5. In judicial partitions in kind, the mortgages, liens and privileges against one of the co-proprietors attach to his share and cease to attach to the shares of the others. C. C. Art. 1338.
6. As a corollary from the above, such mortgages, liens and privileges should, in partition by sale, attach to respective shares in proceeds. See in this connection 38 Ann. 108.
7. In succession partitions by sale, the property passes free from mortgages affecting shares of co-proprietors, and such mortgages are transferred to shares of the latter in the proceeds. 38 Ann. 108, and authorities there cited.
8. The same rule applies to partitions between major co-proprietors by judicial sale, as to partition of successions. 38 Ann. 108, 109; C. C. 1290.
9. A succession partition by sale frees the property from tax privileges, and such privileges attach to proceeds. 33 Ann. 260. In this connection see 30 Ann. 1261; 23 Ann. 298.
10. An adjudicatee at judicial sale, desiring a clear title, may call on those asserting rights on the property, to settle their claims contradictorily with each other. 35 Ann. 759.

M. J. Cunningham, Attorney General, for the State, Appellee:

1. Recorders, sheriffs, notaries public and other persons authorized to convey real estate by public act, are prohibited from passing or executing any act of sale or alienation whatever until the taxes due on the property sold or alienated have been first paid, to be shown by the tax collector's receipt or certificate to that purpose. R. S. sections 3615, 2616, 3630, 3621; sections 37 and 102 of Act 96 of 1877; sections 69, 70 and 71 of Act 96 of 1882; sections 74, 75 and 76 of Act 96 of 1886.
2. A violation of this law is denounced as a misdemeanor, and subjects the officer offending to a severe penalty. Authorities cited in No. 1.
3. No sale or other alienation of property can affect the taxes assessed thereon; but it may still be seized, advertised and sold as the property of the taxpayer to whom assessed, to enforce payment of delinquent taxes. Section 52 of Act 77 of 1880; sec. 66 of Act 96 of 1882.

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4. The ordinance for the relief of delinquent taxpayers in the Constitution of 1879, and the Acts of the Legislature passed subsequently to carry this ordinance into effect, have given a fixed status to properties upon which taxes prior to December 31, 1879, are due. This class of property is subject to sale under Act 82 of 1884, and the rights of the State therein conferred cannot be impaired by proceedings in the courts which involve no question subject to judicial determination.
5. An order of court erasing and canceling the tax liens and privileges in favor of the State and transferring them to the proceeds of sale of the property, would change existing methods prescribed by the legislative power for the collection of the revenues of government. Such an order would be violative of Article 15 of the Constitution.
6. When, in a rule to secure the erasure and cancellation of tax liens and transferring the rights of the State to the proceeds of the sale of the property, the mover does not allege the unconstitutionality of the tax, the invalidity of its levy, or an illegality in the mode of procedure, no question is presented for judicial determination. In the absence of any such allegation, any interference on the part of the judiciary with tax measures or processes would be an usurpation of the functions of a co-ordinate department of the government.
7. Any statute tending to insure the collection of the public revenues should be rigidly upheld and full effect given to its provisions. Cooley's Constitutional Limitations, p. 70; 46 Wis. 175; 37 Ib. 75; 42 Ib. 503, 527; 43 Ib. 48, 55; 45 Ib. 519.
8. Courts should rather assist in removing the obstructions which clog the wheels of government than interpose delays and obstacles which impede the collection of her revenues.
9. Those provisions of the Civil Code under which privileges and mortgages are cancelled and transferred to the proceeds by succession, judicial and partition sales, only affect the privileges and mortgages treated of in the code.
10. They are private laws, and do not affect or have reference to taxes or the mortgages and privileges securing them.
11. Tax mortgages and privileges are established, regulated and controlled by the revenue laws exclusively. They are unknown to the code, and in no manner affected by its provisions.
12. Privileges and mortgages affecting an entire property are not cancelled and transferred to the proceeds of the sale of such property made to effect a partition among co-propriators.

F. C. Zacharie, Amicus Curia, on the side of the State.

The opinion of the Court was delivered by .

WATKINS, J. Under a decree of this court in John A. Morris et al. vs. J. L. Lalaurie consolidated with J. L. Lalaurie vs. John A. Morris, 34 Ann. 204, two pieces of improved real estate in this city were sold on the 11th of April, 1882, by the sheriff at public auction in block, and same were adjudicated to Andrew J. Murphy for \$5,600, upon the following terms of credit, viz: one-third cash, and the remainder on a credit of one and two years.

That decree recited "that from the proceeds after deducting costs, charges and taxes, there shall be paid to Alfred Marchand one-third; to the Factors and Traders' Insurance Company, one-third, and the

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remaining one-third to J. L. Lalaurie," with the reservation to John A. Morris of certain mortgage rights.

This sale was made in order to effect a partition among the co-proprietors, by licitation, the property not being susceptible of division in kind.

The certificate of mortgages discloses the existence of a large number of judicial mortgages and liens, privileges and tax mortgages, in favor of the State and city of New Orleans, recorded against said property, and at various dates during the years 1870, 1872, 1873, 1874, 1875, 1876 and 1877, and aggregating large amounts, more than \$2000 to the State and \$20,000 to Widow Mary Murphy—and she had no interest in the property.

Andrew J. Murphy, as purchaser, took a rule on the parties in interest to show cause why all of said liens, privileges and mortgages should not be cancelled and erased, and same relegated to the proceeds of sale.

For some cause it was abandoned and the present one was taken by Alfred Marchand, one of the original co-proprietors, on the State of Louisiana, D. Pochelu, Madame Bongère and Mrs. Mary Murphy, to same effect.

On the trial, judgment of non-suit was entered in respect to city taxes without objection, and was made absolute in respect to the respective mortgages of John A. Morris, Madame Bongère, D. Pochelu, and Mrs. Mary Murphy; but it was discharged and disallowed in respect to inscriptions of liens, privileges and mortgages in favor of the State, during the years enumerated, in the mortgage certificate.

From this judgment, plaintiff in the rule alone appeals.

The only question presented for our consideration and determination is whether this partition sale had the legal effect of discharging the liens, privileges and mortgages in favor of the State for taxes, and transferred them to the proceeds of sale.

The answer of the Attorney General affirms that no sale, pledge, alienation, or incumbrance on real property, can affect the State taxes assessed against the same; and that same may be lawfully seized and sold in satisfaction thereof, notwithstanding any alienation of same, or prior incumbrance thereon.

I.

We will argue this question on the hypothesis that all the proceeds yielded at the sale were cash, though, in point of fact, only one-third of \$5,600 was paid in cash.

The various decisions cited as bearing on the question, are neces-

sarily predicated on R. C. C. 1338, 1290 and 1383, and are controlled by them.

It is provided by R. C. C. 1338: "In all judicial partitions, when the property is divided in kind, the *mortgages, liens* and privileges against *one* of the co-proprietors shall, by the mere fact of the partition, attach to the shares allotted to *him* by his co-proprietors," etc.

It is provided by R. C. C. 1383: "The heir to whose share an immovable, or some other thing liable to be mortgaged, has fallen, *is not bound by the mortgages which his co-heirs may have given on their individual shares of the same, previous to the partition; and these mortgages are dissolved of right, except upon the property which falls to the heirs who have given the mortgages.*"

It is provided by R. C. C. 1290: "All rules established in the present chapter * * are applicable to partitions between co-proprietors of the same thing," etc.

These principles were recognized in *Beltran vs. Gauthreaux*, 38 Ann. 106, and those previously announced in 33 Ann. 53, *Life Association vs. Hall*, and 35 Ann. 531, *Bayhi vs. Bayhi*, were affirmed.

It is also declared that a partition by licitation has the same effect, and that "mortgages should attach to the share of the proceeds coming to the co-proprietor liable for the same."

We do not understand these decisions as going to the extent of declaring that a judicial sale for the purpose of partitioning real property of co-heirs or co-proprietors could discharge judicial or other mortgages resting upon the *entire* property in favor of some third person.

It has frequently been held that though a probate sale, made in pursuance of an order of court, discharges the mortgages *granted* by the *deceased*, yet it does not affect those with which the property was burdened when it came into his possession. 6 N. S. 386; 5 La. 470; 9 La. 12; 3 R. 5; 11 Ann. 383; 29 Ann. 385.

The provisions of Sec. 2 of Act No. 71 of 1843, are literally incorporated into, and constitute R. C. C. 1338.

Long before its incorporation into the Civil Code in its revision in 1870, this statute had passed under judicial interpretation by this Court.

In *Lecarpentier vs. Lecarpentier*, 5 Ann. 497, it was said: "The act of 1843, relied on by the plaintiffs, is not applicable to licitations under which the property is adjudicated to a *party having previously no interest in it. Such an adjudication is not, in legal intentment, a partition. It is a sale, and does not affect the rights of mortgage creditors.*

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"Any intimation of this Court to the contrary must have originated in a *misreading of the Act of 1843.*"

A sheriff's sale does not discharge a special mortgage recorded against the property sold, unless the amount of the bid exceed it in amount. C. P. 706.

A sheriff's sale under *fi. fa.* is always made subject to legal and judicial mortgages. C. P. 710; 5 Ann. 736.

All judicial sales are made in pursuance of special laws, and can have no other force or effect than are thereby given to them.

II.

But, conceding for the argument, that the effect, claimed by the plaintiff in the rule, can be given to the alleged partition sale—can it be argued therefrom that it likewise discharged the State's liens, privileges and mortgages to secure the payment of delinquent taxes of the years 1870 to 1877, inclusive?

The recordation of such liens, privileges and mortgages, and the enforcement thereof must, of necessity, be controlled by the revenue statutes in force at the date of assessment thereof and the miscellaneous ordinances for the relief of delinquent taxpayers and statutes enacted in conformity thereto. Act 98 of 1882 and Act 82 of 1884; *State ex rel. Taylor vs. Houston*, 37 Ann. 56.

Counsel for plaintiff relies mainly on *Succession of J. W. Zacharie*, 30 Ann. 1260, and *Succession of Dupuy*, 33 Ann. 256.

The Court said in the former case: "The property on which were assessed the taxes, the amount of which is claimed by the city, has been sold under orders of the Second District Court, and it is clear that any right which it may have had on said property was transferred from it to the proceeds of the sale."

Of that decision it is sufficient to say that the sale in question was made in that succession; and the city opposed the executor's account, "for the reason that he refused to class it as a creditor of the succession for the taxes of 1860 to 1877."

Of the decision in the latter, much the same may be said. The city opposed an account in that succession upon the same ground. The Court said: "When the sale took place the privilege attached to the proceeds and was the first privilege thereon, and the city had a legal right to claim taxes out of these proceeds and enforce her privilege therefor by such direct proceedings as was instituted in this case."

Neither the State nor its officers were parties to either of those proceedings, and whatever may be said of their force and effect as to the

taxes of the municipal corporation consenting thereto, those cases cannot conclude the right of the State when she appears in court and asserts her rights, contradictorily, resisting a like claim by her citizens.

It is true that R. C. C. 1338 employs the phrase "the mortgages, liens and privileges;" but it is fair to assume that the mortgages, liens and privileges recognized and established by that Code, alone, were in contemplation of it.

They are merely securities for *debts* and accessories to principal contracts. R. C. C. 3278, 3284. They "can be claimed *only for those debts* to which they are expressly granted in this Code." R. C. C. 3185.

Their effect cannot be extended to any cases not therein enumerated by inference or comparison.

In *City of Shreveport vs. Gregg & Ford*, 28 Ann. 836, it was held: "It is correctly contended on behalf of the plaintiff, that taxes are *not debts* in the ordinary sense of the word, but contributions required of the citizen for the support of the government, and without which it could not be supported, and they cannot be seized, sold or compensated." 26 Ann. 694, *Geren vs. Gruber*.

Cooley on Taxation says: "Taxes are *not debts* in the ordinary sense of the term, and their allowance will in general depend on the remedies which are given by statute for their enforcement. * * *

"Taxes are not demands against which a set-off is admissible; their assessment does not constitute a *technical* judgment; nor are they contracts between party and party, either express or implied; but they are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent, individually, is not required." 30 Ann. 541, *City vs. Davidson*; 36 Ann. 436, *City vs. Waterworks*.

In *Union Towboat Company vs. Bordelon*, 7 Ann. 192, it was held: "It is true, as contended, that the functions of one department of government are kept distinct, and the executive cannot divest judicial process. But the assessment of taxable property and the collection of taxes are *legal* proceedings, or process but *not judicial* proceedings, or process. If these proceedings take place illegally * * * then the functions of the judiciary may be invoked, but not otherwise."

III.

Since the line of demarkation has been clearly drawn between debts and taxes and privileges and mortgages, therefore, it were well to examine the revenue laws under which the taxes under consideration

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were assessed, and ascertain their requirements in regard to their preservation and enforcement.

Section 38 of Act 114 of 1869, declares: "That all licenses and taxes assessed by law on the property of any person, firm, company or corporation, are hereby declared a lien and privilege on the real property of such person, firm or corporation for his or their entire tax, *any alienation thereof or any incumbrance thereon* notwithstanding; and shall exist in favor of the State and parish for the amount of taxes assessed, and *shall be paid by preference to all mortgages and incumbrances.*"

Section 37 of Act 42 of 1871, is couched in even stronger terms. It includes, "movable and immovable property," and confers a lien and privilege for the "entire license or tax," and continues same in force "until same be fully paid," not alone in respect to the licenses and taxes, but likewise "penalties and costs and charges."

This revenue law remained in full force, and the taxes of all the intermediate years were assessed in pursuance thereof until the 20th of April, 1877, when Act 96 of that year went into operation.

Section 36 of that Act provides: "That from the filing of the assessment rolls in the office of the recorder, as provided in this act, the property therein mentioned shall be affected with a lien, privilege and right of pledge, which shall rank all other privileges and exist *without further registering until the payment of the tax* * * provided that the privilege and right of pledge be not considered as lasting a longer period than three years."

The effect of these statutes has been interpreted by the ordinance for the relief of delinquent taxpayers.

It declares that in the event the taxes and licenses due the State prior to the 1st of January, 1879, are not fully paid by the 1st day of January, 1881, "the interest, penalties, costs, fees and charges hereinbefore recited, shall revive *and attach to the property upon which the taxes and licenses are due, and such property shall then be sold* in the manner provided by law, and the title to the purchaser shall be *full and complete.*"

To put this ordinance in force, Act 98 of 1882, was enacted.

Section 1 declares: "That it shall be the mandatory and imperative duty of each tax collector in the city of New Orleans, and of each sheriff and *ex officio* tax collector throughout the State, * * within four months after said promulgation, to advertise for sale * * *all property upon which any taxes* due to the State of Louisiana or to any parish, prior to January 1, 1880, *remain unpaid* or unsettled by partial payment," etc.

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Section 1 of Act 82 of 1884, is couched in similar language.

From these express and unambiguous statutory provisions, there can be no reasonable doubt of the legislative intention in their enactment. They were intended for the sole purpose of enforcing the faithful and *certain* collection of the State's revenues; and in order to accomplish this result, the law declared that the lien and privilege of the State for taxes should rank and prime any and all other liens, privileges and mortgages, and that same should adhere to the property assessed for the *entire* license or tax of the person assessed, any alienations thereof or incumbrances thereon notwithstanding.

We are, therefore, clearly of opinion that the alleged partition sale did not have the effect of discharging from the property sold the lien, privilege or mortgage of the State for taxes assessed in either one of the years enumerated on the certificate of mortgages, and that same is entirely unaffected by the alienation thereof or the incumbrances thereon; and that the property passed into the power and possession of the purchaser charged therewith, and also the penalties, charges and cost.

Judgment affirmed.

Poché, J. I concur in the decree.

No. 9785.

BEULAH WEBB, WIFE, ET AL. VS. AMELIA KELLER ET AL.

1. The fact that only *one* of the parties defendant, cited in an action to annul a probate sale of real estate—portions of which are in possession of various other defendants cited—has prosecuted his appeal, from an order obtained in open court, by him, at the same term at which final judgment was rendered against him, cannot be treated as invalidating his appeal. Those who are not appellants are appellees; and such individual appellant has the right to prosecute *his* appeal, which is regularly taken, notwithstanding his co-defendants—against whom judgments have been *previously* rendered—have not been formally cited, and have acquiesced therein.
 2. A motion to dismiss an appeal on account of informality in the bond, or order of appeal, or even the *want* of the latter, must be made at the term at which the appeal is made returnable, and within three judicial days after the record is filed.
- One filed within the time specified, and not disposed of at that term, cannot be supplemented, at a subsequent term, by another motion to dismiss upon other grounds not enumerated in the one first filed.

ON THE MERITS.

1. If an universal legatee shall marry a second time, having children of a preceding marriage, he or she cannot, in any manner dispose of the property given or bequeathed to him or her by the deceased spouse.

39	55
44	49
44	301
44	422
39	55
45	29
39	55
48	800
48	800
49	181
39	55
51	1041
51	1551
39	55
104	649
104	651
39	55
108	122
39	55
108	181
39	55
110	834
110	1086
39	55
113	638
113	773
39	55
119	227
39	55
121	1049

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The property becomes, by the second marriage, the property of the children of the preceding marriage and such legatee only retains its usufruct.

2. The rulings of this Court in *Bird vs. Succession of Jones*, 5 Ann. 644; *Wells vs. Wells*, 30 Ann. 936; *Succession of Frazier*, 35 Ann. 382; *Succession of Townsend*, 37 Ann. 408, and *Succession of Townsend vs. Sykes*, 38 Ann. 859, are unreservedly affirmed.
3. Mere illegality in the appointment of an administrator, executrix or undertutor will not vitiate the acts done under it. The acts of an officer, in such case, are valid, although he should have been illegally appointed.
4. It was discretionary with the probate judge, on the application of the executrix to cause the property ordered to be sold to be re-examined and re-appraised; as it may well be that a former appraisal was excessive, or the value of it had diminished since it was made.
5. The purchaser at a sale, made at public auction, under an order made by a judge having jurisdiction of the succession, is not bound to look beyond such decree, in order to ascertain its necessity.

He is bound only to ascertain that the judge had jurisdiction; and finding that he had, the truth of the record, in other respects, may be assumed.

6. Informalities in the appointment of an undertutor, in the composition of a family meeting recommending a sale of succession property to pay the ancestor's debts, and in which minors have a residuary interest; in the method of proving the existence of debts of deceased to the judge granting the order of sale—and all other irregularities in proceedings antecedent to and resulting in the probate sale, are prescribed by five years. R. C. C. 3543.

A PPEAL from the Thirteenth District Court, Parish of St. Landry.
Hudspeth, J.

Kenneth Ballio for Plaintiffs and Appellees:

1. A party who accepts the quality of universal legatee and that of executor conferred by will, probates the will, and enters into possession of the property, and "uses and treats it as his own;" he cannot long afterwards retract such acceptance, or set up the nullity of the will or its probate or the proceedings carried thereunder. 28 Ann. 697; 31 Ann. 552; 18 Ann. 141; 7 Ann. 617; 4 L. 61; 15 Ann. 529; 24 Ann. 301.
2. Parties who claim title from such a person, or who set up such proceedings as a shield or protection to their title, are likewise estopped from setting up the nullity of the will or the proceedings carried thereunder. *Louque* p. 223, no. 20; 15 Ann. 684; 15 Ann. 531; 24 Ann. 301; *Bigelow* p. 244 et seq.; 5 R. 523; *Bigelow* p. 473.
3. A will is revoked by the birth of a child subsequent to its date. C. C. 1705. But the nullity is relative and can be waived, and the will ratified by heirs of age.
4. Where the husband, by his will, makes his wife universal legatee, and she accepts and goes into possession of the property under the will, her paraphernal claims, if any she have against her husband's estate, will be lost by confusion. 13 Ann. 52; C. C. 2217; 3 L. 552; 4 R. 416.
5. Where a husband dies, leaving minor children and a widow, and a will making the widow universal legatee, if the widow marries, the property devised to her by the will reverts and belongs to the children of the first marriage, and she will merely have the usufruct of it. 12 Ann. 465; C. C. 1753; 10 Ann. 679.
6. The validity of a will and its probate cannot be collaterally questioned. 4 N. S. 411; 8 N. S. 178, 13 Ann. 117, 5 L. 337; 6 Ann. 446.
7. The capacity of an executor or administrator, or other fiduciary cannot be questioned under a general denial or collaterally. 15 Ann. 27, 505; 5 Ann. 128, 598; 14 Ann. 706; 9 D. 113; 13 Ann. 280; 25 Ann. 54; 30 Ann. 268; 32 Ann. 897; 28 Ann. 807; 26 Ann. 330; 10 Ann. 496; 8 Ann. 35; *Hen.* p. 1152, no. 1.

8. A party cannot do an act which he is at liberty to abstain from, and by a mere reservation screen himself from the legal consequences of his own act; nor can he shift his position so as to defeat the action of the law upon it. 18 Ann. 141; 2 Ann. 617; 4 L. 61; 15 Ann. 520; 24 Ann. 301.
9. When the community is dissolved by the death of one of the spouses, the heirs succeeding immediately to the right of their ancestor are necessary parties to any decree affecting their interest. They have the seisin and a proprietary interest in the community, and in case of a partition, must be duly made parties or represented in the partition proceedings. If not so represented or made parties, the proceedings are null as to them. 32 Ann. 849; 33 Ann. 585; Hen. p. 743, no. 2, p. 744, no. 1; C. C. 2405-6.
10. Heirs have this seisin, even where a universal legatee is named by the will. C. C. 1607.
11. The sale of the property of another is void. C. C. 2452.
12. There can be no family meeting without an under tutor. Family meetings carried on without an under tutor are void. C. C. 275; C. C. 276, 277. He represents the minors in all cases where their interests are opposed to those of their tutor. C. C. 275.
13. An under tutor cannot bind the minors by any approval of debts or claims due by them. He has no such powers. C. C. 273 et seq.
14. A re-appraisement of property in which minors are interested can only be ordered and made under the provisions of art. 342, C. C. When otherwise made it is null.
15. Property in which minors are interested cannot be sold for less than two-thirds of its appraised value. 33 Ann. 466.
16. It is essential that a dative tutrix should only be appointed on the advice and recommendation of a family meeting. C. C. 254, 263, 270.
17. Parties interested have the right to sue to annul a sale for non-payment of the price. C. C. 2045; 24 Ann. 537; 28 Ann. 739. This action is only prescribed by ten years. 24 Ann. 537; 28 Ann. 739.
18. No prescription runs during minority except in special cases. These special cases are the exception to the general rule. *Stare decisis*.
19. Where the surviving widow and the heirs are the owners of property in indivision, the action for partition must be brought in the district court. In 1869 the parish court had no jurisdiction of a suit of that kind. 33 Ann. 585; 30 Ann. 93, 177; 31 Ann. 572; 34 Ann. 288.
20. What is not alleged cannot be proved. Hen. p. 1155, no. 3 and cases cited.
21. A general denial merely traverses the law and facts of plaintiff's case. 14 Ann. 120.
22. A special defense requires a special plea. Hen. p. 1153, no. 10 and cases cited.
23. Where a special defense depends upon the proof of a particular fact, the fact must be specially alleged. Hen. p. 1144, no. 1 and cases cited.
24. A dative tutrix cannot administer where there is a will—a *fortiori*, where an executrix has been appointed under the will. In such cases she represents only the minors. Hen. D. p. 1476, no. 11; 4 R. 42; 7 R. 242; 2 L. 299.
25. An order of a probate court, decreeing a sale of the property as a general rule, protects the purchaser. But it is subject to be attacked and set aside, as are other judgments, for instance: 1st. Where the court had no jurisdiction *ratione materiae*. 2d. Where the parties affected were not cited or represented, and therefore not parties to the decree. 3d. Where the property belongs to a third person, a stranger to the proceedings; and many other examples might be cited. The sound rule in this regard is that that the order for the sale cures all relative nullities, but not absolute nullities. 14 Ann. 662; 11 L. 149, 156; 13 L. 431; 16 L. 440; 3 R. 122; 10 R. 398; 15 Ann. 590; Cross on Pleadings, par. 305-6-7-8.
26. An order of a probate court decreeing a sale does not protect the purchaser where fraud is charged and proved. 14 Ann. 662, and cases just cited.
27. The plea of *res judicata* will not be sustained unless all the issues are the same. 14 Ann. 362; 24 Ann. 332; Bigelow on Est. p. 67. Intro.

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28. An imperfect usufructuary must return articles or property of the same quality and quantity, or their estimated value, on the termination of the usufruct. C. C. 549.
 29. Tender not necessary in this case. 34 Ann. 288.
 30. Only forced heirs can sue for a reduction of a will. C. C. 1504; 12 Ann. 465.
 31. A consent judgment has no force as such, except as to the parties thereto. 3 Ann. 24; 2 Ann. 483; 4 Ann. 65; 6 Ann. 790; 10 Ann. 18; 11 Ann. 696; 15 Ann. 225; 8 N. S. 347; 2 L. 148; 6 L. 354.

Henry L. Garland for Defendants and Appellants.

Harry H. Hall on the same side.

The opinion of the Court was delivered by

WATKINS, J. Plaintiffs seek to dismiss the appeals taken by Mrs. Nannie M. Morris, J. U. Payne, H. M. Payne, Mary I. Garrard and William Curley, on the grounds that they were co-defendants with Amelia E. Keller and others, against whom judgments were rendered on the 14th of April, 1883, and 20th of February, 1885, respectively, and who were not in court when appellants obtained their orders of appeal in open court on the 28th of May, 1885, and were not cited as appellees.

In the alternative, they urge that the value of the property claimed by appellants respectively, is less than \$2000, and this Court is without jurisdiction *ratione materiae*.

The motion including these objections was filed at the term of court at Opelousas, in July, 1885, but which was not passed upon by the court, and subsequently the record was destroyed by fire. This record having been substituted for the one destroyed, the motion to dismiss was supplemented in July, 1886.

In addition, a supplemental motion to dismiss was filed in July, 1886, in which are assigned the additional grounds, viz: First, that no legal order of appeal was granted Wm. Curley in his fiduciary capacity as curator; second, that neither Mary I. Garrard nor Nannie M. Morris were authorized by their husbands to execute their appeal bonds.

I

Prior to the enactment of Act 125 of 1868, amending C. P. 575, requiring appeal bonds to be made payable to the clerk of the court which rendered the judgment appealed from, the uniform current of our jurisprudence was to the effect that, when an appeal was taken from a judgment in an action on a joint contract or in a revocatory action, all who were required to be parties below must be made parties to the appeal, though a part only have appealed, else the appeal was dismissed.

Since the passage of that act, our predecessors have constantly held, and we think correctly, that when an appeal is granted in open court, and the bond is made payable to the clerk of the court, all persons *having an interest* are by law parties to the appeal—*those who are not appellants are appellees*.

In *Walton vs. Police Jury*, 26 Ann. 356, the court said: "The fact that only *one* of the non-resident parties executed an appeal bond, under an order in favor of *all*, cannot invalidate the appeal taken by him. Those who are not appellants are appellees, and the appellant has the right to prosecute *his* appeal, which is regularly taken, although his co-defendants may acquiesce in the judgment." 23 Ann. 370, *Succession of McKenna*; 26 Ann. 220, *Baker vs. Thompson*; 26 Ann. 312, *Frances vs. Lavine*.

The appellants have fully complied with the law, and all other parties having an *adverse interest* are appellees necessarily.

Appellants are clearly entitled to prosecute their appeals, although plaintiffs and appellees had obtained judgments against *other* defendants at antecedent terms of the court, who have acquiesced in them.

Whatever may be the effect of such an apparent severance through plaintiffs' instrumentality, in respect to such *other* defendants, it cannot, in any way, prejudice the rights of *appellants*.

On the alternative part of the motion, in respect to this Court's want of jurisdiction, it is sufficient to say that while the *defendants* against whom judgments were first rendered, have no interest in common with appellants claiming separate and distinct tracts of land, yet, in respect to *plaintiffs* claim of title as heirs of their father and the revocation of the probate sale of January 5, 1870, the *appellants'* claims are identical. They are inseparably blended, and plaintiffs have so treated them; and it would be against equity to permit them to gain any advantage of the appellants by reason of their having taken judgments by piecemeals against *other* defendants, and in some instances by default.

In addition to this, plaintiffs, in their petition, show that the lands which Amelia Keller bought at probate sale were valued at \$39,000, and they fail to show what the *separate* value of the different tracts were which she subsequently conveyed to the defendants; and, as there is doubt with respect to the value of the several properties held by the appellants, we think it our duty, under the circumstances, to favor the right of appeal.

With respect to the remaining grounds, and which are contained in the supplemental motion, filed in July, 1886—more than twelve months

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after the filing of the record—it is only necessary to observe that it came too late.

“A motion to dismiss, on account of informality in the appeal bond, or order of appeal, or even the *want* of the latter, must be made within three judicial days after the record is filed.” 2 Ann. 138; 3 Ann. 326; 4 Ann. 514; 6 Ann. 115; 11 Ann. 613; 12 Ann. 745; 22 Ann. 327; 23 Ann. 467; 21 Ann. 30.

If these objections were not waived by their omission from the motion first filed, they certainly cannot be entertained at this time.

The motion is therefore refused.

ON THE MERITS.

I.

This suit was filed on the 24th of January, 1882, and has for its object the annulment of the various adjudications and sales made to the various defendants, and the recovery of the property described, with its revenues.

Plaintiffs are the sole surviving descendants of Lewis A. and Amelia E. Webb. The latter survived the former's death, which occurred in April, 1861, from whom they claim to have inherited the property in dispute.

On the 6th of July, 1860, Dr. Webb made an olographic will, by the terms of which he gave and bequeathed all of his estate in full property, after the debts were all paid, to his wife, Amelia Webb; and constituted her the executrix, with full seizin.

Below the signature is written this memorandum, viz: “By this will I do (not) disinherit my child, Susan Charlotte Webb, but it is made in the event of her death;” and which was signed, without date.

At the request of the surviving widow, Amelia Keller, the will was probated, letters testamentary issued, an inventory taken, and she was duly qualified and placed in possession of the testator's estate. No further proceedings were taken until after the close of the war.

In 1868, Mrs. Amelia Webb was married to Edward Galligar, who died in November, 1870.

Plaintiffs' contention is that, by her second marriage Amelia Keller “lost the property bequeathed to her by the will * * * and it became vested in her two daughters, plaintiffs in this suit—she thereafter only having the usufruct of it.”

In support of this theory, they rely upon R. C. C. 1753, which provides: “If any person who marries a second time, has children of his

or her preceding marriage, he or she cannot, in any manner, dispose of the property given or bequeathed to him or her by the deceased spouse, or which came to him or her from a brother or sister of any of the children which remain.

"This property becomes, by the second marriage, the property of the children of the preceding marriage, and the spouse who marries again only has the usufruct of it."

Therefrom they contend that they are the proprietors of the whole property, of which they were seized by operation of law; and hence any subsequent forced alienation thereof was the sale of the property of another, and therefore void.

Their argument is that Dr. Webb divested himself of all of his property by the will in favor of his wife, and she had *executed the will, and gone into possession as the universal legatee*, and the property no longer formed a part of his estate. Hence, the probate sale, made on the 5th of January, 1870, was a nullity.

II.

Not contented with this averment of title in themselves as owners by operation of law, through the instrumentality of the will, they set up certain informalities and illegalities in the probate sale to Amelia Keller and the titles of her vendees, as sustaining the charges of nullity made.

They are in substance that Amelia Keller never qualified as testimentary executrix, or *natural* tutrix, and all *acts* done by her, as such, are void.

That the appointment of Amelia Keller as dative tutrix was null and void, on account of the nullity of the family meeting proceedings resulting from the *non*-appointment of an under tutor to fill an existing vacancy.

That the order of sale was improvidently granted, for the reason that the *estate* of Lewis A. Webb owed no debts; and particularly, because it did not owe the debt alleged to have been due to Amelia Keller, surviving widow; or, if it did, "*said claim had never been recognized, or proof thereof adduced before the family council, or before the court; and that the order had been granted without sufficient evidence.*"

That the property was sold for less than two-thirds of its appraisement, "*which real and true appraisement was that of the first inventory,*" taken April, 1861, and not the one made in 1869, and which they charge to have been fraudulently made "*to enable Amelia Keller to bid the whole of it in for a supposed claim due her as alleged of \$40,000.*"

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That Amelia Keller never qualified as dative tutrix, gave no bond, and failed to cause the registration of proper certificate "and all orders and proceedings taken by her in her said capacity are null and void."

There are some other objections, but they are only in the enlargement of those quoted.

To this action, appellants urged the plea of *res judicata* resting on a final decree of this Court in suit of Susan Webb, Wife, vs. Amelia Keller, J. U. Payne, Intervenor, 26 Ann. 596, and on the judgment homologating the executrix's tableau of debts and distribution in the Succession of Lewis A. Webb, on the 25th of February, 1870.

In their answers they denied all the averments of the plaintiffs' petition, and alleged that they derived title from Amelia E. Keller, widow of Galligar, who acquired on the 5th of January, 1870, at a probate sale made under an order rendered by a competent officer having jurisdiction of the subject matter and of the persons interested.

All of appellants plead the prescription of one, three, four, five and ten years against the action of plaintiffs and as a muniment of their titles.

The defendants, J. U. Payne and others, alleged that they had contested the title to the property now claimed in a litigation between Susan Webb and themselves.

III.

The record discloses the following pertinent facts necessary to be detailed, in order to a proper understanding of the contention of the parties.

On March 16, 1869, the testamentary executrix represented to the probate court "that the succession is now chiefly composed of land and the improvements thereon, and that in order to settle the said estate, which petitioner desires to do, it will be necessary to cause the property to be reappraised. Further represents that a sale of the property will be necessary in order to settle the succession, pay its debts and make the necessary partition between petitioner and her children, in the event of the succession proving solvent; petitioner being a creditor with a tacit or legal mortgage for some \$40,000," and she prayed for an order of sale. Accordingly an inventory was ordered and a family meeting was convoked for the purpose of giving advice concerning the interest of the minors and of fixing the terms of sale.

The *proces verbal* of the proceedings of the family meeting show that "after having duly deliberated on said subject, they declared themselves unanimously of the opinion that it will be to the interest of said minors that the whole of the property belonging to the succes-

sion of Lewis A. Webb, either separate or community be sold for cash, payable on the day of sale."

The executrix petitioned for the homologation of the deliberations of the family meeting, and on the 2d of December, 1869, the following order was entered, viz: "Let the proceedings of the family meeting mentioned therein be homologated and approved; and let the property of the estate of Dr. Lewis A. Webb, deceased, be sold for cost, as prayed for by petitioner, and by a duly qualified auctioneer.

"Given in chambers, at Opelousas, this 2d of December, 1869.

"A. GARRIGUES, Parish Judge."

On the 5th of January, 1870, a public probate sale was made by a duly commissioned auctioneer, of the various properties included in the inventory of Lewis A. Webb, both separate and community, and the same were adjudicated to Amelia E. Keller, surviving widow, for \$25,725, with the exception of a tract of 404-94 acres adjoining the sugar plantation.

On the 25th of February, 1870, the executrix filed and caused to be duly advertised, a tableau and classification of the debts of the deceased and distribution of the assets of said estate, and due notice was given to the undertutor for the two minors, plaintiffs herein.

On this tableau was entered the mortgage indebtedness of Dr. Lewis A. Webb to his surviving widow, Amelia E. Keller, aggregating \$36,602 23, being the sum inherited by her from her deceased mother, Martha C. Hargrove, and which were received and appropriated by her husband, and for which amount she had and has a legal mortgage against his estate.

The duly homologated tableau in the succession of Martha C. Hargrove shows the share of Mrs. Amelia Webb to have been, in exact figures, \$37,289 92½.

The items composing said sum are specifically enumerated on the tableau of the executrix, and it is accompanied by the declaration that her claims were duly registered in St. Landry and Avoyelles parishes.

Other debts appear on said tableau, exclusive of succession debts, and charges which of themselves aggregate \$7,000.

On the 4th of April, 1870, this tableau was duly homologated, and the executrix was ordered to distribute the funds realized from the sale, in accordance therewith; and G. W. Hudspeth, one of the attorneys, testified that "the price of the adjudication was paid in actual money, but was credited on Dr. Webb's indebtedness."

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All other defendants acquired title from Amelia Keller, by various *mesne* conveyances, all transalative of property, and duly recorded.

IV.

We will first consider the plea of *res judicata*.

Referring to Webb vs. Keller, Payne et als., intervenors, 26 Ann. 596, we discover that the Susan Webb, who is one of plaintiffs in this suit, was plaintiff in that, praying that the probate sale herein complained of, be declared null, and "that the property be declared to belong to her and her sister."

The court held: "It appears to us that the title to the property purchased by the defendant on the 5th of January, 1870, is, as to third parties, good and valid. Defendant was the executrix of the will. She obtained authority to sell the property of the testator in order to pay debts of his succession, and to make a partition between himself and the heirs.

"An appraisement of the property was ordered; a family meeting was convened, who recommended that the whole property of the succession, whether separate or community, be sold for cash.

"The undertutor concurred in this advice. The property was sold; the defendant became the purchaser. She subsequently furnished an account of her administration, which account, after due publication, was homologated. It was after this sale that the intervenor's mortgage was taken. The title being in the defendant, the property was hers, to do with it as she pleased. She could sell it, or mortgage it. Those who dealt with her did so under the faith of judicial proceedings. To set aside the sale made under the authority of justice, and thus destroy the mortgage which was taken as the result thereof, and which was accepted in good faith, would be to make like proceedings snares instead of shields. * * *

"Plaintiffs' tutrix may have assumed responsibilities towards her, and may have been derelict in her duty. But this is no reason why those who acted in good faith, and whose acts were based upon the orders of a court of competent jurisdiction, should be made to suffer."

In so far as Mrs. Susan Quirk's claims and pretensions are concerned, they are clearly covered by, and embraced in that decree; and the plea of *res judicata* must be sustained. It does not matter that different allegations are made, and somewhat variant issues are now presented, the case is not altered, and the issue is the same.

In respect to the other plaintiff, Mrs. Beulah Beggs, the decree

quoted does not establish *res judicata*, but it furnishes a forcible precedent.

V.

Notwithstanding the fact that the second marriage of Dr. Webb's surviving widow divested her of all claim of title, as universal legatee, under his will—conceding *arguendo* that she had asserted and was previously in the enjoyment of it—and yet, the plaintiffs certainly did not, and could not, acquire any title to *her* one-half of the community property, which was the larger and most valuable part of the estate.

Hence, the claims of Mrs. Quirk must be restricted to a one undivided fourth of the community, and to undivided one-half of the separate property of Dr. Webb.

VI.

The record satisfies us that Amelia Keller did not accept her husband's succession, and never performed a single act of heirship, or assumed or held possession, as owner or legatee. But, if she had entertained such an idea she could not have successfully carried same into effect of her own free will and accord.

In *Bird vs. Succession of Jones*, 5 Ann. 644, the Court said: "Having, as executor, accepted the trust and seizin, it was not in his power to withdraw, at his own discretion, and relieve himself from the obligation and duties which he had judicially assumed."

To the same effect are *Wells vs. Wells*, 30 Ann. 936; *Succession of Frazier*, 35 Ann. 382; and *Succession of Kate Townsend*, 37 Ann. 408.

In this last case, this Court said: "An executor, who has qualified and who is at the same time universal legatee, cannot, by any *act purely his own*, cease to be executor and represent himself as sole heir. He cannot be permitted to deny his capacity as executor by setting up that he has accepted unconditionally as universal legatee, and holds the estate, not as executor, but as owner."

These decisions have been closely followed in the more recent cases of *Succession of Kate Townsend vs. Sykes*, 38 Ann., —

In plaintiffs' brief, we find the following concession on this subject, viz: "She voluntarily accepted the will of Dr. Webb and the bequest to her; probated the will; qualified as testamentary executrix under it over twenty-four years ago; and in all proceedings and pleadings by her in the estate of Dr. Webb, styled herself 'testamentary executrix,' and made the sale of January 5, 1876, as such." Citing 18 Ann. 141; 7 Ann. 617; 4 La. 61; 15 Ann. 520; 24 Ann. 301.

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Also: "Besides, we contend that the validity of the will, and its probate, cannot be collaterally attacked or questioned, as is now sought to be done." Citing 4 N. S. 411; 8 N. S. 178; 13 Ann. 117; 5 La. 887; 6 Ann. 446.

Again: "It is undeniable that all the orders and proceedings taken out by Mrs. Galligar in the succession of Lewis A. Webb, including the order for the probate sale of 1870, were taken by her in her capacity of testamentary executrix of his last will. * * * In fact, as she was acting under the will, in administering the property of the estate, she could act in no other capacity than testamentary executrix."

These admissions serve as a complete answer to the charge in plaintiffs' petition that Amelia Keller was never qualified as testamentary executrix, and that all acts done by her in that capacity are null and void.

VII.

Having fully conceded, as indeed the record otherwise fully proves, that Amelia Keller administered the estate of Dr. Webb as testamentary executrix under his will, and as such procured the sale of the property, it follows as a necessary consequence that his acts as such are legal and valid to all the world, and cannot be assailed in a suit between other parties.

We have the admission in plaintiffs' brief to this effect, viz: "Besides, the capacity of an administrator, executor or other fiduciary, cannot be collaterally assailed," etc.; citing authorities:

In 32 Ann. 364, *Estate of Altemus*, the Court said: "*Mere illegality in the appointment of an administrator, will not vitiate the acts done under it. The acts of the officer in such case are valid, although he should have been illegally appointed.*" Succession of Dugart, 30 Ann. 268; *Bienvenu vs. Parker*, 32 —

This principle applies with equal force to the appointment of Amelia Keller as executrix and dative tutrix, and to the appointment of under tutor.

VIII.

The complaint made of the order of court directing the sale on the ground that the estate of Dr. Webb owed no debts, or, if it did, none that had been recognized and proved before the family meeting or the court, does not go to the court's want of jurisdiction. The debts were subsequently placed upon a tableau and proved to the satisfaction of the judge, who was competent, and same was homologated; and he directed the proceeds of sale to be applied to their payment. This

was a mere irregularity and not a cause to challenge the proceedings as null and void.

IX.

The objection urged that the property was not adjudicated to Amelia Keller for two-thirds of the appraisal made in 1861, is wholly untenable. This Court will take judicial cognizance of the fact that the civil war intervened between that date and the date at which the second inventory was made in 1869. The proof shows that a once valuable plantation was completely devastated and laid waste by the transit of the contending armies, and that the value of the property was greatly reduced; and consequently a new appraisalment was quite necessary in order to effect the sale of January, 1870.

It was the duty of the judge to cause the property to be estimated by experts before proceeding to the sale thereof, if it was such property as had remained unsold for more than one year after the appointment of the executrix. R. C. C. 1169, 1170; 33 Ann. 466, Succession of Hood.

At an offering under these articles, the property was legally adjudicated at two-thirds of that last valuation.

X.

It is the well settled jurisprudence of this Court that the purchaser at a sale made under an order of the probate court, which is a judicial one, is not bound to look beyond the decree recognizing its necessity.

"He must look to the jurisdiction of the court, but the *truth of the record*, concerning matters within its jurisdiction, cannot be disputed." 14 La. 146; 15 La. 182; 7 R. 66; 7 Ann. 468; 14 Ann. 154, 622; 26 Ann. 596, Webb vs. Keller; 29 Ann. 536, Frazier vs. Zylick; 31 Ann. 280, Heineman vs. Janney. "The purchaser at a judicial sale of property of the succession is not bound to look further back than the order of court directing the sale." 18 Ann. 485, Succession of Hebrard; 21 Ann. 505, Woods vs. Hilliard Lee; 11 R. 72; 16 La. 440; 34 Ann. 1004; Nesom vs. Weis.

XI.

Prescription of five years, R. C. C. 3543, provides: "All informalities connected with, or growing out of any public sale made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale, after the lapse of five years from the time of making it, whether against minors, married women or interdicted persons." 28 Ann. 571, Routh vs. Citizens' Bank; 29 Ann.

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536, *Frazer vs. Zylick*; 34 Ann. 209, *Roberts vs. Zansler*; 34 Ann. 594, *Heirs of Miller vs. Ober et al.*; 21 Ann. 585, *Pascaud vs. Pourle*; 10 Ann. 684, *Calais vs. Seinére*; 3 Ann. 328, *Vaughan vs. Christine*; 32 Ann. 337, *Porter vs. Hornsby*; 32 Ann. 437, *Miller vs. Miller*; 33 Ann. 1043, *Mulholland vs. Scott*; 33 Ann. 673.

We regard this plea as strictly applicable to all of the alleged nullities propounded as arising out of proceedings antecedent to and resulting in the probate sale of January 5th, 1870.

The views hereinabove expressed in regard to the various intricate and conflicting claims of the plaintiffs, and the disposition made of the plea of five years' prescription renders a decision of the defendants' other pleas unnecessary.

Of the plea of prescription of ten years, urged by plaintiffs against the debt claimed by Amelia Keller against the estate of Dr. Webb, and of the plea of peremption of her tacit mortgage, it is sufficient to say that no prescription run against her demand during the lifetime of her husband, and the tableau acknowledging it was filed and homologated within less than ten years thereafter, and more than years elapsed thereafter before this suit was filed.

There was no law requiring the inscription of her tacit mortgage until the 1st of January, 1870—only *four days* prior to the sale.

We think the judgment in favor of the plaintiffs and against the appellants was erroneous, and it is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and proceeding to render such judgment as should have been rendered in the court below, it is ordered, adjudged and decreed that the judgment appealed from, in respect to the appellants, be annulled, avoided and reversed, and that all the demands of plaintiffs against them be rejected at their cost.

Mr. Justice Todd dissenting on the motion to dismiss the appeal, takes no part in opinion upon the merits. Mr. Justice Fenner recuses himself on the ground of relationship to one of the defendants in the suit.

DISSENTING OPINION.

TODD, J. This was a suit instituted to annul an order for the sale of succession property, and the sale made thereunder, and to recover the lands purporting to have been conveyed by said sale; and the suit is against the party provoking the sale and the adjudicatee of the sale, and those who hold under her by mesne conveyance.

Among the grounds for the dismissal of the appeal, I find one substantially to the effect:

That all the parties to the suit in the lower court are not made parties to the appeal.

As the basis of the title to the lands held respectively by the several defendants was the succession sale mentioned, and the main and controlling object of the suit was to have the sale in question annulled, it is evident that all the defendants had a joint interest in the result of the suit, and were proper, if not necessary, parties to the same. The suit was not merely a cumulation of separate demands against different parties, between whom there was no privity or joint interest.

The record shows that there are a dozen or more defendants in the suit; that a judgment was rendered against a number of them on the 14th of April, 1883; another judgment was rendered against certain others of them on the 28th of February, 1885, and against the remaining defendants on the 22d of May, 1885—being at different terms of the court.

The only appellants to this Court are the defendants against whom the last judgment was rendered. The other defendants, against whom the previous judgments were rendered, were never cited as appellees, and the plaintiffs urge that these last referred to are not therefore parties to this appeal, and that the appeal should therefore be dismissed.

This is met by the appellants' counsel by the contention that since the statute was passed, providing that appeal bonds should be made payable to the clerk, and this appeal having been taken by motion in open court, that all who are not appellants are necessarily appellees, and refers to 26 Ann. 220, 312, 356; 23 Ann. 370.

This would undoubtedly be correct if the judgment had been rendered against all the defendants at the same term of the court, and the appeal had been taken by these appellants in open court at the same term.

By a fiction of law all parties to such judgments are considered as present in court during the entire term at which the judgment is rendered, and thereby are affected by the appeal. But it has been repeatedly held, and may now be considered settled, that an appeal taken in open court at a term different from that at which the judgment was rendered, does not of itself make parties to the appeal the parties to such judgment. They must be cited. *Hardy vs. Heaerson*, 27 Ann. 95; *Wheeler & Pierson vs. George A. Peterkin et al.*, not yet reported, and authorities there cited. There was no citation to the

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parties to these prior judgments, nor to any of them, and therefore they are not before this court.

Among others not cited nor made parties to the appeal is Amelia E. Keller (Widow Gallagher), who is charged as having fraudulently procured the order for the sale of the property of the succession, and purchased it illegally, and whose purchase is the very foundation of all the rights that the defendants claim to their respective properties, and who, according to the record, stands bound to them as warrantor.

To say nothing of the other parties to the suit, I cannot well conceive how this court could pass on the validity of the sale in question when the party who procured the order for the sale and the purchaser at such sale is not before us.

One of the counsel for the appellant, in his brief, describes Mrs. Keller (quoting), "as a necessary co-defendant in the suit" with his client.

The motion to dismiss, therefore, in my opinion, should prevail.

I therefore dissent from the opinion and decree of the majority maintaining the appeal, and thus dissenting on this point, I take no part in the opinion and decree relating to the merits of the controversy.

No. 9778.

SMITH BROS. & CO. vs. R. S. DELEON.

Questions of fact alone are involved, and the conclusions of the district judge are sustained.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

T. Gilmore & Sons for Plaintiffs and Appellants:

1. A party to whom goods are sold will be held as principal debtor.
2. The fact of his assumption of a commission for the vendor in an incidental employment to buy a certain product will not affect his standing or the nature of his responsibility. *Rwell's Evans on Agency*, pp. 7-8.
3. New issues cannot be made by subsequent or supplemental answer introducing an inconsistent defense. *Cross on Pleading*, 67. A party will not be permitted to shift his defence at will. *Bender vs. Belknap*, 23 Ann. p. 763-4, and cases cited.
4. Accounts settled and stated are binding on the parties in subsequent transactions. *Hennen's Digest*, 515, 516, and cases cited in brief.
5. Parol will be admitted to prove to whom credit is given. Authorities cited in brief.
6. Unrestricted admissions pleaded in compensation extend to the whole character of the indebtedness. Compensation admits the claim sued upon. *Louque's D.*, pp. 116, 117.

Thos. C. W. Ellis and *B. C. Elliot* for Defendant and Appellee:

1. Where plaintiff sues defendant for the price, on the allegation of goods sold and delivered to defendant, and the proof shows that defendant was plaintiff's agent, and that

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the goods were not sold to him, but to third persons, through him as plaintiff's agent, defendant will have judgment, because the *allegata* and *probata* must agree.

2. The contracts of sale and of mandate are different, and the resulting obligations, as also the actions to enforce said obligations are also different,
3. An agency proved to exist is presumed to have continued, and the onus is on him who alleges that it ceased to exist.
4. Where there is conflict of testimony between two witnesses, the opinion of the district judge hearing the testimony has great weight. 23 Ann. 253; 24 Ann. 484.
5. A witness who is candid, prompt and open in his testimony will be believed in preference to one who is evasive, shows over zeal, and states facts against his firm only after long and tedious cross-examination. 29 Ann. 768, Breard vs. Insurance Company.
6. Indebtedness accruing after the date of an attachment suit, or facts subsequently transpiring cannot aid the plaintiff. Such a suit must stand or fall on the condition existing at the date of its institution. Read vs. Ware, 2 Ann. 496; Price vs. Merritt, 13 Ann. 526; Denegre vs. Milne, 10 Ann. 324; Todd vs. Chouse, 14 Ann. 426.
7. Attachment on allegation of non-residence will be dissolved where proof shows that the defendant has a fixed domicile in the place where the suit is brought. C. P. 240; 31 Ann 173; Cross on Pleading, § 370.
8. When plaintiffs fail to show the existence of a debt, the attachment must be dissolved. C. P. 206, 239, 243.

The opinion of the Court was delivered by

FENNER, J. This suit is upon a balance of account for goods, wares and merchandise alleged to have been sold and delivered by plaintiffs to defendant, and for advances made to him, and is accompanied by an attachment of defendant's property.

The defense is substantially a denial that defendant purchased goods from plaintiffs, and a claim that the relation between them was simply that of principal and agent, under which defendant, a resident of Central America, solicited orders for goods from dealers in that country and transmitted them to plaintiffs, who filled them and sent the goods to defendant to be delivered to the parties and to collect and remit the price, for which the latter received no other compensation than a commission of two *per cent* on the amount of said sales.

The above statement involves the controversy in the case which turns exclusively upon questions of fact. The case is one of the most perplexing we have ever encountered. The brevity of this opinion will afford a scant indication of the long and patient labor we have expended in the study of the enormous volume of oral testimony, correspondence and accounts presented in the record, and in the weighing and comparison of the various facts and circumstances, some of which tend to support the theory of plaintiffs while others as strongly corroborate that of defendant.

But there are some undisputed facts which give to defendant's position a strength which plaintiffs have not, in our judgment; overcome,

Smith Bros. & Co. vs. DeLeon.

1st. It is clearly established that from June to December, 1884, the relation between the parties was unquestionably that of principal and agent, under the precise terms stated by the defendant. This is evidenced by the correspondence, which embraces all the features of a written contract. As the business continued without interruption, plaintiffs' contention that the terms of this contract were changed and an entirely new relation established between the parties, throws upon them the clear burden of proof. There are no writings evidencing such a change, and plaintiffs claim that it was the result of oral agreement between the parties during the presence of defendant in this city in December, 1884.

Plaintiffs' testimony on this subject is not satisfactory. It is very confused as to dates and is guarded and uncertain as to expressions, almost admitting that the new agreement was never reduced to particular and distinct expressions on any special occasion, but was merely a general understanding between the parties as the result of all their interviews.

We reach the conclusion that however clear and honest may have been plaintiffs' interpretation of these interviews, such understanding was on their side only and is not brought home to defendant with sufficient certainty to justify us in holding that it abrogated the clear written contract. Defendant denies it point blank and *in toto*. It requires something more than a vague and one-sided understanding of oral interviews to change a written agreement.

2d. While giving full faith to the honesty of the respected plaintiffs in their interpretation of these interviews, circumstances are not wanting to sustain the equal honesty of defendant in taking an opposite view. In all his dealings with parties in Central America from beginning to end, he never, at any time, assumed the role of principal, but acted always and exclusively as the avowed agent of Smith Bros. He never assumed to re-sell goods or make any bargains whatever on his own account, but always delivered the goods consigned to him to the parties for whom they were ordered and under whose marks they were shipped, at the invoice prices of Smith Bros. & Co., without any profit whatever to himself, other than the two per cent commission which plaintiffs continued to pay him. Even in the latest act of the business when, before any difficulty and at a time not suspicious, he took notes from a party for over-due account, the notes were given payable to "R. S. DeLeon, agent of Smith Bros. & Co." These facts powerfully sustain the honesty of defendant's assertion that, from first to last, he considered himself to be acting as the simple agent of plaintiffs.

Inasmuch as his distinct and unqualified assent was necessary to change the original contract, we are bound to hold that it is not shown to have been voluntarily and understandingly given.

3d. The judge *a quo* has decided this case in favor of defendant and nothing less than a moral certainty that he has committed error could justify us in disturbing his conclusion. As already intimated, we are far from feeling any such certainty.

We might consume many pages in discussing the forms of accounts and various expressions in the correspondence, which are relied upon by either side in supporting its theory; but we shall content ourselves with alluding to but a few of these points.

Thus plaintiffs claim that defendant is estopped by rendition of accounts to him in his own name and his acknowledgment thereof.

But similar accounts were rendered to him on October 1st and November 1st, 1884, when the relation of agency existed without dispute. He states that he regards them simply as accounts against him as agent, showing the amounts due for goods ordered by him, and which he was charged with the duty of collecting and crediting him with amounts remitted by him.

This is reasonable and consistent with the course of dealing between the parties.

Again, plaintiffs produce several of defendant's letters in which he sends orders for indicated parties, and directs them to be charged to his account. But in the majority of his orders he makes no such request. Yet all rested on the same basis, and defendant claims that the direction was mere surplusage intended as an order to charge to his agency account, as a basis for his commissions, which was done in all cases whether expressly ordered or not.

Finally plaintiffs say that defendant's action in taking notes from one or two parties for their accounts, showed that he was not acting as agent because he had no authority to sell on time. But the whole course of dealings show that, from the beginning, goods were delivered before payment and collections were not actually made for considerable periods afterward.

This was certainly selling on credit though not, perhaps, on any fixed terms of credit. It is not shown, however, that defendant did sell on fixed terms of credit; but it rather appears that the notes were taken as the best settlement of over-due accounts and, as before stated, they were made payable to "R. S. DeLeon, agent of Smith Bros. & Co."

On the whole we conclude that nothing adduced by plaintiffs is irrec-

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oncilable with the continuance of the clear written contract under which the dealings began and which is not shown to have been changed by evidence sufficiently certain to bind the parties.

If such change was made, plaintiffs have themselves to blame for not having proof of the change as clear as that which established the original contract.

Now, after plaintiffs had ordered the cessation of the dealings, they sent their agent to Central America to settle with DeLeon, who waited on him with this account. DeLeon thereupon offered to turn over to him the notes and accounts which he held as their agent for the goods sold, which fully covered the account and, as the evidence shows, have been since collected; but the agent declined to accept them and returning to New Orleans, advised plaintiffs of his course, whereupon this suit was brought and this attachment levied.

We concur with the judge *a quo* that his action and this attachment must fall under the facts of this case, and that plaintiffs' only rights against the defendant must be vindicated in an action for the settlement of the latter's agency.

Judgment affirmed.

39	74
46	481
89	74
108	531

No. 9663.

STEPHEN DUNCAN VS. DAVID WISE.

- A writ of sequestration is issuable by a creditor having a special mortgage when he apprehends that the mortgaged property will be moved out of the State before he can reap the benefit of his mortgage, and therefore the propinquity of the property to the border of another State is an element to be considered in estimating the strength and reality of his apprehension.
- It is not what a debtor really intended to do that is to be considered in determining whether a sequestration has been lawfully sued out, but whether he was doing and saying that from which his creditor might apprehend the existence of an intention to do the hurtful thing that a sequestration would prevent.
- A mortgage-creditor who has waited longer for payment than he stipulated to wait, whose debtor has defaulted on the payment of several of the notes, and who proceeds to a foreclosure only on the eve of the last-maturing note, is not liable in damages when he has used conservatory process to detain the property in the custody of the law under circumstances justifying it.
- On separate demands in the same suit, a judgment was rendered against the defendant, and another judgment for a smaller amount in favor of defendant against plaintiff. Defendant appealed devolutive from the two judgments.
- Held: 1. The devolutive appeal did not deprive plaintiff of the right to execute his judgment.
2. The two judgments being only devolutive from were equally exigible, and the law operated a provisional compensation between them, effective so long as both judgments existed unreversed.

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3. The plaintiff's right of execution was confined to the excess of his judgment over that of defendant against him.
4. The existence of execution of a *fi. fa.* for such excess only was not such voluntary acquiescence in the judgment of defendant against plaintiff, as would prevent the latter from asking amendment of such judgment on defendant's appeal to this Court.

A PPEAL from the Ninth District Court, Parish of Tensas.
Young, J.

Steele & Garrett, for Plaintiffs and Appellee :

1. To sustain a sequestration, the question is not what the friends and neighbors of defendant thought or believed he would do, but what had the plaintiff a right to believe the defendant was doing and would continue to do, from his own acts, declarations and tacit admissions. *Allen, Nugent & Co. vs. Champlin*, 32 Ann. 515; *Portle vs. Price*, 31 Ann. 361.
2. A writ of sequestration is a lawful act, and in event of failure there should be no damages under the ordinary rule, and in no case should the damages exceed the actual and direct loss. *Braxton vs. Broom*, 15 Ann. 618.
3. Upon the dissolution of a sequestration, no damages can be allowed in the same suit, as in case of injunction. This question does not depend upon the residence of the parties, but upon the fact that there is no statute authorizing such imposition of damages. *Muzan vs. Gore*, 24 Ann. 208.
4. A judgment giving interest from demand upon damages claimed will be reversed. 37 Ann. 497; 15 Ann. 504; 1 Ann. 383.

Kennard, Howe & Prentiss on the same side.

Wade R. Young, for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. In January, 1881, Stephen Duncan sold to David Wise, the Newfoundland plantation, in Tensas parish, for \$20,000, of which three thousand were paid cash, and for the residue four notes were executed secured by mortgage and vendor's lien. One of these notes was paid and executory process was obtained on the others in the latter part of 1884, which was discontinued and an ordinary suit for foreclosure was instituted in January, 1885. At the same time the mules, farming implements, and other movables were sequestered.

The foreclosure of the mortgage was not resisted nor any portion of the debt denied, but the defendant answering the suit reconvenes for fifty thousand dollars as damages suffered by reason of sequestration, and a jury gave him five thousand four hundred dollars therefor, nearly one-half of the unpaid principal of his debt.

The sole question is the lawfulness of the sequestration.

The writ is issuable by a creditor having a special mortgage when he apprehends that the mortgaged property will be moved out of the State before he can have the benefit of his mortgage. Code Prac. Art. 275. The plantation is on the border of the Mississippi river. The

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shore of another State is just opposite. Its propinquity is an element to be considered in estimating the strength and reality of the creditor's apprehension.

The plaintiff alleged his apprehension in the words of the Code and states the reason of it;—

“That the said David Wise has notified the attorneys of petitioner that he had arranged and concluded to turn over all the mules and work stock on said plantation and mortgaged premises in payment of an indebtedness to V. & A. Meyer & Co., of New Orleans; and that said V. & A. Meyer & Co. have already caused said property to be once removed from the mortgaged premises; and though said mules were afterwards returned, the petitioner fears that said David Wise will conceal, part with, or dispose of the said mules and other movables upon said plantation, on which petitioners privilege and right of mortgage rests during the pendency of this suit.”

A brief recital of antecedent events will shew whether cause for apprehension had been given by the defendant, for it is not what he really intended to do or not to do that is to be considered, but whether he was doing and saying that from which his creditor might apprehend the existence of an intention to do the hurtful thing that a sequestration would prevent. *Allen v. Champlin*, 32 Ann. 511.

Duncan wrote to Wise early in November 1884 that he would require a payment of \$4250 on December 1st and \$2200 in January, and would be content with nothing less. The debt was double those sums and was all due or would be in January. At the same time he wrote his lawyers that he did not want to foreclose the mortgage but thought an urgent letter from them to Wise would ensure a compliance with his demand. Wise and the lawyers had an interview on the 19th of November and the conversation then had caused the lawyers to take out the sequestration. Their accounts of it do not materially differ.

Wise had given V. & A. Meyer of New Orleans a second mortgage on the plantation and that firm had advanced him the money to buy mules. He thought they had a claim on the mules superior to Duncan's, or rather to use his own language he “thought as the mules were mortgaged to V. & A. Meyer that they belonged to them,” and he told the lawyers so. He proposed to surrender the plantation to Duncan and the mules to the Meyer firm. There were twenty-eight of them and cost \$140 apiece.

Mr. Steele and Mr. Garrett both swear that in this conversation Mr. Wise stated that the mules were not subject to Duncan's mortgage and that he had arranged with V. & A. Meyer that they should take

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the mules and cancel their mortgage on the property, and that this statement, taken in connection with the fact that the mules were located so near the Mississippi river, the boundary between Mississippi and Louisiana, and could be moved in a few hours out of this State, induced them to believe that the defendant intended to remove the mules herefrom. They believed he would be advised so to move the mules beyond the jurisdiction of the Texas court in order to avoid their being subjected to Duncan's mortgage, and they promptly provoked the issuance of the writ to thwart the execution of this plan. But they "took unusual precautions (we are quoting from Mr. Steele's testimony) to prevent interrupting business or annoying Mr. Wise. We instructed the sheriff to make Mr. Wise's manager, or any other person he might select, custodian of them, and not to interfere with the use of the mules by Mrs. Wise or with the gathering of the crops."

The defendant's version will be given in his own words:

"I told them, if Mr. Duncan would take the place, that V. & A. Meyer would take the mules, as they were mortgaged to them. I never told Steele & Garrett that I would move the mules from the State, and never expressed any such intention. I could have moved the mules from the State, had I desired to do so. I was informed of the contemplated seizure in time to have removed the mules, had I desired to do so. I was offered assistance in removing them, but I declined to remove them."

Neither Mr. Steele nor Mr. Garrett asserted that the defendant had said he would move the mules from the State. Their whole argument is based on the theory that such positive declaration of intention is not necessary to justify the issuance of the writ, and it is manifest that if he had made that declaration there would be no dispute about their client's right to the writ. In attributing to Mr. Wise an intention to remove the mules it is not at all necessary to impute to him dishonesty, for he made it manifest that he thought Duncan had no claim to the mules. The Meyers were his friends and factors, and their money loaned to him had bought the mules and he believed that honesty rather required he should aid them in getting them. But Duncan had legal claims on the mules that he could lawfully assert and enforce, and it was not his policy just then to convince his debtor by argument that he was in error of law, but to use the machinery of the law to prevent his debtor from making practical demonstration of the sincerity with which he nursed his error.

Other creditors than the plaintiff thought the condition of the defendant's business required and justified resort to extraordinary pro-

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cess. His friends Y. & A. Meyer took out an attachment on 2d of December, after the discontinuance of the plaintiff's first sequestration and on the same day the executory process was issued, and alleged that they verily believed that Wise was about to dispose of his property with intent to defraud his creditors and that he was about to convert his property into money with intent to place it beyond their reach. It is no answer to this to say that their action was provoked by the plaintiff. If Wise's friends and factors believed that he was about to act dishonestly in December, Duncan's apprehensions cannot be considered baseless and ill-founded when he first sequestered in November or when he made the seizure complained of in January. These identical mules were seized under that attachment and were removed from the plantation although they were soon returned, the attorneys who obtained the attachment becoming satisfied that the plaintiff had the superior lien.

Other creditors did likewise. Wise was a merchant as well as planter. Friedman Brothers of Boston and Heller of Texas attached. Indeed it is not pretended that Wise was not insolvent at this time. The ruin of his credit is the thing he complains of. He repeats in his testimony that but for the plaintiff's harsh and precipitate action his credit would have remained good. It would be perilous for any one to be a creditor of a Louisiana planter or merchant if he is liable to be mulcted in damages for using against his insolvent or embarrassed debtor such process of law as has been provided for emergencies such as this record discloses.

But in truth an honest man's credit is not ruined by disaster in business if general belief in his honesty survives the disaster. His credit receives a temporary shock but is not destroyed. One Moss, who is sometimes inquired of by a commercial agency, touching the standing of his neighbors in a business point of view and who furnishes the information desired, says "a seizure of a merchant's property is a death-blow to his commercial credit." The experience of the commercial world shews that a merchant's credit suffers only an intermission if his "failure" is wholly without moral blame. Mr. Meyer says "we considered it hazardous to make him (Wise) further advances in view of the complication this seizure created. A seizure of his property has the effect of seriously damaging his commercial reputation and credit." Undoubtedly for the time, but the particular reason why his firm as prudent men considered it hazardous to advance further to Wise was the seizure of the plantation, because that seizure made doubtful whether Wise could longer cultivate it. Now surely a mortgage-

creditor who has waited longer for his money than he stipulated to wait, whose debtor has defaulted on the payment of two of a series of four notes and who proceeds to a foreclosure not until the eve of the last-maturing note, cannot be expected to defer longer simply because a seizure will create a complication that will make it hazardous for any one to advance him further. And as little can he be expected or required to forego using any process for detaining in the custody of the law the property upon which he has a lien for the security of his debt.

Sequestration is a harsh remedy but the Code of Practice has particularized the instances in which it may be used. The plaintiff believed he had good reason for the apprehension he felt. The defendant's declaration to him was well calculated to inspire it, and his use of the writ was authorized under the circumstances. But if the remedy was harsh, it was not harshly used. The plaintiff's instruction to the sheriff deprived it of any more injury than was inevitable, and whatever damage ensued was necessarily incident to the service of the writ.

The defendant denies the right of the plaintiff to urge the rejection of the reconventional demand for damages in this Court because, as he alleges, the plaintiff has acquiesced in the judgment and therefore cannot obtain any relief here.

The judgment on the verdict of the jury was in favour of the plaintiff for the amount of the notes and interest with recognition of his mortgage and vendor's lien, and in favour of the defendant for \$5400 as damages for the illegal sequestration which was dissolved. The defendant appealed devolutively and the plaintiff took out execution and the property was sold. The writ of *fi. fa.* necessarily ordered the execution of the judgment as it stood, i. e. the sale of the mortgaged property to pay the mortgaged debt subject to the writ of \$5400 awarded the defendant as damages. The plaintiff in his answer to the appeal prays an amendment of the judgment below in this, that the sequestration be sustained and the damages disallowed. The acquiescence alleged is the execution of the judgment with a credit upon it, and the defendant insists that the appellee cannot now disavow the credit.

He cites *Williams v. Duer*, 14 La. 523, as conclusive of the question and *De St. Rome v. Steam Press Co.*, 31 Ann. 223, as confirmatory of it.

In the first case the plaintiff *Williams*, having procured an order of seizure and sale, was arrested in its execution by an injunction on this ground among others, "that the purchaser of the plantation was exposed to the risk of being disturbed by an outstanding mortgage in

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favour of the Bank of Louisiana the existence of which had not been declared at the time of the contract and against which the plaintiff his vendor is bound to warrant." The district court was of opinion that there was not sufficient evidence of the extinguishment of the Bank mortgage, and while dissolving the injunction ordered that the plaintiff should give security against that incumbrance. The plaintiff had judgment for his mortgage-debt and the property was ordered to be sold. The defendant appealed. The plaintiff gave the security as ordered and in his answer to the appeal prayed the reversal of the judgment so far as it condemned him to give the bond of indemnity. The Court say:—

"If the only question before the Court had been, whether the appellee was bound to furnish a bond of indemnity, and he had acquiesced in a judgment against him by giving the bond, it appears to us clear that he could not have been permitted a direct appeal under Article 567 of the Code of Practice, which provides that a party against whom a judgment has been rendered cannot appeal, if such judgment have been confessed by him, or if he have acquiesced in the same by executing it voluntarily.

"How is the case varied, when that question is combined with others, all of which are solved in his favor except that, and when, instead of a direct appeal, he seeks, indirectly by a proceeding authorized by the Code and tantamount to a cross-appeal, to rid himself of the condition in which he acquiesced, and from which he could not escape by such direct appeal? We think the appellee ought not to be permitted to seek by a circuitous proceeding a relief which the law forbids him directly."

With the greatest deference to the court that so ruled we think it was straining the point too much. Giving the bond of indemnity was but an incident in the proceedings, an act ordered to be done to protect the defendant from a possible claim against which the plaintiff as his vendor was bound to warrant him. It does not appear to us to be that acquiescence in a judgment that precludes a party from disputing its correctness and seeking relief from it. The present plaintiff like Williams had a judgment for all he claimed. The counter-judgment against him was obtained by his adversary in the same suit. He could not execute the judgment except in its entirety. He could not obtain a writ of *fi. fa.* upon it without the credit set forth in it, and to hold that the execution of the judgment in the only way possible to him must be deemed a voluntary acquiescence in that part of it that condemned him in damages would be giving the defendant's devolutive

appeal all the force and effect of a suspensive appeal. The acquiescence, if there be any, was enforced and not voluntary. *Johnson v. Clark*, 29 Ann. 762.

The provisions of the Code of Practice, arts. 567, 578, 592, formulate the right to execute a judgment pending an appeal if it is not suspensive, attach to the voluntary execution of a judgment the penalty of deprivation of appeal, and grant to appellees permission to have a judgment amended by an answer and prayer therefor. The execution of a judgment pending a devolutive appeal is always at the peril of the judgment-creditor, for if reversed the execution stands for naught. If the execution is voluntary he cannot appeal, and we approve the ruling in *Williams v. Duer* so far as it holds that when one cannot appeal because of a voluntary acquiescence neither can he amend by answering the appeal, but in that case as in this the acquiescence was not voluntary, and the prayer for an amendment is not shut out thereby.

In *St. Rome v. Cotton Press Co.*, 31 Ann. 228, the plaintiff and appellant moved to withdraw her appeal which the defendant opposed. The Court sustained the defendant saying, "an appellant may at any time acquiesce in the judgment appealed from, but the effect of that acquiescence only operates to prevent any change in the judgment for the benefit of the appellant"—and no one will dispute that.

The defendant's brief informs us that the plaintiff has got back the property he sold the defendant in 1881 for \$20,000 with all the improvements he put on it for the balance of the purchase-price and after deducting the \$5400 damages awarded the defendant. That is a misfortune the risk of which he took when he bought on credit. It is apparent from the plaintiff's letters to his lawyers that he would gladly have avoided taking back the property even at such a sacrifice of the defendant's interests and that he much preferred the payment of his debt in money.

The defendant's counsel gloomily predicts the consequences to our State and to its agricultural prosperity if such proceedings as these are sanctioned by the courts. He is mistaken. Capital never flows in insecure channels. Our fields cannot be cultivated without it. Confidence, the very life-blood of credit, can be created only by giving the capitalists assurance that the law will inexorably enforce his claim when it is just.

The defendant calls attention to a supposed error in the date of a payment endorsed on one of the notes. That payment is stated to be

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of the interest up to Dec. 1, 1884 and the judgment is for interest from that date.

It is ordered and decreed that the judgment of the lower court in favour of the plaintiff for the amount of his mortgage claim, interest and attorneys fees, with such credits of payments as are therein mentioned, and for recognition of his mortgage as therein set out is affirmed, and that the judgment in favour of the defendant against the plaintiff for five thousand four hundred dollars as damages on his reconventional demand and dissolving the sequestration be avoided and reversed, and it is now adjudged that the defendant David Wise take nothing by said demand and that the writ of sequestration is maintained and ordered to be enforced, the defendant to pay all costs of both courts.

BY THE COURT:

The application for rehearing in this case is allowed, and the rehearing granted is restricted to the question of the alleged acquiescence of plaintiff in the judgment rendered on defendant's reconventional demand for damages, as affecting plaintiff's right to move on appeal as brought up by defendant, for the reversal of said judgment.

ON REHEARING.

FENNER, J. The only question open for our consideration under the terms of our order granting a rehearing is: Whether the plaintiff has cut off his right to ask a reversal of the judgment rendered against him on the reconventional demand of defendant because he has "acquiesced in the same by executing it voluntarily." C. P. art. 567.

What are the facts?

Plaintiff recovered a judgment against defendant for (say) \$15,000, and, in the same decree, defendant recovered a judgment against plaintiff for \$5400.

Defendant appealed devolutively from the whole decree, thus bringing before us for review both judgments.

In this case, the cause of action in the reconventional demand did not grow out of, or have any connection with, the principal demand, but was entirely distinct from it—the reconvention being allowed solely because plaintiff was a non-resident.

The two judgments were as separate and distinct as if rendered in different actions—so much so that, had one of the judgments only been appealable, it alone could have been appealed from and the other could not have been reviewed. 3 Rob. 387; 10 Rob. 438; 11 Rob. 12; 5 Ann. 105; 6 Ann. 579; 14 Ann. 429.

From this essential separateness of the two judgments, it follows that the execution of one, while implying acquiescence in it, by no means implied acquiescence in the other. To deny plaintiff's right to execute his judgment would be to give to defendant's devolutive appeal the effect of a suspensive appeal.

Had plaintiff simply issued execution for the whole amount of the judgment in his favor, certainly no inference of acquiescence in the other judgment could have been drawn. But had he done this, he would have exceeded his legal right. Why? Because the two judgments co-existing, and being equally exigible, the law operated a compensation between the two—a provisional compensation to receive effect as long as both judgments existed or until one of them had been reversed on appeal. *Sandel vs. George*, 18 Ann. 526; *Lemane vs. Lemane*, 27 Ann. 694.

If he had issued execution for the whole, the defendant's right, by injunction, to reduce it to the extent of the excess over his own judgment, would have been perfectly clear under C. P. 298, par. 10.

Is plaintiff's case to be prejudiced because he has respected the legal rights of defendant and the plain mandate of the law, by issuing execution only for the excess of his judgment over that of defendant?

If plaintiff were asking an amendment of the judgment in his favor, he would be precluded by his voluntary execution of it; but as to the judgment against him, there is no such acquiescence. He has simply submitted to the effect which the law gave to it as provisionally compensating his own judgment so long as it existed unreversed. This submission he could not avoid; it was forced and not voluntary; and does not constitute such *voluntary* acquiescence as precludes him from asking that, in our review of that judgment, we should consider his rights as well as those of defendant.

The correctness of plaintiff's judgment was never questioned below or in this Court. It greatly exceeded that of defendant in reconvention. It was not suspensively appealed from; and upon what principle he could be refused the right of executing it to the extent of its excess, is certainly not apparent. Nor can we see how the exercise of this plain right should involve acquiescence in the other judgment.

Had he applied to the clerk for a writ of *fi. fa.* for the whole amount of his judgment, and had the clerk refused to issue it without crediting the amount of the concurrent judgment against him, and had he applied to the court for relief by rule on the clerk, it is manifest that the court would have sustained the clerk and refused relief. This makes

it clear that, in the execution issued, he exercised his whole legal right and waived none.

It is, therefore, ordered that our former decree herein remain undisturbed.

Todd and Watkins, JJ., dissent, and the former reserves the right to file reasons hereafter.

DISSENTING OPINION.

TODD, J. The plaintiff obtained a judgment against the defendant for \$12,750 subject to credits amounting to about \$2000, and in the same suit judgment was rendered in favor of the defendant on a reconventional demand for \$5400. The defendant took a devolutive appeal to this court, and the plaintiff, in his answer to the appeal prays that the judgment in reconvention against him be reversed.

The counsel for the defendant in this court denies the right of the plaintiff to demand the reversal of the judgment in favor of the defendant or to ask an amendment of the judgment in any respect on the ground that the plaintiff had acquiesced in the judgment.

It further appears that this alleged acquiescence was based upon the following facts:

Both plaintiff and defendant obtained an order of appeal from the judgment devolutive and suspensive. Defendant Wise alone perfected his appeal, the same being devolutive.

Plaintiff, a few days after the order of appeal was rendered, caused execution to issue, and in the writ of execution the amount of the judgment of Wise, defendant against him, for \$5400, was credited on the judgment in his favor against Wise, and the writ issued for the balance, and the property specially mortgaged to secure the debt and recognized in the judgment, was seized and sold, and adjudicated to the plaintiff.

The question, and the only one now before the court for determination, is whether the acts of the plaintiff and appellee with respect to this judgment, can be held to establish his acquiescence in the judgment in contemplation of law, so as to debar him from seeking to reverse it, or change it in his favor.

After a thorough consideration of the matter and a close re-examination of the authorities bearing on it, I am constrained to answer this question affirmatively.

There were two distinct judgments rendered by the district court, one in favor of plaintiff for the amount of his demand, and recogniz-

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ing the special mortgage securing it on the mortgaged property. The other on a claim in no manner connected with the principal demand, and urged by way of reconvention.

The judgment in the principal demand, whilst allowing, by its terms, certain credits on this demand, directs or allows no credit for or on account of the reconventional demand. The judgment did not, therefore, by its terms, require that this credit for the reconventional demand, liquidated by a judgment though it was, should have been inserted or allowed in the writ or indorsed upon it.

In our former decision the opinion expressed why this crediting the one judgment upon the other and causing execution to issue for the balance did not show an acquiescence, was, because such a course was not voluntary, but compulsory.

The plaintiff was not compelled to execute his judgment at all; at least, if he desired to be safe from any complication or risk, and execute his judgment in its entirety, he might have waited until the defendant's appeal was tried.

He might have had execution issue on his judgment, giving only the credits that the judgment itself allowed. It was a distinct, separate and independent judgment from the other on the reconventional demand; and though such execution might have been met by an injunction, yet such injunction could only have affected the execution of plaintiff's judgment to the amount of the judgment in reconvention, and plaintiff could thus have gotten the benefit of his judgment and the right to execute it for the excess of one judgment over the other, without contributing any act of his own to accomplish this object.

If plaintiff had gone forward and paid this judgment, and thus have gotten it out of his way, no one could then doubt that he had acquiesced in it. What he did do was essentially equivalent to its payment. By crediting it on his judgment he took it in payment *pro tanto* of the judgment. Two judgments stood against each other for different amounts, he took both under his control, imputing one, so far as it went, to the payment of the other.

I cannot, from any standpoint, see how this disposition of the defendant's judgment could be regarded in any other light than the virtual execution of the judgment. That when the credit was given for its amount, that it was thereby extinguished, and of course, fully executed.

Thus concluding, I am of opinion that the plaintiff by his acts lost the right of changing or amending the judgment in his favor either

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through an appeal or by prayer for an amendment in his answer to the appeal.

I therefore dissent from the opinion and decree of the majority of the court.

Justice Watkins concurs in this opinion.

No. 9672.

WADE R. YOUNG VS. STEPHEN DUNCAN, ET AL.

This Court has no jurisdiction of a suit instituted to have an attorney's privilege for his fee for less than \$2000 recognized on a judgment exceeding that sum.

A PPEAL from the Ninth District Court, Parish of Tensas.
R. Lewis, Judge ad hoc.

Plaintiff in *propria persona*, Appellee.

Kennard, Howe & Prentiss, and *Steele & Garrett*, for Defendant and Appellant :

1. The matter in dispute is the existence, interpretation and effect of an alleged judgment in reconvention for \$3400, the right of Duncan to have the rules of compensation applied to it, and the right of plaintiff to enjoin with reference to that judgment. The judgment is indivisible; the plaintiff seeks and has obtained an injunction with reference to the whole of it, and the consideration of the dispute requires a consideration of the judgment as a whole. The value of the rights of Duncan in the premises, which plaintiff seeks to enjoin and destroy, is \$5400; and if the alleged judgment be considered as a fund, it is a fund of \$5400. 37 Ann. 7; 34 Ann. 201; 31 Ann. 297; 35 Ann. 206.
2. The opinion heretofore rendered should be maintained, for the reason therein given. Both this case and No. 9663 were before the Court at the same time, the counsel the same, and an alleged judgment in that the foundation of this. See *Day vs. N. O. P. Ry. Co.*, 37 Ann. 131.
3. The judgment in this cause should be reversed.
- (a) An injunction cannot lie to restrain a creditor from compensating a claim of his debtor with a claim of his own, under the circumstances here shown. As well might one enjoin the rising of the sun, or enjoin the Civil Code. The compensation acts, *pleno jure*, and even without the knowledge of the debtors, and relates back to the simultaneous existence of the debts. Dig. 16, 2; Larombiere on Ob., vol. 3, pp. 616, 618. No defendant could obey such an injunction, for the compensation would take effect in spite of any effort at obedience.

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- (b) The alleged judgment of \$5400, in favor of Wise against Duncan, never had any existence, as claimed by plaintiff. The moment judgment was given in favor of Duncan against Wise, for about \$17,500, and for Wise in reconvention for \$5400, the effect was the same as if a balance had been struck and judgment given for Duncan for that balance C. P. 369; Levy vs. Roos, 32 Ann. 1029. Duncan owed Wise nothing, and there was nothing for plaintiff's claim to operate on.
- (c) Wise is admitted to be insolvent, and to make Duncan pay his lawyer would be irrational and unjust. Illustrations given.
- (d) The claim of plaintiff that he is a third person, to whose prejudice compensation cannot take place, is unfounded. R. C. C. 2215; C. N. 1298, prohibit compensation only to a debtor who has become a creditor after the right of a third person has attached. Duncan was a creditor of Wise before plaintiff was even employed, and had his judgment before or at least at the time of the judgment in reconvention. Duncan does not, therefore, come within either the letter or the spirit of the Art 2215.

ON REHEARING.

The opinion of the Court was delivered by

TODD, J. Further reflection has satisfied us that this case is not within our jurisdiction.

This is a suit to have recognized and enforced a privilege for \$1650 on a certain judgment described in the pleading.

It was accompanied by an injunction, taken out against the judgment debtor, to prevent him from paying, compensating or in any manner extinguishing the judgment on which the privilege was claimed. The judgment in question exceeds the sum of \$2000.

If the suit was simply to recover a debt of \$1650, of course it would not be contended by any one that such a suit would be within the jurisdiction of this court. The privilege claimed does not enlarge the demand, but is exactly commensurate with it, nor is it affected by the injunction, since it is only invoked as a means of the preservation and enforcement of the privilege. The petition for its issuance contains no demand for money in the way of damages or otherwise; nor does it enjoin the party from doing or omitting to do anything which would cost him a single dollar. As stated, it is simply and purely a suit to enforce a privilege on a judgment exceeding in amount the privilege claimed.

It does not seek to alter or annul that judgment to any extent.

If this were a suit to enforce the vendor's, lessor's or any other kind of a privilege, though the action might be directed against property ten or a hundred-fold greater in value than the amount of the demand, there could be no possible pretense that the value of the property

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could invest this court with jurisdiction. It is not contended that there is anything in the nature or character of a judgment that puts it on a different footing from other property. So far as relates to the question as presented in this case, the fact that it is a judgment is of no significance whatever. A judgment may be the subject of a privilege, and it may be seized and sold to satisfy it, like any other property.

The question of jurisdiction here presented is very analagous to that involved in a revocatory action. The creditor in such action has no privilege on the property against which the action is directed, but he has something that it is equivalent to it; he asserts the right to have the sale of the property revoked in order that his debt may be paid out of it, and the property declared subject to his debt. In such an action it has been repeatedly held that the jurisdiction of this court is not determined by the value of the property, which is sought to be reached by the creditor, but by the amount of his demand.

So where as in this instance a creditor is seeking to save his debt by fastening a privilege on property exceeding the value of his debt, the jurisdiction of this court is determined not by the value of the property, but by the amount of the debt claimed.

But as a conclusive test of this matter, suppose that Mr. Duncan, the defendant in the suit, either before or after its institution had stepped forward and paid to Mr. Young the plaintiff the amount of his demand, say \$1650, would it not have extinguished his demand in toto, and left surviving to him no right or cause of action whatever in whole or in part? There can be but one answer to this question.

It thus plainly appears that this court has no jurisdiction over the controversy.

It is therefore ordered, adjudged and decreed, that the decree of this court heretofore rendered in this cause be annulled and set aside, and it is now adjudged and decreed that the appeal be dismissed, at the cost of the appellant.

Note of the Reporter: In this case the original opinion and decree having been set aside are, under the rule of the Court, not reported.

Johnson & Randolph vs. McLaughlin.

No. 9800.

JOHNSON & RANDOLPH vs. ARTHUR McLAUGHLIN.

The case involves only questions of fact, which are examined and determined in accordance with the judgment below.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

T. Gilmore & Sons, for Plaintiffs and Appellees :

W. S. Benedict, for Defendant and Appellant :

The opinion of the Court was delivered by

FENNER, J. Plaintiffs, managers of a cotton press, entered into an agreement with defendant, a drayman, by which the latter was to haul all cotton which plaintiffs might have to haul in or out of the press, during the season of 1884-5, at a rate of twenty-four cents per bale, namely, eleven cents per bale inward and thirteen cents per bale outward. As defendant, however, was a member of a labor organization, known as the Draymen's Association, which assumed to regulate the charges of its members, and had fixed the rates at twenty-eight cents per bale, or thirteen cents for inward and fifteen cents for outward hauling, the agreement was, at his request, divided into two separate written contracts, viz: Contract A, intended for exhibition to the association, by which plaintiffs were to pay for the hauling at the rates of thirteen cents inward and fifteen cents outward; and contract B, by which defendant obligated himself to pay to plaintiffs four cents per bale on all cotton hauled by him.

Plaintiffs bring this suit to recover \$2325 18, alleged to be due on the last-mentioned contract.

Defendant admits the contract, does not contest the correctness of the account according to the contract, and makes no pretense of payment; but avers that, shortly after its date, the plaintiffs agreed with him to cancel and annul the contract B; and that, thereafter, the hauling was done and paid for exclusively according to the terms of contract A.

Upon this defense the testimony of the parties is widely divergent.

Both agree that shortly after the hauling began, the Draymen's Association passed a resolution requiring each member to go before a

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notary and make an affidavit that he receives full tariff rates, and a committee was appointed to carry the resolution into effect. Although the resolution itself does not so state, defendant says that he was required to swear that he received full tariff rates, *without rebate*.

In this dilemma, he appealed for relief to plaintiffs. Here the divergence begins. Defendant swears that plaintiffs then agreed to cancel and annul contract B. Plaintiffs swear that, to accommodate defendant, and to enable him to placate his conscience in the matter of the affidavit, they agreed to pay him in full, according to the contract A, for the hauling as it was done through the season, without deducting the rebate, and that after the season was over, and the contract ended, defendant would then pay them the whole amount due under contract B.

Plaintiffs' theory is supported :

1st. By the decided preponderance of the oral testimony.

2d. By their retention and production of the written contract B, which, if defendant's theory were correct, should have been canceled or destroyed.

3d. By the absence of any consideration to induce plaintiffs to forego so substantial an advantage, secured by a positive contract with a responsible man, and by the maxim, "*nemo facile præsuntur donare*."

4th. By the fact that when, at the end of the contract, plaintiffs presented their account, and demanded payment, defendant's answer in writing, set up no such defense, but assigned other reasons for not complying with the demand.

5th. By the fact that the learned district judge, who saw and heard the witnesses, found in favor of plaintiffs.

Under such conditions we have no hesitation in holding that the defense made is not sustained.

Judgment affirmed.

No. 9776.

BERTRAND SALOY VS. HIBERNIA NATIONAL BANK.

1. A bank which has received from a depositor, as collateral security for an account there overdrawn, or which may be overdrawn subsequently, certain certificates or bonds payable to bearer at a future day for value, is entitled to hold the same as against one

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claiming ownership thereof and alleging that *one whom he had constituted* the depository of same had misappropriated them—unless the claimant shall allege and prove that the bank's acquisition was *mala fide*.

2. A vendor of real estate that is charged with a general mortgage, who deposits with the notary passing the title, a sum of money or valuable securities as a guarantee that he will procure the erasure of same, incurs the risk of the deposit.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

Robt. Mott for Plaintiff and Appellant.

T. Gilmore & Sons for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. It is the object of this suit to recover the possession of certain bonds of the city of New Orleans, known as certificate bonds issued under Act 58 of 1882—two being of the denomination of \$1000 each and ten of \$50 each, and all of the aggregate amount of \$2500—of which plaintiff claims the ownership.

He claims that on the 1st of October, 1885, he executed a title to a certain piece of immovable property described, to Mrs. Magioni, before William J. Castell, a notary public of the city of New Orleans, which was subject to a general mortgage, the erasure of which he obliged himself to the vendee to procure, and to guarantee the performance of this contract, he deposited the aforesaid bonds with the notary, until he should produce evidence of the cancellation of the mortgage.

For these bonds a receipt was executed on the 1st of October, 1885, by W. J. Castell, notary, per Jas. J. Woulfe, expressing the purpose thereof as above set forth.

On the 1st of January, 1886, plaintiff called for the bonds, but they were not to be found among the papers of Castell, who had in the mean time died; but upon enquiry they were ascertained to be in defendant's possession.

In its answer the bank says that it is holder and pledgee of the twelve certificates or bonds which it received from William J. Castell as collateral security for moneys advanced and to be advanced to him, and to be applied to same, and to cover any balance that might remain due to the bank on the account of Castell.

It also represents that, at the time of Castell's death, he was indebted to the bank in a balance of \$4,913.25, which is still due and

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owing, and for which the said certificates or bonds stand pledged; and that defendant is a holder of them in good faith, for a valuable consideration, before maturity, and that same are payable to bearer and negotiable and transferable by delivery only and without indorsement.

Defendant claims that on the 30th of September, 1885, Castell was duly notified that his account was overdrawn, and three days thereafter he pledged the bonds to the bank to cover his account, as well as the amount of his overdraft as any future overdraft that might occur.

Plaintiff's counsel admits in brief that "the testimony of Mr. Palfrey is clear to the point that the deposit of the bonds was made to cover the overdraft, and Mr. Woulfe's statement was made regardless of the facts," etc. Also that "the bank afterwards continued to allow Mr. Castell to further overdraw his account, far in excess of the value of the bonds; and he was overdrawn when he died in the sum of \$4,913.25," the exact sum claimed by defendant.

On this statement of facts, the sole question presented for consideration is whether the certificates were pledged to the bank "in the ordinary course of business," or "under such circumstances as should have put the bank upon inquiry."

The plaintiff argues to the effect that the bank transacted with the notary as a *quasi* officer of that institution, whose conduct was such as to have inspired doubt of the transaction, and the same was *out of* the usual course of trade, "the holder being neither a broker, a dealer in securities, or a merchant covering an account." He insists that, as Mr. Castell was the notary of the bank, and a creditor thereof for professional services, he was "a *quasi* officer" thereof, and hence—inferentially—notice of the illegality of the transaction was sufficiently brought home to defendant to have put it on inquiry.

This argument is untenable. There is nothing in the record to establish that proposition. The fact that Mr. Castell was usually employed by defendant to perform certain services as notary, in the course of its business, does not constitute him a *quasi* officer of the bank.

The evidence satisfies us that Mr. Castell's account was, on the 30th of September, 1885, overdrawn for more than \$2500, the amount of the certificates deposited on the 4th of October following.

Subsequently his account was diminished by deposits and increased

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by checks, alternately, until, at his death, he was indebted to the bank in excess of \$4000—more than sufficient to consume the deposit.

In *Brown vs. Schmidt*, 7 Ann. 349, it was held that "the purchaser of property who, without authority, pays the price into the hands of the notary, incurs the risk of the deposit," and if the notary embezzle the money the purchaser must sustain the loss.

In *Arby vs. Ducatel*, 18 Ann. 470, the Court said: "The law has not made it the official duty of a notary to receive money to erase mortgages." 20 Ann. 78, *Monrose vs. Brocard*.

In *Givanovich vs. Citizens' Bank*, 26 Ann. 15, the Court held that Ducros was indebted to the bank when the notes were placed in its possession as collateral security therefor, and that the bank had the right to thus receive them. That Ducros was lawfully in possession of them, and, as to third persons, the owner of them; and could dispose of them at pleasure.

The responsibility was from Ducros to *his* principal, and not from the bank to plaintiff.

That case involves a like principle to the one under discussion here.

In *Fairfax vs. Beer*, 37 Ann. 821, this Court held that "the transferee for value, of negotiable securities not due, from the possessor and apparent owner, gets a title which cannot be defeated without proof of *actual* or *constructive notice* of the imperfect title of the transferor, amounting to *malu fides*."

The burden of proof was on the plaintiff to establish such actual or constructive notice to defendant of Castell's imperfect title to the certificates in question.

The legal presumption is that the holder of a negotiable instrument has acquired it without notice of anything to impeach his title.

In *Collens vs. Gilbert*, 94 N. S. 753, the Supreme Court held that "the title of a *bona fide* holder for value, of an accepted draft indorsed in blank, is not affected by the fact that the party from whom he received it, before its maturity, had possession of it for certain purposes and misappropriated it." *Shaw vs. Railroad Company*, 101 U. S. 563; *Brown vs. Sheppard*, 95 U. S. 481.

There is no evidence in the record that impeaches the good faith of the defendant. We think the judgment appealed from is correct.

Judgment affirmed.

Mercier et al. vs. Harnan.

No. 9794.

J. G. MERCIER ET AL. VS. PATRICK HARNAN.

39	94
46	451
39	94
113	868

The best evidence must be produced.

A copy of a copy is not admissible in evidence unless the original is alleged and proven to be lost, and that a copy thereof cannot be obtained. C. C. 2268, 2269, 2270, 2279, 2280; 6 N. S. 208; 2 Ann. 998; 6 Ann. 683; 7 N. S. 550; 5 N. S. 175; 13 L. 536.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

James Timony & F. Michinard for Plaintiff and Appellee.

Jos. H. & J. Z. Spearing, for Defendant and Appellant :

The opinion of the Court was delivered by

TODD, J. The plaintiffs sue to recover certain immovable property described in their petition, and to annul a tax title of the same, made to the defendant in possession.

The plaintiffs claimed to be owners of the property by inheritance from their mother, Henrietta Antoinette Corinne Smith, wife of Dr. Armand Mercier. They deny that Dr. Mercier ever owned the property, though the same was assessed in his name, but aver that it belonged to Mrs. Mercier, and was donated to her by her mother at her marriage, in 1837, and constituted a part of her dotal effects under her marriage contract, passed in said year, before two notaries, in Paris, France, where the marriage was celebrated.

There was no motion filed to dismiss the appeal, but the counsel for plaintiffs' counsel suggest, in their brief, that this court is without jurisdiction *ratione materiæ*, alleging that the value of the property is below the jurisdictional amount.

The plaintiffs, in their petition, allege the property to be worth over \$2100. The defendant, in his answer, alleges its value at \$3000, and in this court has filed his affidavit asserting its value at said sum. The evidence in the record shows it was assessed at from \$4000 to \$4500 in different years.

The amount of its adjudication at the tax sale is no test of its actual value in the face of the above. We have jurisdiction of the cause.

On the trial the plaintiffs, to prove their ownership of the property

Cotton Exchange vs. Assessors et al.

in dispute offered in evidence an abstract from the records of the office of the Recorder of Mortgages of New Orleans, which purported to be the record of a copy of the marriage contract referred to, under which the mother of the plaintiffs acquired title to the property in controversy.

The admission of this record was objected to, substantially, on the ground that it was not the best evidence, that it was but a copy of a copy, and offered without averment or proof of the loss or destruction of the original act or the copy thereof, purporting to be recorded and without proof or allegation that another copy of the original could not be obtained.

This objection was overruled, and the record admitted, to which exception was made and noted.

The judge erred in his ruling. The objection embodied an elementary principle found in every work on evidence, and so completely consecrated by established jurisprudence as to dispense with any citation of authorities to support it.

This appears to be the sole evidence of the plaintiffs' title to the property to be found in the record.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, which was in plaintiffs' favor, be annulled, avoided and reversed, and that the suit be dismissed as of non-suit, at plaintiffs' cost in both courts.

No. 9792.

NEW ORLEANS COTTON EXCHANGE vs. BOARD OF ASSESSORS ET AL.

Proof that there has been a decrease in the values of buildings in the immediate vicinity of that, whose assessment is sought to be reduced by suit, and also a diminution in the rents of such property in the same locality, and proof likewise of extravagance in the construction of the building, so that such cost is not a proper test of its value when assessed, will justify a reduction of the assessment.

Cotton Exchange vs. Assessors et al.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Bayne & Denègre for Plaintiff and Appellee.

M. J. Cunningham, Attorney General, *W. H. Rogers*, City Attorney,
Wynne Rogers and *James Moïse* for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. The object of this suit was to effect a reduction of the assessment on the Cotton Exchange building in this city. The assessment complained of is that of 1885.

From a judgment of the district court reducing the assessment from \$300,000 to \$200,000, the State and city of New Orleans have appealed.

A similar case was before us last year touching the assessment of the same property for the year 1884, reported in 37 Ann. 423. In that case the court declined to reduce the assessment. Among the reasons expressed for the conclusion then reached were, substantially, that there was no proof that the cost for the construction of the building was "particularly extravagant, none that the property had deteriorated in value, or that the owner would sell it for an amount less than its cost."

In the instant case the omission of proof in the respects mentioned, and so essential to anything like a correct estimate of the value of the property has been abundantly supplied.

We have the testimony in the record of auctioneers and real estate agents and of the owners of real estate in the immediate vicinity of the Cotton Exchange, that there has been a steady decline in the values of property in that locality of more than 25 per cent, and a still greater decline in the rents of property; and in addition to this it is shown that since the assessment of 1884, that there has been a depreciation in the stock of the company of at least one hundred per cent.

It was also satisfactorily proved that there had been unnecessary extravagance in the construction of the building, and that, therefore, its cost was no proper test of its present actual value.

These considerations lead us to the conclusion that, upon the whole, there is no reason or just cause to disturb the judgment of the court of the first instance which reduced the assessment to \$200,000 as before stated, and that judgment is therefore affirmed with costs.

State ex rel. Hirsch vs. Judge.

No. 9647.

THE STATE EX REL. MRS. HIRSCH, WIFE, vs. THE JUDGE OF THE
NINETEENTH JUDICIAL DISTRICT, AND THE JUSTICE OF THE
PEACE FOR THE SIXTH WARD, PARISH OF ST. MARY.

30	97
46	534
39	97
49	1725
49	1728
39	97
51	509
39	97
111	194
39	97
112	429

The Supreme Court, under Article 90 of the Constitution, has *exclusive* control and general supervision over all inferior courts. It *alone* can issue the remedial writs mentioned in that article.

Other appellate courts may issue similar writs, but *only* in aid of their appellate jurisdiction.

A prohibition issued otherwise by a district court to a justice of the peace, is an absolute nullity. It ought to have been ignored and the justice ought to have proceeded, notwithstanding.

A *wadamus* cannot issue to a justice, who is willing to proceed, but who thinks himself prevented by superior authority from doing so. The prohibition having been annulled, the justice must proceed with the case.

APPPLICATION for Prohibition, Mandamus and Certiorari.

B. F. Winchester for the Relatrix.

P. H. Mentz for the Respondents.

The opinion of the Court was delivered by
BERMUDEZ, C. J. This is a proceeding against a district judge and
a justice of the peace, charging the former with usurpation of author-
ity and the latter with denial of justice.

The relatrix complains that the district judge has issued a prohibi-
tion, forbidding the justice from trying a suit instituted before him, by
her, the object of which was to prevent a third party from taking pos-
session of a house of which she claims to be the owner.

She further complains that she has called upon said justice to pro-
ceed with the trial of said suit; but that he declined to do so, in con-
sequence of the prohibition issued against him.

The relatrix charges that said district judge had no jurisdiction to
issue the prohibition; that it was not binding on the justice, who ought
to be ordered to proceed to determine her case.

She accordingly prays for a *certiorari* to test the validity of the pro-
ceedings thus had, that those had before the district court be annulled
and the said court prohibited from interfering with the justice, and that
the latter be commanded to try her suit.

The facts do not appear to be disputed by the respondents.

The district judge in his answer admits them. He insists that the
justice had no jurisdiction and that he accordingly was right in issuing

State ex rel. Hirsch vs. Judge.

the prohibition. The justice in his return pleads the prohibition in justification of his conduct.

The questions are of law only.

Article 90 of the present Constitution vests this Court with control and general supervision over all inferior courts, and with power to issue writs of *certiorari*, prohibition, mandamus, *quo warranto* and other remedial writs.

The Constitution does not confer *similar* supervisory jurisdiction on any other court, whether it be a district court or a circuit court; although it vests the other appellate courts with the power to issue like writs *in aid of their appellate jurisdiction*.

Those courts have therefore no power to issue any of those writs, when not in aid of their appellate jurisdiction.

In a case in which a *certiorari* had been asked, the city judge pleaded to our jurisdiction, asserting that he was amenable *only* to the district court, to which appeals from his judgments could be taken.

We there held, in a considered opinion, that this Court has *exclusive* control and general supervision over all inferior courts, and that it *alone* can issue to such courts the remedial writs mentioned in Art. 90, whether in appealable or unappealable cases. See State ex rel. Gas Light Co. vs. Judge, 37 Ann. 286.

This view of the case dispenses us from passing on the question of lack of jurisdiction in the justice's court. Its incompetency could not vest the district court with a power denied it by the Constitution.

As the district court had no power to issue the prohibition, the justice was not bound to respect it. He ought to have ignored it and proceeded with the case. His transgression could not have been punished. State ex rel. Liversey vs. Judge, 34 Ann. 741 (746, VI.), and authorities cited.

This does not, however, justify a *mandamus* to the justice. The record shows that he overruled an exception to his jurisdiction and that, far from refusing to proceed with the case, he would have tried it unless for the prohibition, and that he is ready to hear and determine it.

There can be no doubt that the prohibition being declared a nullity, and having thus ceased to be an impediment in his way, and his tremor of martyrdom and incarceration being placated, he will try the case. It is not until he shall have refused to proceed that the writ can be sought.

It is therefore ordered that the prohibition issued by the District

State ex rel. Huyghe vs. Judge.

Court for the 19th Judicial District, for the parish of St. Mary, be annulled to all ends and purposes, and that said court be prohibited from issuing any other similar writ to the justice of the peace for the sixth ward of said parish; and,

It is further ordered that the application for a *mandamus* against said justice be dismissed.

No. 9850.

THE STATE EX REL. MRS. ANNE HUYGHE VS. F. A. MONROE, JUDGE
DIVISION C., CIVIL DISTRICT COURT, PARISH OF ORLEANS.

The conduct of a district judge who enjoins an execution predicated on a judgment of the Supreme Court, on the ground, as alleged, that said judgment, from its terms and under restrictions placed by the court which rendered it, is not yet executory, is not amenable to the charge that the inferior judge refuses obedience to the mandate of the superior court.

It is competent for the district judge to consider such an allegation, and to act according to his construction of the true meaning of the judgment. His course will not be interfered with by *mandamus*.

APPPLICATION for *Mandamus*.

Alfred Goldthwaite, for the Relatrix.

Bayne & Denègre and Braughn, Ruck & Dinkelspiel, for the Respondent.

The opinion of the Court was delivered by

POCHÉ, J. The complaint of relatrix is that the respondent judge has illegally issued an injunction restraining the execution of the judgment rendered in her favor by this court in the case entitled *Huyghe vs. Brinkman*, reported in the 37th Annual Reports, p. 240, and she invokes, at our hands, a writ of *mandamus*, intended to coerce the respondent to rescind his order of injunction.

The district judge returns that in his opinion, and under his construction of the various *dicta* and decrees of this court in the premises, the judgment enjoined was not intended by the court to be executory at the present stage of the litigation between the parties, independently of the ultimate adjudication of *Brinkman's* alleged good faith, which, under the law, and in accordance with our decree, was the condition precedent of his right of recovering moneys disbursed by him for taxes and improvements on the property in suit, and that therefore he deemed it his duty in equity and good conscience to enjoin the execution sued out by relatrix, with a view to consolidate all questionable

State ex rel. Huyghe vs. Judge.

incident to, and depending upon, the fundamental question of title and good faith, which is now pending in a proper proceeding, between those parties.

Our examination of the record, and a mature consideration of the *status* of the litigation, have failed to show that the respondent has committed an error which would justify our interference by mandamus, as suggested by the relatrix.

Our conclusions in the case of the 37th Annual were that the nature of the action was possessory; that plaintiff in that case, relatrix here, was entitled to rents during the time that she had remained ejected at the instance of Brinkman, and that if the adverse possession of the latter had been in good faith, he was entitled to recover his taxes and "whatever else he could properly plead in offset to the plaintiff's claim for rent." Hence we entered the following decree:

"It is therefore ordered and decreed that the judgment of the lower court is reversed, and that the plaintiff now have judgment for the possession of the premises described in her petition, and for thirty dollars a month rent of same, from November 2, 1878, with five per centum interest from the expiration of each month, and costs of both courts, and that the case be remanded to receive proof of the matters above indicated, and counter-proof of the same for judgment thereon."

The matters "above indicated" were the alleged good faith of the defendant Brinkman, and, as depending thereon, the amounts which he had disbursed for taxes and for necessary repairs, including his right to offset such amounts, if legally due, against the claim, judicially recognized, of plaintiff for rent.

The right of plaintiff to execute the moneyed judgment therein rendered in her favor was subordinated to, and made to depend upon the contemplated judicial determination of the matters "above indicated," and which were to that end referred to the investigation of the lower court.

It is not even pretended that the judgment was at that juncture executory; the very reverse is apparent from the inaction of relatrix, who did not call for an execution for more than eighteen months thereafter.

Now, has anything since transpired to legally vest it with that character?

The record contains no proceeding which supplies an affirmative answer.

Under our order, the district judge tried the question of Brinkman's good faith; he decided it in his favor, and gave him a judgment for

\$1900, as an offset *pro tanto* to the amount allowed by our judgment to Mrs. Huyghe on her claim for rent.

On appeal, we reversed this judgment, not because Brinkman had failed, under the evidence, to make out his case of good faith and of the amounts of his disbursements; but because the nature of his alleged good faith necessarily involved a decision of the validity of his title to the property in suit, and because such a question could not be judicially discussed in a possessory action.

Hence, we expressly reversed all his rights in the premises for adjudication in a proper proceeding, which we indicated in the opinion, and which is naturally suggested, as the petitory action.

It, therefore, appears that thus far, only two matters in this apparently interminable litigation, have been judicially set at rest, and these are:

- 1st. Mrs. Huyghe's right of possession of the premises, and
- 2d. Her right to recover rent at \$30 a month from November 2, 1878, up to the time at which she was restored to possession.

But nothing more is as yet judicially certain.

Now we are informed that the action which we have indicated is pending in the district court, and to that suit all matters have been relegated, including the right of relatrix to execute her judgment, subject or not, as the case may be, to an offset on the part of Brinkman.

In our last decree we said, in reference to that matter: "A judgment in such an action will take up the whole series of adverse claims, of title, of rents and revenues, and the incidental right of compensation for alleged necessary disbursements." That language and other utterances, in our opinion, have, it seems to us, been correctly construed by the respondent judge.

Relatrix lays great stress on our supplemental opinion and decree, in which we refused to entertain Brinkman's application for an order partially suspending the execution of the judgment for rent in her favor.

The pleadings before us did not present or even remotely involve the question of the character of the judgment, as to whether it was executory or not, hence we were powerless to dispose of such an issue at that time.

We said then, and we repeat now, that as a judgment it was final, and that it was the property of Mrs. Huyghe, and as such, beyond our control or that of any other tribunal.

The practical meaning of Brinkman's application, which we discountenanced, was a movement for an injunction without affidavit or bond and without an issue.

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But in the present proceeding, the pivotal question involves that very point, and it was competent for the district judge in an injunction proceeding to consider the allegation that, under the restrictions placed thereon by the court which rendered it, the execution of the judgment depended upon future contingencies—and that is precisely the question which the present application places before us, in regular injunction proceedings.

We have noted the reliance of counsel for relatrix on that line of authorities which define the duties of inferior courts in dealing with mandates of their superiors referred or returned to them for execution. But this is not the case at bar. The respondent is not in the attitude of an inferior judge who even hesitates to obey the mandates of his superior. The whole extent and scope of his judicial action has been to ascertain *in limine*, the true meaning and judicial effect of a mandate emanating from his superior, and to order accordingly.

The case falls within the principles considered in our recent opinion in the case of the State ex rel. Sentell vs. Judge, 38 Ann. 31.

We therefore conclude that relatrix is not entitled to the writ of mandamus.

It is therefore ordered that the writ herein prayed for be refused at the costs of relatrix.

No. 9796.

MRS. A. H. CARTER ET AL. VS. MADELAINE FARRELL ET AL.

A simulated sale is no sale. It is an absolute nullity. So where such pretended sale is even in the form of an authentic act or of a judicial sale, if it is accompanied by a counter-letter, or the possession of the alleged purchaser is precarious or not continuous and complete, a judgment creditor of the vendor may disregard the apparent title and seize directly, and if enjoined may, under proper pleadings, show by written or oral evidence the simulation charged.

As a general rule amendments to the pleadings should always be allowed in promotion of justice, where they do not change the issues nor cause delay.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

A. E. Billings and R. G. Harris for Plaintiffs and Appellees:

When a person is in possession of real estate under an act, not void on its face, the question of fraud and simulation cannot be inquired into collaterally by commencing with a seizure, but the seizing creditor must resort to the revocatory action. *Barbarin vs. Sancier*, 5 N. S. 361; *Weeks vs. Flower*, 9 La. 385; *Morton vs. Crosby*, 14 La. 426; *Kirkland vs. Bank*, 1 Ann. 300; *McAdam vs. Soria*, 31 Ann. 862; *Willis vs. Scott et al.*, 33 Ann. 1037; *Majors vs. Dennis*, 35 Ann. 336; *Johnson vs. Kingland et al.*, 38 Ann. 249.

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The revocatory action nor any evidence to sustain it can be offered without allegation of insolvency of debtor. *Nieman vs. Coudran*, 34 Ann. 847; *Long vs. Klein*, 35 Ann. 384. Pleadings cannot be amended after case has been called for trial. *Case vs. Watson*, 22 Ann. 351; *Spyker vs. Hart*, 29 Ann. 534.

B. R. Forman for Defendants and Appellants:

A simulated title, even in the form of a judicial sale, may be disregarded by the judgment creditor of the real owner of the property, and the creditor may seize the property, and when enjoined may plead and prove the simulation by counter-letter or other sufficient evidence. *Kimble vs. Kimble*, 1 N. S. 633; *Weeks vs. Flower*, 9 L. 385; *Hiriart vs. Roger*, 13 L. 126; *Cammack vs. Watson*, 1 Ann. 135; *Spurlock vs. Manier*, 1 Ann. 306; *Jonas vs. Dreux*, 1 Ann. 364; *Hobgood vs. Brown*, 2 Ann. 323; *Lindeman vs. Theobalds*, 2 Ann. 913; *Clark vs. Bank*, 3 Ann. 326; *Oglesby vs. Drake*, 3 Ann. 640; *Dawson vs. Holbert*, 4 Ann. 36; *Erwin vs. Bank*, 5 Ann. 1; *Hughes vs. Winfrey*, 5 Ann. 668; *Maxwell vs. Mallard*, 5 Ann. 702; *Emswiler vs. Burham*, 6 Ann. 710; *McMasters vs. Place*, 8 Ann. 431; *Dosson vs. Bieller*, 10 Ann. 570; *Simpson vs. Mills*, 12 Ann. 173; *Souly vs. Kearns*, 14 Ann. 436; *Gleises vs. McRatton*, 14 Ann. 560; *Austin vs. Da Rocha*, 23 Ann. 46; *McAdam vs. Soria*, 31 Ann. 865; *Willis vs. Scott*, 33 Ann. 1026.

The opinion of the Court was delivered by

TODD, J. The plaintiffs having seized under a judgment against W. H. Finnegan certain immovable property in the city of New Orleans, described in the pleadings, the sale of it was enjoined by Delia Farrell, who claimed to be the owner of it.

In the answer to her petition, plaintiffs denied her ownership of the property. They further averred, substantially, that the property was originally bought by the judgment debtor, Finnegan, and paid for with his own money on the 29th of May, 1875, but that he caused the title to be made to the third opponent, who lived with him at the time as his concubine. That this conveyance to her was a pure simulation, and that she executed and signed a counter-letter acknowledging the simulation, and that the real title was in Finnegan, which counter-letter was subsequently stolen and destroyed by her. Further, it was averred that Finnegan caused Delia Farrell to make a conveyance of the property to one Swinney, and subsequently had the property sold under a foreclosure of the special mortgage retained for a part of the price, and again had the naked title put in the name of this third opponent in the sheriff's deed, though Finnegan was the real owner and all the time in possession of the same.

There was judgment in favor of the third opponent, and plaintiffs have appealed.

On the trial of the cause, plaintiffs offered proof of the simulation charged, both with respect to the deed made to her in May, 1875, and the subsequent one at the sheriff's sale in May, 1877, and offered to prove the execution of the *counter-letter* and its destruction. This evi-

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dence was rejected by the judge on objection made, substantially, to the effect that the third opponent having exhibited title to the property—the sheriff's deed—and possession under it, that it could only be attacked in a direct action, and that a direct seizure could not be made of the property in disregard of her title, and proof of its simulation offered collaterally.

In the argument of counsel, it was stated that the judge *a quo* was governed in his ruling on this question of evidence by the authority of *Willis vs. Scott*, 33 Ann. 1026.

We think he has extended the doctrine of that decision beyond its true limits.

We there laid down the general rule that immovable property held under a title translatative of property, accompanied by actual delivery and continuous possession and control as owner, could not be directly seized by a creditor of the transferrer; but we clearly indicated that for the application of this rule it was necessary that the possession and control should be "perfect and complete," and when there was any interruption or infirmity or ambiguity of the possession established, which tended to rebut the presumption of ownership and create an *indicium* of simulation, the rule would not apply.

We think in this case the evidence sufficiently shows such defect in the possession of the transferee—it appearing that Finnegan continued to administer the property, to rent it and collect the revenues, and though he acted as the assumed agent of his transferee generally, he did not in all cases observe even this precaution.

But we think it still more clear that the authority referred to does not apply where the transfer of the property was accompanied by a counter-letter. Such a document, if establishing clearly the simulation of the transfer, utterly destroys the effect of the transfer between the parties and makes it as if it had never been passed. It takes away all the reasons which support the general rule laid down in *Willis vs. Scott*, and leaves it entirely without application.

The rejection of evidence to prove the existence and contents of such a counter-letter, and its fraudulent destruction by the transferee, was error.

And in this connection, without deciding whether, under the peculiar circumstances of this case, it was necessary for the defendant—the seizing creditor—to allege injury to himself by this transfer, we think the judge *a quo* was clearly in error in rejecting the amended answer of the defendant, in which such injury was clearly charged by the averment, in substance, that it was the only property of his debtor out of

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which his judgment could be satisfied. Thus concluding, the case must be remanded.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed, and the case remanded to be proceeded with according to law and the views herein above expressed; the cost of appeal to be paid by the third opponent, and of the lower court to abide the issue of the cause.

No. 9733.

MARY J. ASHBY VS. JOSEPH S. ASHBY ET ALS.

An action can only be brought by one having a real and actual interest which he pursues. So where one claiming to be a judgment creditor of another, seeks to annul a mortgage executed by the latter in favor of his children, on the ground of fraud, and the record shows that the judgment, on which the suit is founded, is not in favor of the plaintiff, but in favor of her minor children, for whom she was tutrix, and who had obtained their majority before the action of nullity was brought, and they do not join in the action, the suit must be dismissed.

39	105
47	345
47	637
39	105
116	655

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

J. S. & J. T. Whitaker and Ohas. S. Rice, for plaintiff and Appellee.

A. J. Lewis, for Defendants and Appellants :

The liquidation and adjudication to the surviving parent of the shares of the minors in the community may render a settlement of tutorship useless and unnecessary. In such cases there is no prescription of four or ten years. 5 Ann. 598; 21 Ann. 643; 23 Ann. 17; 25 Ann. 612; 30 Ann. 673; 34 Ann. 1041; 37 Ann. 121; 38 Ann.

The inscription of the liquidation suffices. 35 Ann. 943.

To make a mortgage fraudulent two things are necessary, the intention to defraud and actual loss; and the insolvency of the mortgagor must be brought home to the mortgagee. 4 L. 256; 18 L. 388; 2 R. 92; 4 R. 408; 24 Ann. 158; 38 Ann.

A contract in good faith cannot be annulled, though injurious to creditors. C. C. 1978, (1973); 1 R. 527; 2 R. 299; 11 R. 493, 533; 12 Ann., 429.

The constant verbal and written recognition by the father of his children's claims, is a constant interruption of prescription. 34 Ann. 752.

A mortgage is indivisible and must be annulled *in toto*, or not at all; therefore, all parties thereto must be legally cited. One party thereto, an absentee, cannot be brought into

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court by citation upon the lawyer who had accepted the mortgage for her, but whose authority to stand in judgment for her, is neither alleged nor proved. 38 Ann. 239.
The imputation of payment by the creditor must be accepted by the debtor. 15 Ann. 526.
It must be made at the time of payment and not afterwards. 2 Ann. 24; 3 Ann. 351.

The opinion of the Court was delivered by

TODD, J. This is a suit instituted by plaintiff, claiming to be a judgment creditor of the defendant Joseph H. Ashby, to annul a mortgage executed by him in favor of his children—co-defendants—which is charged to be fraudulent and intended to secure an unjust claim against him in their favor to the prejudice of the plaintiff's rights. The defendant excepted on the ground that the petition disclosed no cause of action.

Following a vicious practice that prevails to some extent throughout the State, this exception, though determinable on the face of the papers, was referred to the merits.

The answer is in part, substantially, explanatory of the exception of no cause of action, giving specifically the facts or reasons why the plaintiff cannot maintain the suit.

From a judgment in favor of the plaintiff annulling the mortgage assailed, the defendants have taken this appeal.

It appears from the pleadings and record :

That the plaintiff has no moneyed judgment against the defendant Joseph H. Ashbey, on the faith of which she seeks the annulment of the mortgage. This judgment, which is referred to in the petition, is not a judgment in favor of the plaintiff, but one in favor of her children, to whom she was at one time tutrix.

It further appears that, when this suit of nullity was instituted, these children had attained their majority, and one of them had married, had children and died.

It is not alleged or proved that the plaintiff ever acquired from her children this judgment or any right thereto, and the parties owning the judgment are not parties to the suit, or in any manner represented therein, but the plaintiff sues alone and in her personal capacity.

It follows, therefore, that plaintiff has instituted and prosecuted a suit in which she has no personal interest whatever, and in which she does not represent the real parties in interest.

An action can only be brought by one having a real and actual interest which he pursues. C. P., Art. 15; *Corral & Co. vs. Towboat Co.*, 37 Ann. 808.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be annulled, avoided and reversed, and proceeding to render such judgment as should have been rendered, it is further ordered, adjudged and decreed that the suit be dismissed at plaintiff's costs in both courts.

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No. 9779.

THOMAS H. HANDY ET AL. VS. THE CITY OF NEW ORLEANS ET ALS.

Tax-payers have a standing in court to contest upon proper charges, the validity of a municipal ordinance and contract executed under it, whenever its enforcement may increase the burden of taxation.

A district court, the lower limit of whose jurisdiction is fixed, has jurisdiction to pass upon such controversy, when the matter in dispute, which is the value of the contract, exceeds that limit, and the Supreme Court has jurisdiction, on appeal, when that value exceeds two thousand dollars.

A petition of taxpayers discloses a cause of action, which charges that a municipal corporation has, in excess of its powers and in violation of prohibitory provisions in its charter, passed an ordinance under which a contract of lease was entered into.

Courts of justice have the right to sanction and to determine such controversies, but in the exercise of that power ought to act with great caution and have due regard for the legal discretion with which the Legislature may have clothed such corporations, which are in reality, State functionaries, whose acts must be respected whenever they are done in furtherance of delegated authority.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Kennard, Howe & Prentiss and White & Saunders, for Plaintiffs and Appellants.

W. S. Benedict, Bayne & Denègre and Farrar & Kruttschnitt, for Defendants and Appellees:

The opinion of the Court was delivered by

BERMUDEZ, C. J. This cause comes up on an exception, to be determined on the face of the papers.

It is an action brought by three resident taxpayers of New Orleans, in their own behalf and in that of all others similarly situated, for the annulment of a municipal ordinance and of the extension of a lease, made under it, of the wharves on the river bank, in favor of certain named parties.

The city and the lessees were made defendants and a number of citizens intervened, joining in the demand.

An elaborate petition guardedly and sharply drawn, sets forth the *gravamen* of the complaint substantially, to be:

That the city has violated the mandatory provisions of her charter, in disregarding the forms prescribed as conditions precedent, *sine quibus non*, for the letting or farming out, of the wharves in question, *namely*: In not having invited competition by publication or otherwise, or at least in fixing excessive wharfage rates, which are destructive of the interest of commerce and of the inhabitants, and which enable the lessees to realize annually a profit nearing \$100,000, and in

39	107
48	99

39	107
50	885
51	716

39	107
106	150

39	107
108	588
108	681

39	107
109	850

39	107
117	268

39	107
119	22

39	107
121	8
121	1030

39	107
124	724

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not imposing obligations such as the construction and repair of sheds, etc., which would, if exacted, redound to public welfare.

The petitioners further aver, that other parties have made to the city more liberal offers; that they themselves have proposed to accept the lease on more advantageous terms to the city and less onerous on the commercial community, one of them going so far as to tender a *bonus* of \$75,000 to the city to secure a preference; that had competition been permitted, the leasing might have been made with wharfage rates at least ten per cent lower, to the great benefit of the commerce and business in New Orleans and of petitioners and of other taxable inhabitants; that the offers, proposals and tenders aforesaid were not considered and were ignored.

The petitioners further allege that the matter in dispute exceeds \$5000, and that the interest of each exceeds \$2000.

Upon these averments an injunction is prayed for to prevent the execution of the lease, which had not yet begun to run, and a judgment is asked annulling the ordinance and new lease, and perpetuating the injunction.

The lessees excepted, pleading want of capacity in plaintiffs, misjoinder and no cause of action. The city urged like exceptions, save that of misjoinder.

The district judge declined the writ, and dismissed both the petition and intervention.

He considered that it does not appear that the plaintiffs, or either of them, have a sufficient pecuniary interest to maintain their action in any court the jurisdiction of which is limited to a specific sum.

He further considered that, even if plaintiffs have shown such interest, the petition discloses no cause of action.

The plaintiffs appeal.

The record does not show that any plea to the jurisdiction was filed and sustained; but here, certain counsel for the defense admit formally, while the others deny absolutely, any jurisdiction in the lower court, and a *fortiori* in this court, over the controversy, even if a cause of action be disclosed.

I

The first question to be determined is whether the plaintiffs have a standing in court.

It is unnecessary to indulge in any discussion of the long-mooted, but now apparently settled question: Whether taxpayers, or even one of them, have a right to contest judicially, as plaintiffs, the validity of

municipal ordinances, at which they level the charge of illegality, for any cause.

The sedate doctrine, after much contrariety of opinions and considerable vascillation among the courts, seems to be: That the right of property holders, or taxable inhabitants, is recognized, to resort to judicial authority to restrain municipal corporations and their officers, from transcending their lawful powers, or violate their legal duties, in any unauthorized mode which will increase the burden of taxation, or otherwise injuriously affect taxpayers and their property; such as an unwarranted appropriation and squandering of corporate funds, an unjustifiable disposition of corporate property; an illegal levy and collection of taxes not due or exigible, etc. We accept this conservative doctrine.

The recognition of that privilege is predicated on the principle, that it is proper that those who may be immediately affected by the abuse, should be armed with the power to interfere, directly and at once in their own name, in a mode which affords an easy, prompt and adequate preventive relief against an evil which might otherwise entail irremediable wrong.

The exercise of that right or privilege is the more justified when the law does not vest a State or an officer with the power to seek redress.

In such instances the action is regarded as having a public character and as being a public proceeding in which the public complains. *Crompton vs. Zabinski*, 101 U. S. 601; *New London vs. Brainard*, 22 Conn. 552; *Baltimore vs. Gill*, 31st Md., 375; 97 Ind., 1; *Cooley on Tax*, 548; *Dillon on Mun. Corp.*, 914 to 937, and authorities in notes.

Our legislation is silent on this subject. Hence, taxpayers enjoy the prerogative of protecting themselves by their own act in proper cases. This conclusion is fortified by additional considerations suggested by the instant case itself, which will now be developed.

Let it be supposed that the city authorities were to consider the ordinance and lease attacked as *ultra vires*, and the corporation was judicially to demand their annulment, could the lessees, for one moment, be heard to except to the want of capacity of the city, to ask relief and to object to the jurisdiction of the court?

Unquestionably not, for two obvious reasons, that a party to the contract has the undeniable right to demand judicially its annulment for a proper cause, and that in such a case a court of limited lower jurisdiction, but unbounded otherwise, would surely be competent to pass upon the validity of a contract of a value far in excess of the jurisdictional initial point.

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In this case the execution of the ordinance under the lease is stated as yielding a profit nearing annually \$100,000. The contract which is the matter in dispute, clearly exceeding \$2000, the lower court and this court have jurisdiction over it.

It is quite apparent that in such a case had the lessees been cast, they would indisputably have had the right to appeal, and so of the city if defeated. The law in this regard cannot, and does not, discriminate between litigants by denying to the one what it accords to the other.

If the taxpayers have the privilege of doing that which the city could have, but has not, done, and if the lessees could have appealed, it would indeed be monstrous to say that the plaintiffs are denied the same privilege.

It is true that the plaintiffs have not alleged in explicit terms that, owing to the charged violations of the law by the city authorities, the burden of taxation which they and other taxpayers are required to bear will be increased, and that they will be injuriously affected thereby beyond measure, but the plaintiffs have done what is equivalent to it, and what is an unavoidable corollary.

They have stated facts, which, if true, may, and no doubt do, materially cripple to some considerable extent, the commercial business of the city and deprive the city of important revenues which otherwise might be raised by taxation, both on property and persons in the shape of taxes on stock in trade or of license.

The right which the city could have, but has not exercised, the taxpayers can therefore judicially champion and vindicate in proper cases, just as fully and effectually as though the corporation itself had brought the action.

Hence the plaintiffs have a standing, and both courts have jurisdiction over the contention.

An expression of opinion on the lack of competency in the lower and in this court, was deemed necessary to enable us to pass on the merits of the exception of no cause of action.

The plea of misjoinder is mentioned here merely to show that it was noticed and considered.

It is impossible to perceive on what it rests.

The plaintiffs had a right to come together, and the intervenors had a right to join them. The defendants are the city, and the lessees were necessary parties, and had to be brought in.

II.

The second and only next question is: Whether the plaintiffs have

set forth averments sufficient to justify the annulment of the ordinance and of the lease attacked.

The grounds relied on are simply: That the city has refused or failed to invite competition, has fixed most onerous wharfage charges, has leased the wharves as a whole, and not in sections, and has not imposed obligations which ought to have been exacted; and that it has thus inflicted injury on the commercial welfare, on petitioners and other taxpayers.

The serious charge is, after all, that the city has maladministered the public thing respecting the lease of her wharves.

Under such a complaint can the petitioners be heard?

If it could be questioned whether the city, in the exercise of the police power, which is inherent in all municipal corporations—could build and keep wharves and exact compensation for the use of the facilities derived from them by those enjoying the same; or, convey and transfer unto another that right—all discussion on the subject would be at once hushed by the positive and express delegation of authority in that respect, made to the city by the sovereign, in the charter under which she breathes, moves and acts.

The eighth section provides, that the Council shall have the power to prescribe and collect wharfage and levee dues and erect sheds over the wharves and buildings to protect merchandise and to make such charges therefor *as will pay for the construction, keeping in repair, lighting and policing of such wharves and sheds, and no more.*

The charter also provides that the city may lease or farm out the wharves and landings in section for a period not exceeding ten years, to such persons as will bind themselves, with security, to construct and keep in good repair such wharves and landings, and construct and keep in repair sheds over the wharves, and light the same and pay for the cost of policing the same for such *just and reasonable* charges on vessels and merchandise, or either, for the use of the wharves and sheds, as may be fixed in advance by the Council, and with such specifications as may be required by them.

It is apparent that the city was formally vested by the Legislature with the power of administering by herself or by the agency of others, the wharves and landings dedicated to commerce.

There can be no doubt, then, that what the city has done in this regard, in the exercise of the police power can no more be questioned than if the State herself had acted directly.

The acts of the State functionary in furtherance of delegated authority, become the acts of the sovereign.

It is claimed, however, that where a municipal corporation is empowered to impose a wharfage charge, as a compensation, for keeping the wharves in a proper condition, for the safe and expeditious shipping and landing of merchandise, a court will not undertake to fix any limit to the amount which the municipal authorities may exact for that purpose.

In support of that doctrine reference is made to the case of *First Municipality vs. Pease*, 2 Ann. 538.

An examination of that decision shows that the question presented and determined, received full consideration.

After dilating on the dire consequences which, it was apprehended, were to flow from the municipal acts charged against, the Court said:

"The remedy for this can be had elsewhere than from the judicial power. With more enlarged views of public policy, the electors may apply at once a remedy to the evil, or the Legislature itself may confine the exactions of the municipalities within fixed reasonable limits."

The correctness of the ruling and the soundness of the views supporting it are not questioned, but the material fact on which the same rest, must not be lost sight of.

The provisions of law considered and expounded, placed no restraint on the municipal corporation and left the exercise of the powers delegated exclusively dependent on its discretion and sense of justice and propriety.

The section of the charter (Sec. 20—1836), enumerated the powers vested in the City Council, the first of which was "to fix a uniform rate of wharfage to be paid by ships, steamboats and other crafts mooring in front of all parts of the city."

But that legislation did not long survive the ruling made in 1847, for, in 1850, the consolidation charter placed a restriction requiring that the rate be a fixed sum for each day the crafts would remain in port.

This was not altered by the supplementary charter of 1856, but in the charter of 1882, No. 20, p. 21, Sec. 8, it is distinctly provided that, while the Council may farm out the wharves and landings, they can do so only on such just and reasonable charges and specifications as will pay for the construction, keeping in repair, lighting and policing of such wharves and sheds, and no more, and as they may fix in advance.

However correct the doctrine be which was announced in 2 Ann., it cannot be applied to a case like the instant one, in which a shackled municipality is arraigned for disregard and violation of prohibitions

Hite et al. vs. Hinsel & Tallien et als.

placed on the exercise of certain administrative powers with which it is vested.

The plaintiffs charge that the lease in question was granted without competition ; that the wharfage rates fixed are *unjust* and *unreasonable* ; that the wharves ought to have been farmed out by sections and not as a whole ; that the obligation of constructing sheds and keeping them in repair was not exacted, etc.

The district judge did not pass upon the sufficiency of the allegations of the petition to warrant the judgment sought. He held that the plaintiffs could not be heard, first, because the court had no jurisdiction, and next, because the court cannot go behind the ordinance and inquire into the validity of the lease.

We cannot pass presently upon the sufficiency of each and every allegation of the petition, but will say that, if the plaintiffs succeed in establishing them all, or one or more sufficiently to justify the annulment of the ordinance and contract under it, they will be entitled to judgment, because, surely the petition discloses a cause of action in at least one of its averments, and the courts have the power to sanction and determine an inquiry into the right of a municipal corporation to transgress mandatory prohibitions, or provisions of its charter, touching the administration of its affairs.

In thus holding, we think it proper to say that courts, in passing upon such matters, ought to do so with great caution and due regard to the legal discretion which the sovereign may have vested in such corporations.

Under the circumstances, a trial on the merits becomes necessary.

It is therefore ordered and decreed that the judgment appealed from be reversed ; and it is now ordered and decreed that the exceptions filed to the petition of plaintiffs be overruled, and that the defendants be ordered to join issue by answer, and that the case be remanded to the lower court, to be further proceeded with according to law, the costs of appeal to be paid by the appellees, and those of the lower court to abide the final result of the case.

No. 9876.

JACK HITE ET AL. VS. HINSEL & TALLIEU ET ALS.

The Supreme Court cannot and will not exercise jurisdiction in all cases not excepted by the Constitution, unless it appears affirmatively from the pleadings that the matter in dispute involves an amount exceeding two thousand dollars.

The burden of proof is not on the appellee to show want of jurisdiction, but on the appellant to prove the existence of jurisdiction, as defined in the Constitution.

39 113
52 70780 113
108 10839 113
116 71839 113
124 1071

Hite et al. vs. Hinsel & Tallieu et als.

In an action looking to the fixing of boundary lines, it is incumbent on the appellant to show that an amount is therein contested exceeding two thousand dollars, in order to maintain his appeal here.

A PPEAL from the Twentieth District Court, Parish of Assumption.
Beattie, J.

W. E. Howell and Walter Guion, for Plaintiffs and Appellants.

O'Sullivan & Blake, for Defendants and Appellees:

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs in an action to settle boundary lines between their lands and those of neighboring owners, are appellants from a judgment dismissing their suit on an exception of misjoinder of parties.

Appellees suggest our want of jurisdiction in the premises on the ground that the amount in dispute, if any is at all disclosed in the pleadings, is far below the lower limit of our jurisdiction.

It appears from the petition, that a former plantation, having been subdivided and parceled out, is now owned in parcels by a large number of different owners, among whom are the parties to this suit, and that the respective owners have been in possession since the date of their respective purchases, in accordance with a map or plan made in 1871, by a competent surveyor.

Now, plaintiffs, alleging that the metes and bounds of said lots having since become obliterated, and being no longer visible, bring this action for the purpose of settling said lines by some legally licensed surveyor, under the appointment and control of the court.

No moneyed demand is contained in the petition, no suggestion is even made of a possibly contested line between any of the various owners of the twenty-five lots into which the original plantation was subdivided, or of any demands by any of the owners for more land than he now possesses.

The pleadings, therefore, contain no allegation or averment of any matter in dispute, on which a calculation of a pecuniary contest can possibly be based. Hence, we must conclude that the ground on which we can exercise jurisdiction is not apparent.

We have more than once said that in a boundary action the real amount in dispute was the value of the land contested, or included between the contested lines. *Lombard vs. Belanger*, 35 Ann. 311; *State ex rel. Levet vs. Lapeyrollerie*, 38 Ann. 264.

But in this case there are no lands in dispute, and even no lines contested.

In the *Lombard* case, we intimated, and it can be easily understood,

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that the value of the lands included between the contested lines can be materially affected, and greatly increased by the changes which the establishment of new lines could or might require in the nature of the removal of buildings or fences, or the change of ditches or canals, but no such element enters in this case, where no possible contest about lines is even intimated or suggested in the petition.

We are referred to an affidavit made by plaintiffs, who therein state that their pecuniary interest in the controversy exceeds two thousand dollars.

But this is merely their opinion or appreciation of remote contingencies, and it finds no support whatever in any of the allegations or averments contained in their petition.

We can but repeat here what we have previously said touching a similar contention :

" But no allegation and no affidavit can create an appealable amount of interest in a litigation which, from its very nature and essence, presents an issue involving no pecuniary loss to the parties in the suit." State ex rel. Police Jury vs. Miscal, 34 Ann. 834 ; Buddig vs. Baldwin, 38 Ann. 394.

The jurisdiction of this court is defined by the Constitution, and under its direction the court cannot and will not assume jurisdiction unless the same appears affirmatively from the pleadings.

It is therefore ordered that this appeal be dismissed.

No. 9628.

CHARLES H. REED VS. HIS CREDITORS.

1. In case property subject to liens, privileges and mortgages in favor of the State for taxes, has been surrendered and sold by the insolvent, and said liens, privileges and mortgages canceled by judgment of court, and the same referred to the proceeds, the tax collector has authority to direct claim for the proceeds, and to assert it judicially, if not allowed otherwise.
 2. A tax collector has the right and capacity to stand in judgment in injunction suits, and even to institute suits, in the name of the State, *whenever the taxes cannot be collected otherwise*, or when it is evident a seizure would occasion an injunction, or other unnecessary delay.
 3. The provisions of the Civil Code under the title of prescription do not apply to the limitation prescribed by statute in respect to the collection of the revenue.
- Laws fixing the term within which *actions* must be brought upon *pecuniary* obligations, do not affect the rights of the State, unless she, in terms, includes herself.
- Revenue laws are *sui generis*, and are not to be assimilated to those on any other subject.
- State ex rel. Jackson vs. Recorder. 34 Ann. 178, and Davidson vs. Lindoff, 36 Ann. 765, affirmed.

39	115
46	608
39	115
50	42
51	977
90	115
162	2049
89	115
111	241

 Reed vs. Creditors.

4. Tax statutes have no retrospective effect, or operation unless this purpose is announced specifically in the act.
5. The imprescriptibility of city taxes assessed prior to 1877, as recognized in *Davidson vs. Lindoff*, is also applicable to State taxes assessed during the same year.
6. Taxes assessed under the revenue law of 1877 are barred by the lapse of three years; and the lien and privilege securing same cannot, therefore, be enforced against the property assessed in the hands of third persons.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

M. J. Cunningham, Attorney General, and *James Moise*, for the State of Louisiana, Opponent and Appellee:

 A.

1. Sections 37 and 38, of Act 42 of 1871, unambiguously make tax liens and privileges imprescriptible.
2. The provisions of this law, touching the imprescriptibility of tax liens and privileges created under it, have never been repealed.
3. Section 38 of the act is retroactive, in the sense that it affects the taxes levied under former Revenue Acts, and this *quasi* retrospective operation is one of the objects of the act, expressed in its title.
4. The Revenue Acts subsequent to the Act of 1871 are prospective in their operation. The prescriptions fixed by them and their repealing clauses refer to the future. There is no retroactive operation announced as objects of the acts in any of their titles. *Davidson vs. Lindop*, 36 Ann. 765.
5. The intent to adopt a statute, retroactive in its operation, must appear in clear and unambiguous language. *Poydras Asylum case*, 33 Ann. 850; *Wade Retroactive Laws*, §§ 34, 35, 36.
6. Revenue laws are in no sense retrospective: they always provide for the future. 13 Ann. 268; *Trellman vs. Tax Collector*, 21 Ann. 104; *Municipality vs. Blake*, 10 Ann. 745.
7. The Revenue Acts are a series of supersessions; the collection of the taxes being regulated by each act under which the taxes are levied respectively.

B.

1. It is impossible to compress every principle of law in our Code. *Martin vs. Jennings*, 10 Ann. 553.
2. The articles of the Codes are not applicable to any issues arising under the Revenue Acts, for the reasons following:
Firstly. The latter are subsequent in the date of their adoption. C. C. 23. *Jus posterior derogat priori.*
Secondly (a). The articles of the Code and the Revenue Acts belong, respectively, to two distinct classes of laws, viz: the public law (*jus publicum*) and the private law (*jus privatum*).
 - b. The public law comprehends these rules of law which relate to the Constitution and Government of the State—that is, the relation of the highest power to the people.
 - c. The private law comprehends those rules of law which pertain to the legal relations of the people among themselves. *Dropsie's Mackeldy*, Div. I, § 8; *Justinian* 1, 1, 1, § 4; *Domat*, Vol. 1, Chap. xi, secs. 40, 41, 44.
 - d. In enacting her private law, the State imposes no restrictions upon herself. It operates only upon the citizen; the sovereign is beyond its domain.
 - e. Hence, Articles 3369, 3521 and 3544 of the Civil Code, as well as all other Articles

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on the subject of registry, privileges, mortgages and prescription, do not apply to the State, nor to any matters arising under the public laws.

Thirdly. Organized government is a social necessity, with respect to all the objects necessary to its vitality and preservation; the State must be sovereign. Therefore, if held subject to the articles of the Codes, many rights therein conferred would involve the power of her own destruction. Such an element of weakness in the system was never contemplated by its founders.

Fourthly. Because of their conflicts and differences. They are neither co-ordinate nor co-extensive; the intent of the law-maker being that both should be operative, but in their respective spheres. These conflicts and differences are:

- a. Prescription under Article 3457 applies not to taxes; they are not debts, but forced contributions. 26 Ann. 697; 7 Ann. 194; Cooley on Taxation, p. 13; 28 Ann. 836; Cooley Const., sec. 593; Blackwell, 1; Desty on Taxation, 7; 20 Cal. 318.
- b. In lieu of petition and citation, as required by the Code of Practice, constructive service by advertisement is the method substituted by the revenue laws. 10 Ann. 764, 767; 11 Ann. 338; Bond vs. Hiestand, 20 Ann. 140.
- c. Tax mortgages are not recognized by the Code. They are neither judicial, conventional nor legal mortgages as defined by the Code. They are excluded in unequivocal terms by Article 3312 (C. C. 3314 to 3320, inclusive).
- d. In the recordation of tax mortgages, the rules of the Code are either ignored or violated in every formality. In no one particular are tax inscriptions subject to these private laws.
- e. The revenue laws do not provide for the reinscription of tax privileges, liens and mortgages. Hence, reinscription was never contemplated.

C.

1. The relationship of sovereign to subject in the State of Louisiana is precisely the same as that relationship is in every other State of the American Union and in the government of the United States.
2. As this relationship is based upon principles forming a part of a pre-existing system, antedating the organization of our government, which system is the basis of our political structure, the relationship between citizen and State must be taken and understood according to those principles.
3. Our Constitution and public laws define this relationship, and assume the continued existence of the principles upon which it is based. These principles are to be found in the Common Law.
4. Our private law is interpreted by the rules of the Civil Law. Our public laws by the rules of Common or English Law.
5. The doctrine of *nullum tempus occurrit regi* is as much a part of our system as, that taxation and representation are inseparable, that as a right we enjoy the freedom of speech and the liberty of the press, and that local self-government is an essential element in our political organisation.

D.

1. Prescription cannot be pleaded against the State unless the statute clearly indicates that that it may. *Linsley vs. Miller*, 6 Peters, 666; *State vs. Arledge*, 2 Bailly (S. C.), 401; 2 Overt. (Tenn.), 353; 12 Johns (N. Y.), 227; 4 Vt., 215; 5 Mass., 522, 528; 4 Hen. & M. (Va.), 57; 16 Serg. & R. (Pa.), 245; 10 Id., 334; 1 Watts (Pa.), 54; 6 Ohio, 336; 16 Ala. 239; 6 Pa. St., 136; Id., 298; 2 Ga. 143; 3 Pa. St., 157; 19 Mo., 607; 4 S. B. Mon. (Ky.), 516; 23 Miss., 500; 28 Id., 753; 10 Pa. St., 466; 33 Id., 455; 5 Miss. (4 How.), 13; 1 Gill & J. (Md.), 373; 9 Miss. (1 Smed. & M.), 179; 7 Mo., 194; 3 Brev. (S. C.), 254; 8 Yerg. (Tenn.); 6 Port. (Ala.), 84; 11 Gratt. (Va.), 572; 4 Har. (Del.), 108; 71 Mo., 519; *Kirchheimer vs. R. R. Co.*, 67 Ga. 760; *Glase vs. R. R. Co.*, 67 Ga. 761; 16 Fed. Rep., 350; 16 Ohio, 34; 9 Miss. (1 Smed. & M.), 179; 11 Gratt. (Va.), 572; *Ware vs. Green*, 37 Ala. 494; Ala. Sel.

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Cas., 383; State vs. Pratte, 8 Mo. 286; 2 Ill. (1 Scan.), 106; 4 B. & C., 138; 6 D. & R. 188; 34 Ann. 1011.

E.

1. The legislative intent not to abandon tax debts due prior to December 31st, 1879, is made manifest by the constitutional ordinance and the many statutes passed for the relief of delinquent taxpayers wherein all past taxes are recognized as due. Ordinance for the relief of delinquent taxpayers; Constitution of 1879; Act 37 of 1877; No. 9 of 1878; No. 49 of 1880; No. 126 of 1880; No. 100 of 1880; No. 96 of 1882; No. 82 of 1884; (No. 93 of 1880 repealed by No. 29 of 1882.)
2. The reliefs granted are from payment of costs, penalties, interest, etc., the right of redemption in case of forfeitures, and the privilege of paying taxes in certain warrants. Delinquents are nowhere released from the imprescriptibility of tax inscriptions fixed in the Act of 1871: on the contrary, the delinquent ordinance of the Constitution appropriates the funds paid into the Treasury on account of these taxes to the payment of the "Baby Bonds."
3. It is a sound rule of construction, that when one species of relief is omitted the intent was not to grant such relief. Repeals by implication are not favored by law. C. C. 23, 8; Bond vs. Hiestand, 20 Ann. 140.
4. However absolute the right of the individual may be, it is still in the nature of that right that it must bear a portion of the public burdens and that portion must be determined by the Legislature. 4 Peters, 514; Disty on Taxation, 11.
5. The taxpayer must look to the legislative department of the government for relief when the imprescriptibility of taxes or tax liens are claimed to be oppressive.
6. Such an interpretation should be put upon the laws as will uphold them and give effect to the legislative intent. Cooley on Const. Lim., p. 70. No article of the Civil Code should, therefore, be held to nullify and abrogate the unambiguous legislative declaration in the Revenue Act of 1871, providing for the absolute imperishability of tax liens and privileges.
7. Prescription is sometimes applicable to the "person," sometimes to the "thing." It runs not against a minor, yet the promissory note held by him is prescribed. Whether it does or does not run against the State is a distinct proposition from the question as to whether or not it runs against a tax or a tax privilege.

F.

1. The laws in the "Recopilacion of the Indies," making the Spanish Crown in certain cases amenable to the laws of prescription, are special enactments. 11 Martin, 210; 9 Rob. 287; White's Recopilacion, Book IV, Title II, laws 26, 17; Title III, law 47.
2. As the Crown is specially mentioned in these laws, it cannot be said that she is amenable to the general laws of prescription.
3. There is no analogy between Article C. C. 3521 and the prescription laws of the Recopilacion. The former is a general and the latter are special laws.
4. Article 3521 of our Civil Code is taken *verbatim et literatim* from Article 2251 of the Code Napoleon.

G.

1. Article 3521 of the Civil Code was not intended to provide for the persons who shall be subject and amenable to or governed by the laws of prescription, but for the causes which shall suspend prescription.
2. It relates to a temporary cessation of the flow of prescription under certain specified conditions. It does not mean that the United States, or the State of Louisiana, shall be subject to the laws of prescription, but in the cases of those who are subject to these laws there shall be no suspension of its operation. When the suspensive conditions are removed the laws are again operative.
3. It is well established, that the running of a statute of limitations may be suspended by causes not mentioned in the statute itself. 10 Wall. 223.

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4. Prescription has been held not to run in the following cases, although there was no exception established by law:
- a. The doctrine of "*contra non valentem*," etc., is not recognized by our Code nor contained in our statutes, yet is a well established rule of law in this State. 20 Ann. 131; 24 Ann. 31; Hennen Prescription (Va.), Nos. 1, 13, 17, 27; 11 Wall., 245; 9 Wall., 688; 12 Wall., 701; 6 Wall., 532; 23 U. S. 26; 11 Wall., 496; Civil Code Strey, Article 2251, note 13; 10 Ann. 553.
 - b. Disability to sue suspends prescription in the case of absentees. 17 Ann. 269; 20 Ann. 407.
 - c. Where a judge could not be sued in his own court, prescription does not run. 7 N. S., 471.
 - d. Prescription does not run against things *hors de commerce* and public rights. 3 N. S. 630; 18 L. 272; 3 N. S. 294; 20 Ann. 228.

W. H. Rogers, City Attorney, for the city of New Orleans, and
Blanc & Butler, for Tax Collector, Opponents and Appellees.

F. C. Zacharie, *amicus curiæ*, on the same side.

B. R. Forman and E. M. Hudson, for Opponents and Appellants.

The opinion of the Court was delivered by

WATKINS, J. In January, 1884, Charles H. Reed, syndic of his own estate, filed a final account and tableau of distribution, on which he stated that the total assets realized by sale of his property were \$8,022.

This he proposed to distribute—

1st—To the auctioneer, notary, in repairs, and insurance....\$	515 00
State taxes, with privilege.....	183 00
City taxes, with privilege	612 50
Attorneys' fees and cost	1,007 20
2d—To Mrs. Hill's mortgage of	10,765 38

According to this account, the debts, charges and taxes enumerated had absorbed all the assets, and nothing remained for distribution among ordinary creditors, a list of which is appended thereto. On this appears State taxes for 1875, 1876 and 1877, aggregating \$450; and city taxes for 1874, 1875, 1876, 1877, 1878 and 1879, aggregating \$1,085—but without interest, cost or privilege, and not entitled to participate in the distribution.

The city of New Orleans opposed the homologation of this account, alleging that there were taxes due her by the syndic for the years 1869 to 1883, inclusive, aggregating \$4,827.20, and that said taxes, with interest, are secured by lien, privilege and mortgage on the property of the insolvent; that many of said taxes are in judgment; and all should have been placed upon said account and paid by preference out of the proceeds of sale—and her prayer is to that effect.

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James D. Houston, State Tax Collector for the Upper District of New Orleans, likewise opposes the homologation of said account and tableau, alleging that taxes are due the State for the years 1869, 1875, 1876, 1877 and 1878, amounting to \$1,313.80, and that same are secured by privilege and mortgage, and are entitled to be paid out of the proceeds of sale by preference over all other claims.

The account and tableau were also opposed by E. M. Vallette, demanding \$35 for compensation for services rendered while provisional syndic; and the Teutonia Insurance Company opposed, demanding \$75 insurance premium due.

I.

The first question we are met with is the exception of Mrs. Hill to the capacity and authority of J. D. Houston, State tax collector, to appear in court and represent the State, and set up a claim to the proceeds of sale in payment of State taxes.

It appears from the evidence that, after sale of the property to Mrs. Hill, the syndic took a rule on the city of New Orleans, the Attorney General, James D. Houston tax collector, Mrs. D. G. Hill, and other persons who are mentioned in the certificate of mortgages annexed, and procured the cancellation and erasure of all the mortgages, privileges and liens therein enumerated, and the remission of same to the proceeds of sale.

In support of his objection, counsel for the syndic cited Article 210 of the Constitution, and *Alexandria vs. Hyman*, 35 Ann. 301.

The answer to them is that in *City of New Orleans vs. Wood*, 37 Ann. 782, this Court held that "Article 210 is not self-operative;" and *Alexandria vs. Hyman* only applies to suits against the taxpayer for the collection of taxes. Here we have quite a different case. The property, once subject to the State taxes claimed, has been disposed of at judicial sale to Mrs. Hill, the mortgage creditor of the insolvent, who is at the same time the tax delinquent. Upon his application, as the syndic of his own estate, he procured the cancellation and reference above mentioned, and filed his final account and omitted therefrom the taxes, which provoked this opposition.

The surrender, judicial sale and judgment of cancellation have placed the property assessed *out of reach* of seizure and sale by the collector. We can perceive no good reason why he is not entitled to make direct claim for the amount due.

In 13 Ann. 497, *The State, through Thomas Askew, State Tax Collector, vs. The Southern Steamship Company*, the Court said: "It appears to us that the right to collect the taxes presupposes a right to

Reed vs. Creditors.

stand in judgment in suits of injunction, and even to *institute* an action in the name of the State *whenever the taxes cannot be otherwise collected*.

"It is true that the law has indicated a more summary proceeding than suit for the collection of the taxes; still, as the sheriff is charged with their collection, for which he is compelled to give bond, we can see no sufficient reason why he should not be permitted to use the name of his principal, in a direct action, instead of seizing property, if it is evident that the seizure will occasion an injunction or other unnecessary delay. * * *

"It does not lie in the mouth of a defendant to question the right to sue when he admits the propriety of the same, by the issue he tenders, and a *denial of the right of the State to recover*." Budd vs. Houston, 36 Ann. 959; United States vs. Lee, 107 U. S. 196; Blackwell on Tax Titles, p. 553.

The exception was properly overruled.

II.

Mrs. Hill further excepts to the alleged appearance of Thos. Duffy, civil sheriff, in opposition of the city, "because he has no right to appear."

The opposition of the city is in *her own name alone*, though it is signed C. F. Buck, city attorney, and Blanc & Butler, "of counsel for civil sheriff."

On the trial of the merits, there was introduced in evidence a contract between the mayor and city council, disclosing some right in the civil sheriff to collect arrearages of delinquent taxes due the city.

But this is not a suit for the enforcement of that contract, in any sense. It does not change the issue, nor, in any way, affect the *status* of the parties litigant.

III.

Mrs. Hill likewise urges as an exception to opponents' demands the prescription of two, three, five and ten years—both in respect to the taxes, and the privileges, liens and mortgages securing same.

The precepts of the Civil Code, under the title of Prescription, in our opinion, bear no relation to the limitation prescribed by statute in respect to the collection of the revenue.

First, because taxes are not debts in the ordinary acceptance of the term, but forced contributions, levied by the sovereign upon the property of the subject for the support and maintenance of government. City of Shreveport vs. Gregg & Ford, 28 Ann. 836; City vs. Davidson, 30 Ann. 541; City vs. Waterworks, 36 Ann. 436; Desty on Taxation, sec. 7; J. A. Morris vs. J. L. Lalaurie, 38 Ann. —, just decided.

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Second, because the Constitution and laws have not provided that *action* shall be brought in the courts for the collection of taxes due the State. *Alexandria vs. Hyman*, 35 Ann. 301.

We do not doubt the correctness of the opinion of the Court, as expressed in *Graham vs. Tignor*, 23 Ann. 570. In that case the Auditor had brought suit on a series of notes defendants had executed for the purchase price of school lands. It was an "*action*" in the sense of R. C. C. 3540.

The State, in that case, occupied the position of an ordinary suitor. In this case the State appears through the tax collector (who is represented in this Court by the Attorney General) for the sole purpose of taking from the tax delinquent—an insolvent person—the taxes due the State; and out of a fund created by *the insolvent's own act*, assented to by his mortgagee, who purchased the property at judicial sale.

Clearly, the right of action by the State and city *only arose* when the judgment of the court was rendered requiring the cancellation of the privileges and mortgages securing their taxes, and their reference to the proceeds of sale.

The prescription urged here is against "*the claim*" of the State and city. We understand by this that it is statutory, and predicated upon the theory that, by the *inaction* and failure of the officers of the State and city to *timely* enforce the collection of the taxes, the right had lapsed.

We do not understand the *gravamen* of the opinion of the Court in the Succession of Zachary, 30 Ann. 1262, to favor that theory. It goes no further than *Graham vs. Tignor*, which it approves.

It says: "The corporation of the city of New Orleans, as the State, is a body politic and, in law, an intellectual person; and, as it may acquire and be released by prescription, there is no reason it should be excepted from its effects, *when it appears in court and claims as a creditor*. In this instance its action is barred by the lapse of ten years."

That was a suit for city taxes, which had not been sued to judgment as they have in this case.

But we think the concurring opinion of Chief Justice Manning more correct, and prefer to follow it.

He said: "I concur in the decree in this case, but I do not wish to be understood as assenting to the doctrine that general laws regulating prescription affect the rights of the State. The State is sovereign, and when she enacts laws fixing the time within which *actions* must be brought upon *pecuniary* obligations, or for the establishment of the rights of property, she is legislating for her citizens and is not impos-

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ing restrictions upon herself, and such laws *do not affect her own rights, unless she, in terms, includes herself within their operation.*"

Laws appertaining to prescription are *stricti juris*, and when sought to be applied to the State are *strictissime jure*.

At most, they constitute a bar to the assertion of rights judicially. They do not operate *in pais*. They are neither self-acting nor self-enforcing.

Prescription proceeds upon the theory that one, in whose favor a right once existed, has lost *judicial* recourse for its enforcement by reason of his own neglect, for such a length of time, that it would be against equity to permit its assertion.

Such an equity cannot arise in favor of the subject, as against the sovereign, by reason of the failure of her officers to perform their duties. Certainly not, unless the Legislature has so declared in unmistakable terms.

In *State vs. Viator*, 37 Ann. 735, this Court said: "The revenue laws hold tax collectors to a very rigid accountability, and on the other hand give him exceptional facilities for collecting.

"They are *qui generis*, and are not to be assimilated to those on any other subject."

The statement of facts upon which our opinion is predicated discloses that there are no "current taxes" for the years since the adoption of the Constitution of 1879, involved. Only those denominated "back taxes," or "delinquent taxes," and such as come within the province of the ordinance for the relief of delinquent taxpayers are involved. Hence, there arises no question pertaining to the proper construction of the Constitution, or the laws since enacted pursuant thereto.

The Constitution, and the ordinance for the relief of delinquents, dis-severed "back taxes" from "current taxes." They did not operate a repeal of prior revenue laws; but same were thereby most distinctly left in full force for, at least, all purposes of collecting the taxes that had been assessed under them.

This Court had occasion to place an interpretation upon one feature of this question in *The State ex rel. Mrs. Jackson vs. The Recorder*, 34 Ann. 178, in which these principles were announced, viz:

1st That "under the express terms of Act 68 of 1870, and Act 42 of 1871," taxes were secured by a mortgage as well as a lien and privilege.

2d. That Act 96 of 1877 did not affect the mortgages by which they were secured.

3d. That Act 77 of 1880, which provides that "all tax mortgages and tax privileges shall be prescribed by three years from the filing of

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the tax rolls," has "no application to either privileges or mortgages for *pre-existing* taxes."

In the more recent case of Davidson vs. Lindoff, 36 Ann. 765, Jackson vs. Recorder was affirmed.

In that case, city taxes for the years 1871 to 1879, inclusive, were involved. The Court say: "Section 20 of the city charter of 1879," (1869 was clearly intended,) "provided 'that the taxes assessed and levied by virtue of this act * * * are hereby declared a lien and privilege upon said property, * * * and said lien and privilege shall exist in favor of the city of New Orleans * * * until the same shall be fully paid; and same shall be paid in preference to all mortgages, or other incumbrances, other than taxes due the State.' Under this law the tax privileges of the city of New Orleans were *practically imprescriptible*. It remained unaffected by any subsequent legislation until Act 96 of 1877. * * *

"But, clearly, privileges existing for *prior* taxes are entirely outside of the language and meaning of the law.

"Conceding then that the law applies to taxes of the city of New Orleans, after its passage, it is, nevertheless, merely a statute of prescription, *subject to interruption* in the modes prescribed by law, and applicable only *as a defense in bar of action and judgment*.

"But here we find that, in every case, the city has sued and recovered judgment, with the recognition of the lien and privilege which had been recorded in the mode prescribed by law."

This Court has repeatedly held that tax statutes have no retrospective operation, unless this purpose is specifically declared therein. 33 Ann. 39, City vs. Virgnoie; 33 Ann. 258, Succession of Dupuy; 31 Ann. 781, City vs. R. W. L.; 29 Ann. 416, New Orleans vs. Day, 33 Ann. 858, City vs. Poydras Orphan Asylum.

These taxes are thus removed from the operation of those statutes.

The opinion in Davidson vs. Lindoff is conclusive as to the entire controversy, so far as it appertains to city taxes, all of which are evidenced by tax bills, in due form, and judgments regularly pronounced and recorded.

In respect to the State taxes, we find that the excerpt from the city charter, above quoted, is in very nearly the exact language of Section 37 of Act 42 of 1871, and Section 36 of Act 114 of 1869, and the opinion in Davidson vs. Lindoff is precisely applicable in all respects.

But, inasmuch as the taxes asserted in the tax collector's opposition are only those of 1869, 1875, 1876, 1877 and 1878, those only of the last

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two years are prescriptible under Act 96 of 1877; but, as we have seen, the mortgage securing them is unaffected by it.

In addition to this, we find the State taxes of 1875, 1876 and 1877, and city taxes of 1874, 1875, 1876, 1877, 1878 and 1879—without privilege or mortgage—entered on the syndic's account, on the list of ordinary debts; and this was not opposed by Mrs. Hill, and the account was duly homologated so far as not opposed. That is a clear and unmistakable acknowledgment of the liability of the insolvent for them.

The certificate of mortgages shows the timely inscription of the assessments in the book of mortgages, so as to perfectly preserve their effect against third persons.

The pleas of prescription were properly rejected.

ON THE MERITS.

In respect to city taxes, we have only to say that we regard the judgments in favor of the city as conclusive. They formed *res judicata* with respect to Reed prior to his surrender; and Mrs. Hill made no answer or appearance of any kind, except for the purposes of her exceptions; and she is without any standing in court to control them.

In respect to the State taxes, the syndic's acknowledgment of those of 1875, 1876 and 1877 is conclusive.

There is in the record no sufficient proof to establish the taxes of 1869. They amount to \$252, and must be rejected. But the taxes of 1878 are fully proven by the assessment roll of that year, which corresponds precisely with the demand on tax collector's opposition.

In respect to the complaint of the syndic that the assessments are not sufficiently accurate in respect to the description of the property for the liens and mortgages to attach to them, to say the least, it comes with poor grace from a citizen who has, for so many years, defaulted in the payment of his taxes. But he is completely estopped from urging such an objection by reason of his proceeding by rule to procure a judgment coercing the cancellation of the privileges and mortgages in question, and their reference to the proceeds of sale.

The certificate of mortgages is annexed thereto, and the judgment making the rule absolute refers to the mortgages and privileges that are to be cancelled as those "recorded against the *following described* property"—giving the description.

There is no merit in the defense.

It is therefore ordered, adjudged and decreed that the judgment of the court *a qua* be amended so as to reject and disallow the State taxes

Reed vs. Creditors.

of 1869, \$252; and as thus amended, that the same be affirmed—one half the cost of appeal to be taxed against J. D. Houston, tax collector, and one-half against the syndic and other appellants.

Judgment amended and affirmed.

Poché, J. I concur in the decree.

ON APPLICATION FOR REHEARING.

The appellant, Mrs. Sarah H. Hill, *alone*, makes this application; though she was joined in her appeal by the syndic.

She complains that our opinion treats this as a contest made by the insolvent, whereas it is between her and the State and city, touching the rank of their liens and privileges.

The facts of the case are: That the tax delinquent, as syndic of his own estate, procured a sale of his property, on which Mrs. Hill held a first mortgage, for a large sum, and, at the sale, she became the purchaser. Soon after, the syndic proceeded by rule on the certificate of mortgages, and, contradictorily with them, obtained the cancellation of all liens and mortgages, recorded against the *identical* property she purchased, and their reference to the proceeds of sale.

The object of that proceeding was manifestly for the purpose of disencumbering her property, and to which her assent was given.

The only question with which we have now to deal is the *rank* of the liens affecting those proceeds.

The insolvent, as syndic, filed an account and tableau of distribution of same, and the appellant was thereon placed as a first mortgage creditor.

The taxes of 1880 and subsequent years were allowed, as being entitled to participate in the distribution; but those of years previous to 1880 were placed on a list appended to the account, without any lien or privilege.

This account and tableau were opposed by the State and city, on the grounds stated in the opinion.

To these oppositions Mrs. Hill tendered several exceptions, and, among others, a plea of prescription.

On these issues the oppositions were tried, and decided against Mrs. Hill and the syndic.

It seems clear that Mrs. Hill is as much bound by the judgment as the syndic was. The amount of the taxes was tacitly at issue, and adjudged, quite as her lien and mortgage on the proceeds.

Railway Company vs. Mayor and Council.

The acknowledgment of the syndic on his account, to which Mrs. Reid had made herself a party, by plea and exception, resisting the demands of opponents to it, became conclusive against all parties, when final judgment was rendered on the issues thus joined.

She urges specific objection to the effect that the taxes of 1880 having been allowed on the account, the judgment affirmed, virtually allowed them a second time. Such was not the interpretation we placed on the decree. In our opinion it merely revised and restated the account, and increased this item, by the addition of costs, only.

There are other objections urged against the opinion, but the points covered by them were sufficiently discussed in the original opinion, and their argument need not be repeated here.

But, on reflection and re-examination of the law, we have become satisfied that the lien of the State for the taxes of 1878 has lapsed, and have become barred by the limitation of three years, provided by Section 36 of Act 96 of 1877, and that the judgment appealed from should be reduced by the sum of \$146 52 on that account—but that a rehearing is unnecessary in order that this reduction be made.

But, in so deciding, we are not to be understood as reversing, or even modifying the opinion of this Court, as expressed in *State ex rel. Jackson vs. Recorder*, 34 Ann. 178, and others cited in opinion. On the contrary, we expressly affirm them.

It is, therefore, ordered, adjudged and decreed that the judgment of the District Court, and of this Court, be and the same are hereby amended and reduced by the sum of \$146 52, and, as thus amended, our original opinion remain undisturbed.

No. 9579.

NEW ORLEANS ELEVATED RAILWAY COMPANY VS. MAYOR AND COUNCIL
OF NEW ORLEANS.

An injunction *in limine* does not lie to prevent the mayor of a municipal corporation from signing an ordinance passed by the council, purporting to repeal a previous ordinance and contract under it.

Non constat, that the mayor will sign the ordinance, or that the council will pass it over his veto if returned unsigned, or that it will become executory.

It is not until after such ordinance has been signed, or become executory, that its validity can be judicially contested and determined.

Otherwise, the court would be exposed to adjudicate on the legality of an ordinance merely in *embryo*, which may never be signed or acquire vitality.

Courts of justice have enough to do in dealing with real, existing and actual wrongs, without anticipating and combatting hypothetical evils of the future which may or not arise.

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Railway Company vs. Mayor and Council.

A decree dissolving an injunction *in limine*, issued to prevent the signature by a mayor of an ordinance passed by the council, and a judgment sustaining an exception of "no cause of action," under insufficient averments of the petition, are correct and will not be disturbed on appeal.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Blanc & Butler, for Plaintiff and Appellant:

A.

1. Where an injunction against the mayor and the council of the city restrains the signing and promulgation of an ordinance and also the enforcement of it, it may be dissolved so far as it restrains the signing and promulgation, and maintained so far as it prevents the enforcement or operation of the ordinance.
2. If an appeal be taken from such a judgment and not joined in by the city, the judgment is final so far as it maintains the injunction to prevent the operation and enforcement of the ordinance.
3. Where plaintiffs set forth a contract valid and binding, and their fulfillment thereof, and show further that one of the contracting parties has refused to comply with its obligations, and without a hearing or discussion of any kind has attempted to forfeit and annul the contract, in violation of the Constitutions of the State and United States, a cause of action is set forth.
4. The contract naming a committee of a council to see that the lines and the grades for the structure, and that the position of the work in the route, be correct, has no power to change the route itself, or to make a substantial modification of the franchise itself. *Dillon's Mun. Corp.*, p. 477, sec. 483; 5 Peters, 1.
5. The grant of the right of way through St. Charles street, with the naming of a committee to fix the lines, grades and positions of the structure, does not authorize such a committee to change the right of way from the street named to another. So, where the franchise is for a right of way along the river front, and the whole purpose of the enterprise and the object of the grant is to provide an elevated structure on the river's edge or front, it is not in the power of the committee appointed to supervise and see that the structure is erected and placed in the proper position and with proper lines and grades, to change the right of way from the front to the back, or from the indicated route to another which is entirely destructive of the whole purpose and intent of the contract.
6. Where the approval of a council and its committee is required for the plans, surveys, grades and positions in the indicated route, it is not possible for the company, under their contract, to do any more work after the completion of said plans and surveys and the submission to the council and committee, until the committee and council shall have approved.

B.

7. In matters of contract the city of New Orleans is to be regarded as an individual, and is controlled by the same laws, the same principles of equity, the same articles of the Constitution. *State of Louisiana ex rel. Bermudez vs. Mayor of New Orleans*, 20 Ann. 173, 174; *Rice vs. Schmidt*, 11 La. 72.
8. The city of New Orleans is not a co-ordinate department of the government, it is not the legislature, nor entitled to the immunity from judicial control allowed co-ordinate departments. *Arnoult vs. New Orleans*, 11 Ann. 54; *Spring Valley Waterworks Company Case*, Vol. 2, p. 25; 5 Saw. 217; 19 U. S. 433; 9 N. Y. 270.
9. The only method to destroy a title or franchise is by forfeiture for non-user or misuser, judicially ascertained. The city council, indeed, the legislature itself, have no power to forfeit or annul their contracts, stating that the party had not complied with them.

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That is a judicial function, to be exercised only after a hearing and proper trial. *Benson vs. Mayor of New York*, 10 Barb. 224; *Carondelet Canal and Navigation Company Case*, 36 N. Y. p. —.

10. The city of New Orleans is a corporation of very limited power. It has no legislative (so-called) powers, except as clearly given by its charter. The moment it goes beyond these special grants of authority, the council become a mob, and are not entitled to injure citizens, impair rights, slander titles, or do any harm in defiance of judicial control. *Dillon's Municipal Corporations*, secs. 18, 19, and note; 43 Iowa, 48.
11. The assertion that a city council, sitting in the form of a legislature, acting in the form of an assembly, cannot be enjoined from passing an ordinance, however illegal, corrupt or wrong, is not only not good law, but is an absurdity not sustained by any decision known to counsel.
12. The true doctrine is, that courts of equity may enjoin the passage of an ordinance which is entirely beyond the power and authority of the council to pass. *Spring Valley Water-works Company Case*; *American and English Corporation Cases*, Vol. 2, p. 25; *People vs. Sturtevant*, 9 N. Y. 270.
13. If the passage of an illegal ordinance cannot produce the least effect, and require some act to be done under it before anyone can be effected thereby, the courts will not generally arrest the passage, but will wait until some step is taken under it.
14. But the passage of the ordinance itself will be arrested by injunction, when the mere act of passage, as in the case of an attempted repeal of rights, will work irreparable injury.
15. It is obvious that the repeal of an important franchise granted by the council will so overshadow and cast doubt upon such franchise as to make it impossible to procure capital or exercise any rights upon said franchise. Men will not place their money in matters involved in law suits or at the time in dispute.
16. Were it true that a city council could not be enjoined in the passage of any kind of an ordinance, because the city council is a legislature, the same doctrine would prevent the courts from commanding such a legislature to do anything. But no one denies that the courts have a right to command the city legislature to take their legislative seats and pass ordinances to carry out their contracts and perform their obligations. There can be no good reason why the passage of an utterly illegal and wrongful act should not be enjoined, when the execution of the same may be arrested by injunction. The same grounds which would permit an injunction give power to prevent the passage.
17. Equity favors prevention. It is better to prevent a threatened wrong than to await the injury before applying a remedy. *Hugh on Injunctions*, §§ 21, 147, 269; 49 Barb. 57; 32 Barb. 102, 104; *Story's Equity*, 907; 14 N. Y. 506; 17 Barb. 445; 10 Barb. 226.

W. H. Rogers, City Attorney, for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff company appeals from two judgments, one an interlocutory decree, dissolving in part an injunction issued *in limine*; another, a final judgment sustaining an exception of *no cause of action*, dismissing the suit.

The fundamental averments are: That the Council of the city of New Orleans has passed an ordinance, the object of which is to *repeal* another ordinance, under the provisions of which a valid contract was entered into between the plaintiff company and the corporation; that

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the ordinance was sent to the Mayor for his signature ; that the passage, signature and promulgation of the ordinance are unfair, unjust, utterly and outrageously unlawful, beyond the power of the city, and a violation of the previous ordinance and the contract thereunder; an attempt to divest vested rights and to impair the obligations of a contract, contrary to the Federal and State Constitutions.

The prayer is, that the Mayor and Councilmen be enjoined from signing, promulgating, recording, enforcing or giving effect to, the ordinance purporting to *repeal* the anterior ordinance, until the further order of the court; and that, after due proceedings, the injunction be perpetuated, and the attempted repeal and ordinance or enactment be declared null and void.

On those averments, a preliminary injunction issued, which, however, on a rule to dissolve, was set aside, as far as it restrains the passing, signing or promulgation of the ordinance or resolution complained of.

An exception of "no cause of action" was subsequently filed and sustained, and the suit was dismissed with costs.

We have carefully considered the authorities referred to by plaintiff's counsel, but do not propose to contest the correctness of the rulings relied on. It suffices to say, that, in none of the cases does it appear that a suit kindred to the present one, was instituted and passed upon.

There can be no possible dispute that, where a municipal corporation has passed a valid ordinance and under it has entered into a valid contract, subsequently carried out, the Council has no right to pass an ordinance repealing the ordinance and the contract, on false grounds; that such ordinance would be absolutely null, and that a court of justice would so declare.

It does not, however, follow that, where the ordinance was simply passed, and is in the hands of the corporation executive officer, the Mayor, the court has the right to issue an injunction *in limine* to prevent that official from considering the ordinance and approving it by his signature, in the exercise of his discretion, should he deem proper to do so.

The court would have a right to presume that the Mayor will do his duty, and that, if he finds that the submitted ordinance is *ultra vires*, he will *veto* it, and that the Council itself will yield and sustain the *veto*, and thus recall the ordinance. *Non constat* that this will not be the course of the Mayor and of the Council.

But, were it true that the Mayor would sign and promulgate the or-

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dinance, unless impeded by the court, such signature and promulgation of the ordinance *proprio vigore* could not, and therefore would not, make the repeal effectual, if such action was prohibited by law, as *ultra vires*.

The plaintiff claims that, under the provisions of the ordinance (No. 215, Council Series), adopted on March 20, 1883, giving, granting and establishing the franchise and right of way for an elevated railway along the river front, from the lower, or near the lower limits, to the upper boundary of the city of New Orleans, which ordinance conferred rights and imposed obligations—the plaintiff company has entered into a contract with the city on the 28th of April following, (1883), which is binding and indissoluble.

It is further alleged that, in furtherance of said ordinance and contract, the company has fully carried out all such of its engagements as were susceptible of execution, and that, without a hearing, and while certain matters were pending before a committee, the Council has undertaken illegally to pass the repealing ordinance complained of, and already mentioned.

It is apparent that the petition discloses no cause of action for an injunction, *in limine*, for the obvious reason that the application is premature.

In the case of *State ex rel. Behan vs. Judge*, 35 Ann. 1075, (1081), in which a preliminary injunction had been issued to prevent the City Council from proceeding to the impeachment of the City Treasurer, the Court held, that the general rule is, that courts cannot impede by preliminary injunction, the usual functions of a municipal corporation; but that this rule is subject to very few exceptions, where, from the nature of the act to be performed, and of the consequent inevitable and irreparable injury to public interest, the proposed action of the corporate body may be reached otherwise by the arm of the judiciary.

In so holding, the court rested its conclusions on good authority. *Dillon on M. C.*, 3d ed., vol. 1, No. 94, vol. 2, No. 908; *High on Injunctions*, Secs. 783, 795; *Slaughterhouse Co. vs. Police Jury*, 32 Ann. 1192; *Harrison vs. New Orleans*, 33 Ann. 222; *Healy vs. Allen*, 38 Ann. —.

The injunction issued *in limine* by the district judge was declared by this court to have been illegally granted, and the judge was prohibited from giving it effect.

In the present instance, the resolution passed does not direct the active or physical performance of any act which may inflict injury on the plaintiff.

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It is not minatory, but merely declaratory that a previous ordinance is repealed, because of breach of the contract under it.

As much as any individual citizen, a municipal corporation has a right to think and to say that a contract, to which it is a party, is a nullity and to repudiate it, as far as practicable.

Such statement, of course, does not of itself, do away with the ordinance, or contract made in furtherance of it, as it is a mere declaration, or expression of opinion, not required by law to be uttered, as a condition precedent to obtain eventual relief and the contract may well stand, notwithstanding it, *provided*, the enunciation be not founded on grounds sufficient to substantiate and justify it.

It is not until after the ordinance shall have been signed by the Mayor, or been passed over his *veto*, or have become final by the lapse of time, that its validity can be judicially contested and determined.

Otherwise the court would be exposed to adjudicate upon the legality of an ordinance merely in *embryo*, which may never be signed, or never become definitive.

As was said, in 29 Ann. 272, and repeated with approbation in 32 Ann. 1196-7:

"Courts of justice have enough to do in dealing with real, existing and present wrongs, without anticipating and combating hypothetical evils of the future, which may or may not arise."

The dissolution of the preliminary injunction and the dismissal of the suit, on the exception, were proper.

Judgments affirmed.

No. 9864.

THE STATE EX REL. JOSEPH A. WALKER AND VALENTINE MERZ VS.
THE JUDGE OF SECTION "A," CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS ET AL.

1. When a party is prosecuted for crime under a law alleged to be unconstitutional, in a case which is unappealable, and where a proper plea setting up the unconstitutionality has been overruled by the judge, a proper case is presented for the exercise of our supervisory jurisdiction in determining whether the judge is exceeding the bounds of judicial power in entertaining a prosecution for a crime not created by law.
2. The Civil District Court for the parish of Orleans has no control, direct or indirect, over the Criminal District Court, and no injunction or order of any kind issued by the former can have effect to curtail, restrain or suspend the jurisdiction of the latter court.
3. If the district attorney, joined as respondent, has violated an injunction of the Civil District Court, to the prejudice of relators, their relief lies not in an appeal to our supervisory jurisdiction, but to the punitive powers of the court which issued the injunction.
4. Act No. 18 of 1886, known as the Sunday law, does not violate either Act 4 of the Con-

39	139
44	90
44	773
44	1103

39	132
45	81

39	139
48	521
48	1373
49	1454

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stitution of the State concerning religious liberty, nor the 14th Amendment to the Constitution of the United States, nor Art. 1 nor Art. 6 of the State Constitution, touching the constitutional protection of "life, liberty and property," and guarantee of "equal protection of the laws."

5. Said act is a valid exercise of the police powers of government, the nature, extent and grounds of which are discussed and expounded, and therefore subject to none of the constitutional inhibitions urged.

A PPLICATION for Certiorari and Prohibition.

Braughn, Buck, Dinkelspiel & Hart for the Relators :

1. The writ of prohibition issues when one court takes jurisdiction of a cause that belongs to another; the writ of certiorari issues in unappealable cases to test the validity of judicial proceedings. C. P. Art. 846 and 855.
2. Civil courts may issue injunctions against the enforcement of penal laws. High on Injunction; 34 Ann 86; 3 Woods, 222.
3. By means of the writ of certiorari, the Supreme Court, in an unappealable case, may pass upon the existence or non-existence, constitutionality or unconstitutionality, of an act of the legislature 30 Ann. 454; 34 Ann. 504; 32 Ann. 719; 37 Ann. 579.
4. Act 18 of 1886 is unconstitutional, because violative of the 14th Amendment of the Constitution of the United States, and of the first, fourth and sixth articles of the Constitution of Louisiana. 33 Ann. 981; 1 Fed. Rep. 461; 11 Rep. 10; 16 Wall. 97.

M. J. Cunningham, Attorney General, for the Respondents.

The opinion of the Court was delivered by

FENNER, J. Relators invoke the exercise of our supervisory jurisdiction through the writs of prohibition and certiorari, for the purpose of restraining the respondent judge and the district attorney of the parish of Orleans from proceeding further in certain criminal prosecutions instituted and pending in the Criminal District Court of said parish, for alleged violations of Act No. 18 of 1886, commonly known as the "Sunday law," and of annulling the proceedings already had in said causes.

The grounds assigned for the relief sought are two-fold, viz :

1st. Because said criminal prosecutions were instituted in, and entertained by, the said Criminal District Court, in violation of an injunction previously issued by Division "A" of the Civil District Court for the parish of Orleans, restraining the Mayor of New Orleans, the Chief of Police, the several recorders of the city, the district attorney, the assistant district attorney and the criminal sheriff for the parish of Orleans from arresting, or instituting proceedings against relators, for any violation of the provisions of said Act No. 18, until the further order of said Civil District Court.

2d. Because said Act No. 18 of 1886, having been passed by the General Assembly in violation of the Constitutions of the United

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States and of the State of Louisiana, is not a valid law, and the alleged violation thereof by relators is not a crime and cannot form the basis of a criminal prosecution against them.

I.

The first question to be determined is whether, conceding the allegations of relators' petition to be true, the case is a proper one for the exercise of our supervisory jurisdiction.

The cases pending in the Criminal District Court against relators under said Act No. 18 of 1886, are for offenses the penalty imposed for which is not of a character to vest this Court with appellate jurisdiction thereof, and no other court is vested with any appellate jurisdiction over said Criminal District Court.

The relators have filed in said court proper pleas *in limine* presenting the foregoing objections to the proceedings which have been heard and overruled by the judge.

It is plain, therefore, that however just be relators' cause, they are absolutely without any legal remedy unless they may find one under our supervisory jurisdiction.

Two propositions appear to our minds sufficiently clear :

1st. If the injunction issued by the Civil District Court had the legal effect to deprive the Criminal District Court of the right to entertain the prosecutions referred to, the latter exceeded the bounds of its jurisdiction in proceeding therewith.

2d. If the law for the violation of which relators are being prosecuted is unconstitutional, then it is not a law and no court can have power or jurisdiction to arraign, try and punish a citizen who is not charged with the violation of law, and such proceedings are null and void.

In *Liversey's case*, 34 Ann. 741, we held, in substance, that where the proceedings of a court were in excess of judicial power they were null and void and would be so held under our supervisory jurisdiction.

In *Carcase's case*, 32 Ann. 719, we took cognizance, under like proceedings, of a complaint that the relator had been prosecuted, tried and convicted under a law which had been repealed by the Constitution of 1879.

Analogous rulings were made in *Jarvo's case*, 37 Ann. 578, and in *Hirsch's case*, 38 Ann., not yet reported. In *Geale's case*, 30 Ann. 454, the court indicated a like opinion on general principles, but refrained from exercising the jurisdiction on account of the special restriction imposed by the Constitution of 1868, confining the power to issue these writs to cases where they were invoked "in aid of its appellate juris-

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diction." This restriction is absent from the present Constitution. State ex rel. City vs. Judge, 32 Ann. 540.

We, therefore, hold that, if relator's allegations were founded in law, in fact they would be entitled to relief at our hands.

II.

What effect had the injunction issued by Division A of the Civil District Court upon the jurisdictional power and authority of the Criminal District Court?

We are bound to hold that it had none. The Criminal District Court derives its jurisdiction exclusively from the Constitution, and is, in no manner, subordinate to, or subject to the control of, the Civil District Court, which is vested with no power of any kind to curtail, extend, suspend or regulate its action in any case.

It is proper to say that the judge of the Civil District Court, who issued this injunction, has not assumed, and never would have thought of assuming, to exercise any such power.

His injunction is not addressed to the Criminal District Court or to the judges thereof. It is addressed to certain other public officers, who are vested with functions, not judicial, in the execution of the criminal laws of the State.

The judge of the Civil District Court is not a party to this application, and we are not called upon to adjudge the validity or regularity of his proceedings.

Conceding their validity, *argumenti gratia*, they do not concern, and are entirely inoperative upon, the respondent judge; and, so far as the district attorney is concerned, if he has violated the injunction addressed to him, the remedy is not found in an appeal to our supervisory jurisdiction, but in a proceeding for contempt before the judge who issued the injunction.

The power assumed by the judge of the Civil District Court is analogous to the jurisdiction exercised by Courts of Equity in enjoining proceedings at law. Such injunctions do not run against the courts of law or their judges, but only against the parties litigant therein. While they may be enforced by punitive measures against parties violating them, it is held that they are inoperative against the courts of law, and are without effect to oust their jurisdiction, restrain their proceedings or avoid their judgments. High on Injunction, §46; Hill on Injunction, C. 6, p. 13.

This ground of relief is, therefore, unfounded.

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III.

Is Act No. 18 of 1886, known as the Sunday law, unconstitutional? Its salient object is to require the closing of all places of business, with exception of certain designated classes, from 12 o'clock on Saturday night until 12 o'clock on Sunday night of each week, and to punish violations thereof by criminal penalties.

We shall now consider the various charges of unconstitutionality brought against the law.

1st. It is charged with violating Art. 4 of the Constitution of the State, which prohibits the passage of any law "respecting the establishment of religion or the free exercise thereof."

We take occasion promptly to say that if the object of this law were to compel the observance of Sunday, as a religious institution, because it is the Christian Sabbath, to be kept holy under the ordinances of the Christian religion, we should not hesitate in declaring it to be violative of the above constitutional prohibition. It would violate equally the religious liberty of the Christian, the Jew and the infidel, none of whom can be compelled by law to comply with any merely religious observance, whether it accords with his faith and conscience or not. With rare exceptions the American authorities concur in this view. *State vs. Bott*, 31 Ann. 663; *State vs. Baum*, 33 Ann. 985; *Corporation vs. Minden*, 36 Ann. 913; *McGatrick vs. Wason*, 4 Ohio, 566; *Com. vs. Has*, 122 Mass., 40; *Com. vs. Specht*, 8 Penn., St., 312; *Com. vs. Nesbit*, 34 id. 398; *Hudson vs. Geary*, 4 R. I., 485; *State vs. R. R.*, 15 W. Va., 362; *Charleston vs. Benjamin*, 2 Stroble, 508; *Johns vs. State*, 78 Ind., 332; *Bohl vs. State*, 3 Tex. App., 683.

The law in question makes no reference to Sunday as a religious holy day, and, indeed, the exceptions expressly made to the general prohibition conclusively show that the statute is not designed to enforce the Christian idea of the Sabbath, or to apply the rules of any religious sect to its observance.

The statute is to be judged precisely as if it had selected for the day of rest any day of the week other than Sunday; and its validity is not to be questioned because, in the exercise of a wise discretion, it has chosen that day which the majority of the inhabitants of the State, under the sanction of their religious faith, already voluntarily observe as a day of rest.

For these reasons we consider that the constitutional provision now under consideration has no application.

2d. It is claimed that the law conflicts with that clause of the Fourteenth Amendment to the Constitution of the United States,

which forbids any State to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

No one who has read the decision of the Supreme Court of the United States in the celebrated Slaughterhouse cases, can, for a moment, doubt that this clause is entirely without application. Fortunately for the preservation of State autonomy and the inestimable right of local self-government, that high tribunal has wisely distinguished the "privileges and immunities" of *citizens of the United States* from those which appertain to *citizens of the State*. To the latter class belong, as it holds, all those fundamental civil rights for the security and establishment of which organized society is instituted, and these remain, with certain exceptions expressly established by the Federal Constitution, subject to the exclusive control and authority of the States free from all Federal restraint. On the other hand, the "privileges and immunities of citizens of the United States" are those which arise out of the nature and essential character of the national government, the provisions of its constitution and the laws and treaties made in pursuance thereof; and these alone are placed under Federal protection by the clause quoted. It declares that a different construction "would transfer the security and protection of all civil rights from the States to the Federal government;" would authorize Congress to "pass laws in advance, limiting and restricting the exercise of legislative power by the States in their most ordinary and usual functions," and would constitute the Supreme Court of the United States "a perpetual censor upon all legislation of the States on the civil rights of their own citizens with authority to nullify such as it did not approve as consistent with those rights. Wherefore the Court said: "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them." Slaughterhouse cases, 16 Wall. 36.

It is needless to say that the privileges and immunities involved under this statute belong to that class which the court characterizes as those of citizens of the State, and therefore are not referred to by this clause of the Fourteenth Amendment.

3d. The other constitutional inhibitions invoked may be grouped and considered together.

They are (1st) the remaining clauses of the Fourteenth Amendment, viz: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws;" (2d) the clause of Art.

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6 of the State Constitution declaring that no person shall be "deprived of life, liberty or property without due process of law;" and (3d) the declaration in Art. 1 of the State Constitution that government's "only legitimate end is to protect citizens in the enjoyment of life, liberty and property. When it assumes other functions it is usurpation and oppression."

All these provisions simply express fundamental principles of American constitutional government, which are embodied or necessarily implied in the constitutions of all the States, and are everywhere recognized and enforced.

It is not essential to discuss them severally, or with too great nicety, for it is universally admitted that, however broadly these principles may be expressed, there exists, *ex necessitate rei*, in every government, the power to impose certain restrictions upon individual rights of "life, liberty and property," which it is not within the meaning and intent of such provisions to prohibit or restrain. Without such power society and government could not exist, or would subserve no useful purpose, the main object of government being to prevent individuals, in the exercise of their own rights, from transgressing the rights of others, and to impose that degree of restraint upon the conduct of each which is necessary to the conservation and promotion of the rights of all.

This is what is known as the police power of government, and it is founded in and properly limited by a just and reasonable application of the principle, "*sic utere tuo ut alienum non ledas*."

As has been said by an eminent judge, "it is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." Definitions of it have been given by Blackstone, by Judge Cooley, by Chief Justice Shaw of Massachusetts, by Chief Justice Redfield of Vermont, by Judge Christiancy of Michigan, and by many other jurists and judges. *Vide* 4 Blackstone Con. 162; Cooley Const. Lim., 572; Com. vs. Alger, 7 Cush. 84; Thorpe vs. Rutland, 27 Vt. 140; People vs. Jackson, 9 Mich. 285.

The most recent writer on the subject, who is disposed to construe this power strictly, after quoting various definitions, uses the following language: "It is to be observed, therefore, that the police power of government, as understood in the constitutional law of the United States, is simply the power to establish provisions for the enforcement of the maxim, *sic utere tuo ut alienum non ledas*. 'This police power of the State (quoting Judge Redfield) extends to the protection of the

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lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State. According to the maxim, *sic utere*, etc., it must of course be within the range of legislative action to define the mode and manner in which every man may so use his own as not to injure others.' Any law which goes beyond that principle, which undertakes to abolish rights the exercise of which does not involve an infringement of the rights of others or to limit the exercise of rights beyond what is necessary for the public welfare and general security, cannot be included in the police power of the government. It is a governmental usurpation." Tiedeman's Limitations of Police Power, p. 4.

We have quoted this passage as an exposition of what we conceive to be the true meaning of the clause quoted above from Art. 1 of our State Constitution and as a sound and conservative statement of the extent of the police power, showing how broad it is, even under the strictest statement.

The same author says: "Where the letter of the Constitution would prohibit police regulations which, by all the principles of constitutional government, have been recognized as beneficent and permissible restrictions upon the individual liberty of action, such regulations will be upheld by the courts, on the ground that the framers of the Constitution could not possibly have intended to deprive the government of so salutary a power, and hence the spirit of the Constitution permits such legislation, although a strict construction of the letter may prohibit." Tiedeman, *Lim. on Police Power*, p. 12; *People vs. Jackson*, 9 Mich. 285.

So universal and long-continued has been this construction of constitutional inhibitions against governmental deprivation of life, liberty and property of citizens, that it may now be considered as written into every constitution.

It is the province of the law-making power to determine primarily what are the proper occasions and subjects for the exercise of this police power; and courts will only interfere with its action when satisfied that the restrictions imposed are not sustained by such considerations for the safety, comfort, health and well-being of society as bring them within the reasonable application of the maxim, *sic utere tuo ut alienum non laedas*, yielding due consideration to the discretion and good faith of a co-ordinate branch of the government, yet taking care that this principle shall not be used as a cloak for unwarrantable interferences with individual rights as secured by the constitution.

There exists a remarkable *consensus* of authority that the establish-

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ment of a compulsory day of rest in each week is a legitimate exercise of the police power.

Such laws have been passed in nearly every State of the Union and their constitutionality has never been successfully questioned in but a single case within our knowledge, that of *ex parte* Newman, 9 Cal. 502; and it was subsequently overruled by the same court in *ex parte* Andrews, 18 Cal. 678. See 40 Ala. 725; 5 Eng. (Ark.) 725; 30 Ark. 131; 19 Cal. 130; 3 Kelley (Geo.) 18; 5 Ind., 112; 33 id. 201; 20 Mo. 214; 2 Md. 310; 7 Gill (Md.) 326; 4 Ired. (N. C.) 400; 8 Gray (Mass.) 488; 2 Met. (Ky.) 3; 69 N. Y. 557; 20 How. Pr. (N. Y.) 76; 33 Barb. (N. Y.) 548; 4 Ohio St. 566; 25 id. 507; 3 Serg. & R. (Penn.) 48; 8 Penn. St. 312; 2 Strobb. (S. C.) 508; 29 Texas 335; 30 id. 524; 3 Texas App. 683; 21 Fed. Rep. 299.

They have likewise received the sanction of eminent text writers. Cooley on Const. Lim. 589, 590, 726; Bishop on Stat. Crimes, 237; 2 Bishop Crim. L. § 950, *et seq.*; 2 Whart. Crim. L. § 1431 *a.*; Tiedeman Lim. on Police Power, p. 175, *et seq.*

The grounds upon which such legislation has been sustained are various; but those which commend themselves to our judgment as most conformable to the principle of police power, are best stated by the Supreme Court of California: "The duty of government comprehends the moral as well as the physical welfare of the State; and, in this instance, it is asserted, on behalf of this law, that the passage of it is essential to the welfare of the people, both moral and physical. It is claimed that, from physical causes, men require respite from intellectual and physical labor, in the proportion of one day's rest in seven; and that a law which enjoins this is not only for the aggregate good of the society, but for the benefit of all the members. It is said that the labor of six days, with this relaxation, is more productive in the long run than the uninterrupted labor of the week. It is said, besides, that this law affords, indirectly, protection against oppression to employes, women, apprentices and servants, and that, but for the law, men would keep open stores and shops, because their neighbors did so, and that, by competition, a sort of compulsion exists to violate the laws of health." *Ex parte* Andrews, 18 Cal. 678.

Mr. Tiedeman develops the same ideas, as follows: "Whatever the metaphysicians or theologians may tell us about free will, in the complex society of the present age, the individual is a free agent to but a limited degree. He is in the main but the creature of circumstances. Those who most need the cessation from labor are unable to take the necessary rest, if the demands of the trade should require their unin-

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interrupted attention to business. And, if the law did not interfere, the feverish, intense desire to acquire wealth, inciting a relentless rivalry and competition, would ultimately prevent, not only the wage-earners, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the instincts of self-preservation by resting periodically from labor. Remove the prohibition of law and this wholesome sanitary regulation would cease to be observed." Tiedeman Lim. on Pol. power, p. 181.

The foregoing considerations are certainly rational and plausible, and they bring the legislation within the distinct purview of the principles underlying and sustaining the proper exercise of the police power. We have considered the objection urged against the law that it operates unjustly against our fellow-citizens of the Jewish faith, who, in obedience to the mandates of their religion, observe Saturday as a day of rest. This objection has been often considered and overruled. 40 Ala. 725; 18 Cal. 678; 19 id. 130; 101 Mass. 30; 122 id. 40; 3 Serg. & R. (Penn.) 48; 8 Penn. St. 312; 2 Strobb. S. C. 508; 15 W. Va. 362.

The law leaves the Jew at entire liberty to observe his own religious Sabbath, but it is not bound to take cognizance of individual religious beliefs as a ground of exemption from the operation of general laws.

Uniformity in the day fixed is essential to the successful execution of the law, which would be rendered much more difficult if a different day of rest were assigned to various classes, besides the inconvenience to the business interests of the community which would result from the partial suspension of trade on several different days.

It only remains to consider the objection urged against the law on the ground of inequality, because of the numerous exceptions contained in the act.

The objection has not the slightest force. The law is not unequal in any constitutional sense. No person in the State is permitted to pursue any of the prohibited callings on Sunday; every person is at liberty to pursue those which are excepted. The same discretion which authorized the Legislature to determine that the public health, welfare and convenience required the adoption of the general rule, equally authorized it to exempt from its operation certain specified callings on the ground that the public welfare and convenience would be more hindered than advanced by the suspension of such callings.

It is not for us to control the law-making power in such a case, or to require it to fit its laws to a procrustean bed of our own construction.

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It is said that, under the clause of the law exempting the keeping open of public and private markets, merchants who deal in all kinds of goods in the public markets will be at liberty to pursue their prohibited avocations while others engaged elsewhere in the same business will be restrained.

It is enough to say that the law does not expressly grant such privilege; and it will be time enough for us to determine whether, under a proper construction of the law, it exists, when a case directly involving the question is presented.

Thus, on correct principles sustained by overwhelming authority, we reach the conclusion that Act No. 18 of 1886, known as the Sunday law, is a legitimate exercise of the police power of the State, not violative of any inhibition contained in the Constitutions of the United States and of the State of Louisiana.

A like conclusion was reached by the respondent judge and sustained by a learned and vigorous opinion.

It is, therefore, ordered, adjudged and decreed that the restraining order herein granted be set aside, and that the application of relators for relief by prohibition and certiorari be denied.

No. 9846.

THE STATE OF LOUISIANA EX REL. THE ATTORNEY GENERAL VS.
HENRY L. LAZARUS, JUDGE OF CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS, DIVISION "E."

Suit instituted under the original jurisdiction of the Supreme Court, by virtue of Article 200 of the Constitution of this State, by the Attorney General, on the information of fifty citizens and tax payers, for the removal of the defendant from office, for non-feasance and mal-feasance, favoritism and oppression in office, gross misconduct and incompetency.

Held by the Court:

- That the charges of mal-feasance and gross misconduct have been fully established against the defendant by the evidence.
- That a district judge has no right or authority whatever to employ experts at the expense of litigants, or of a succession, or of a minor, to examine and report on the pleadings or evidence in any record, when such examination is to be made by the judge himself.
- That the allowance of the fees to such experts made by this defendant, in the matter of the succession of Quiazaro, was not only an act of mal-feasance on the part of the judge, but it was also an act of spoliation.
- That the minutes of all courts of record throughout the civilized world are uniformly recognized as evidence of the very highest rank, and never allowed to be contradicted by parol testimony, unless perhaps under an allegation of fraud or forgery. In our jurisprudence the minutes of courts have always been clothed with an authenticity which borders on sanctity.

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That the minutes of a court are in the nature of a citation and need not be offered in evidence, as they make proof of themselves.

That it is unlawful and unwarranted for a judge to assume the personal administration of a fund belonging to litigants, or to a succession, or to a minor.

That this defendant, having assumed such personal administration of the funds of the Quilazaro Succession, has also assumed, in consequence, the burden of proving clearly that a proper and lawful use has been made of those funds; that he has completely failed in such proof and accounting; that his acts in the premises show glaring malfeasance on his part.

Duties of the minute clerk examined and defined.

Strong condemnation by the Court of the customary omission of defendant to cause the minutes of his court to be read aloud by the clerk, and to be signed by himself.

That it is not necessary, under Article 200 of the Constitution of this State, for the purpose of the removal of a district judge, that the non-feasance, or malfeasance, or gross misconduct charged, should, as a condition precedent, be proved to be criminal or corrupt.

Malfeasance defined.

That it was the intention of the framers of the present Constitution of this State to leave the application of Article 200 to the sound and legal discretion of the Supreme Court; and that, by the decree of the latter, none but able, conscientious and irreproachable judges should be retained on the Bench in the State of Louisiana.

Difference between the provisions of the Constitution of the United States and the present Constitution of the State of Louisiana, for the punishment of impeachable offences.

M. J. Cunningham, Attorney General, Thomas J. Semmes, B. R. Forman and F. C. Zacharie, for the Relator.

Bayne & Denègre, Wm. F. & D. C. Mellen, Gus. A. Breaux, W. S. Benedict, Sam. P. Blanc, Max Dinkelspiel, Geo. H. Braughn, E. M. Hudson, Jonas & Nixon, and Farrar & Kruttschnitt, for the Respondent.

The opinion of the Court was delivered by

POCHÉ, J. This proceeding, brought for the removal of the respondent from the office which he now holds, is predicated on two articles of the State Constitution, which read as follows:

Art. 196. "The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Attorney General, Superintendent of Public Education, and the judges of all the courts of record in this State, shall be liable to impeachment for high crimes and misdemeanors, for non-feasance or malfeasance in office, for incompetency, for corruption, favoritism, extortion or oppression in office, or for gross misconduct or habitual drunkenness."

Art. 200. "For any of the causes specified in Article 196, judges of the courts of appeal, of the district courts throughout the State, and of the city courts of the parish of Orleans, may be removed from office by judgment of the Supreme Court of this State, in a suit instituted by the Attorney General or a district attorney in the

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name of the State, on his relation. The Supreme Court is hereby vested with original jurisdiction to try such causes; and it is hereby made the duty of the Attorney General, or of any district attorney, to institute such suit on the written request and information of fifty citizens and taxpayers residing within the territorial limits of the district or circuit over which the judge, against whom the suit is brought, exercises the functions of his office. Such suits shall be tried, after citation and ten days' delay for answering, in preference to all other suits, and wherever the court may be sitting; but the pendency of such suit shall not operate a suspension from office." * * *

The charges against this respondent are: nonfeasance and malfeasance, favoritism and oppression in office, gross misconduct and incompetency, contained and detailed in eight specifications.

1st. The first specification is substantially as follows: That the defendant, without any color of law or right, and in violation of his duty as judge, illegally obtained, on the 3d of March, 1882, possession of the sum of \$291 54, of a fund belonging to the succession of Nicholas Quiazzaro, and that he has never accounted for said sum to the heirs, nor to any heir or tutor of the heirs or other representative of the succession.

It is averred that said sum was the balance of a fund belonging to said succession, and placed, under orders of the court, in the custody of Ben Onorato, auctioneer, who had sold the property whence the fund proceeded; and that it was drawn from the custody of said B. Onorato by means of an order of court issued by the defendant, and by him entrusted for execution to one Charles E. Sel, who was instructed to, and did, bring and deliver to the defendant the aforesaid sum, being the balance of the fund hereinabove described.

In his answer to this specification the defendant gives a detailed history of the proceedings through which his court obtained control of the funds belonging to the succession of Nicholas Quiazzaro.

It appears from his statement and from evidence in the record that Quiazzaro died in September, 1868, leaving a considerable estate, which, after administration, went into the hands of his surviving widow, as community property, belonging to herself for one-half, and the other half in equal shares to her three minor children, Ernestine, Gilbert and Arsene Adelaide Quiazzaro, the latter having been born a few months after the death of the father. The administrator's account was presented in 1870, and was accepted by the widow in an authentic act, on September 14, 1870. It showed clear assets amounting to the sum of \$22,649 97.

On the judicial demand of two of her children, who had then become of age, the widow Quiazzaro, who had in the meantime contracted a second marriage, presented to the court on the 28th of May, 1880, an account of her tutorship, which showed her indebtedness to her children to be \$3651 11 to each, and which was homologated.

At the organization of the present Civil District Court, the record of the succession of Nicholas Quiazzaro was allotted to the division to which the defendant had been appointed. And shortly thereafter, the widow of Quiazzaro, who had been abandoned by her second husband, presented a petition to the court for the purpose of being judicially authorized to sell, free of the minor Arsene Quiazzaro's mortgage, two pieces of immovable property which she owned in this city, and which she had purchased in the year 1869, at the aggregate price of \$10,000.

Considering the amount of taxes due on the property, its dilapidated condition and its greatly depreciated value, the family meeting recommended and the court ordered a sale of the property. No adjudication having been made at the first offering, the application for a sale was renewed, and after considering the recommendations of a second family meeting, and a report made to him by Joseph Garidel, whom he had appointed as an expert to ascertain the amount of taxes due by, and exigible against, the property, the judge rendered the following decree of date of April 5, 1881:

"It is ordered, adjudged and decreed that the *proces verbal* of the 12th of February, 1881, be homologated and approved, and the recorder of mortgages directed to erase and cancel the general mortgage in favor of Arsene Adelaide Quiazzaro, in so far as the same affects or operates upon the property described in the petition and *proces verbal* of the date aforesaid.

"It is further ordered, adjudged and decreed that the property described as aforesaid be sold for cash, by Ben Onorato, auctioneer, to the highest bidder, after usual advertisements prescribed by law.

"It is further adjudged and decreed that a *proces verbal* of the sale be filed in court, and the price realized from said sale be deposited in the judicial depository, there to await the order of the court for the payment of taxes and charges, upon the court's approval.

"It is further ordered, adjudged and decreed that Henry Bier be authorized to settle the taxes due on said property; first filing a statement at what rates said taxes can be settled, and subject to the court's approval.

"It is further ordered, adjudged and decreed that any surplus re-

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maining from the amount realized from said sale, after payment of the taxes, charges and costs due by said property, up to the amount of the general mortgage in favor of Arsene A. Quiazzaro, be invested in State registered bonds, under Act of 1857 and Article 348 of the Civil Code

"And it is further ordered that a fee of fifty dollars be taxed in favor of Jos. Garidel, as costs."

In obedience to that order the two pieces of property were sold, and realized together the sum of \$2025, of which \$205 remained in the hands of Onorato, and were subsequently disbursed by him under orders of the court, and the balance, \$1820, was deposited in the Branch Depositary of the State National Bank, which had previously been selected as the judicial depository of the Civil District Court.

From the books of the bank it appears that the account was opened and was kept under the following title and style: "Ben Onorato, administrator succession Nicholas Quiazzaro, No. 824 Civil District Court, Division E, subject to order of court."

The deposit was made on June 17, 1881, from which date to the 10th of February, 1882, numerous orders were rendered by the court directing the disbursement of the fund for various purposes; the bank paying out on Onorato's check, accompanied by the order of the court, calling for an amount corresponding with that of the check.

The orders included between these two dates may be classified as follows:

For all State and city taxes due on the property.....	\$966 85
For costs incurred for the sale, including the auctioneers' commission, advertisements, two family meetings, attorneys' fees, court costs, stamps, express and appraisers, etc....	469 35
For Garidel's fees as expert, and fees of other experts.....	150 00

Amounting together to.....	\$1586 20
And leaving a balance out of the fund of.....	438 80

Now, the answer avers that subsequently additional payments of taxes and costs were made, and the minutes of the court and the books of the bank show that an order for the disbursement of \$147 26, purporting to be for taxes still unpaid, was made on the 10th of February, 1882, which left to the credit of the fund \$291 54. It is then averred in the answer that on the 2d of March, 1882, the defendant was reminded by his minute clerk, F. A. Luminais, since deceased, of the existence of that balance, which he estimated at about \$200, and which, he suggested, should be invested in bonds, in compliance with the previous order of the court. Whereupon, the following morning the defendant

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made arrangements with a friend of his, Henry Bier, a broker in bonds, for the purchase of bonds, without charging any commission therefor.

On the same day, the 3d of March, 1882, he issued the following order:

"More than six months having elapsed since the sale of the property, in the above succession, and no opposition to the distribution of the same having been made, and no one claiming any interest in the proceeds of said property other than the minor Quiazzaro:

"It is ordered that the proceeds of said property belonging to the succession of Quiazzaro be invested in State Consols, or bonds of the State known as 'Baby Bonds,' and that said bonds be registered by the Auditor of the State, under Art. 348 of the Civil Code."

On presentation of this order to Onorato, on behalf of the judge, by Charles E. Sel, then a deputy clerk in the Civil District Court, the former declined to honor it for want of sufficient precision. On the report of Sel of such refusal to the judge, the latter added, after the words "Civil Code" and over the signature of the deputy clerk who had made out the certified copy of the order, the following words: "And that B. Onorato be ordered to pay the same over to make the said investment." The order thus amended brought out of Onorato a check of \$291 54, which was cashed by Sel, who handed the roll of money to the judge, some time after 3 o'clock p. m. of the same day.

The answer then avers that without counting the roll of money, the judge handed it to his minute clerk, Luminais, with instructions to have the same invested in "Baby Bonds" through Henry Bier.

On subsequent inquiry of Luminais, the judge was informed that the bonds had been bought, and were in the possession of Bier, from whom they were obtained by Sel, who delivered them to the judge, by whom they were handed to Luminais, the minute clerk, with instructions to paraph them for non-negotiability, and to deliver them to John Lemonnier, the counsel of the tutrix, also since deceased. And it is then averred that from that time, about the 6th of March, 1882, the defendant never more saw these bonds to this day, and never heard of them until the month of April, 1886, on the occurrence of certain events to be hereafter referred to.

With the exception of two or three instances, the foregoing recital, taken from the answer and from the evidence, contains a statement of the undisputed salient facts involved in the discussion of the first specification of relator's petition.

As a result of the answer and of the voluminous evidence which was

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introduced on allegations therein contained, the original pleadings have been considerably enlarged, and the distribution of the whole fund brought into court, as well as the manner of making the distribution, has been discussed by counsel on both sides, as a vital issue on this branch of the case.

It appears from the record that every order, made for the purpose of drawing money from the Quiazzaro fund in the judicial depository, was rendered *ex parte* without notice on, or hearing from, the tutrix, the under-tutor, or any other party who may have had any interest in its proper distribution.

This course is charged by relator's counsel to be in direct violation of the rules adopted by the five judges, including the defendant, composing the Civil District Court for the Parish of Orleans, and to be of itself a malfeasance and a gross misconduct. The twenty-fourth of these rules was adopted in furtherance of Article 133 of the Constitution, and of Act 33 of 1880 of the Legislature, of Louisiana.

That rule, which treats of the judicial depository, contains, among others, the following provisions:

"3. Drafts or orders on the bank for the payment of money or delivery of property, shall be made to the order of the person entitled thereto, or his attorney, duly authorized, and shall specify in what particular suit or on what account the money or property is to be paid out or delivered.

"4. Such orders or drafts shall be drawn by the officer, pursuant to an order of the judge of the division having control of the case, wherein the money or property has been received.

"No order, unless by consent, in any pending cause, shall be granted except on regular notice or order to show cause, duly served on the attorneys of all parties who have appeared therein."

As the property which produced the fund was the personal property of the widow Quiazzaro, it is apparent that a compliance with the rule would have required her consent in her individual capacity, or in default thereof, a notice on her to show cause, in order to legalize every order for the payment of taxes, of costs, of experts, and of all other disbursements down to the balance, or residue, which accrued to the minor; and that the order for the investment in bonds of that residue should have been preceded by notice on Arsene Quiazzaro.

But nothing of the kind was done, and no disbursement was made, in compliance with the rule. The order for the payment of State taxes was not in favor of the tax collector, but the money was drawn and disbursed by Luminais, the minute clerk. The order for city

taxes was not in favor of the City Treasurer, but the money was drawn by the Civil Sheriff of the parish of Orleans, who settled those taxes, although in the order or decree of the 5th of April, 1881, Henry Bier had been entrusted with that duty.

Without expressing any opinion as to the alleged malfeasance which may result from the course pursued by the defendant, the legal mind must conclude that the judge thereby assumed the administration of that fund on his own responsibility, and that in law he must be held to a strict account of his administration.

Both in his answer and in the evidence which he has introduced, the defendant has admitted that obligation, and he has endeavored to account for the fund which he had disposed of, not a dollar of which has, however, been shown to have been received by the acknowledged owner of the residue, after the payment of taxes and other legal charges, the minor Arsene A. Quiazzaro or her legal representative. The result of his administration was a total disaster to the Quiazzaro family.

The payment of \$966 85 for State and city taxes, of \$469 35 as law charges and costs incidental to the two offerings and to the sale of the property, although excessive, as well as the sum of \$20, paid to John Dufour for a valuable report on the condition of the property as to taxes due thereon, is legally accounted for, and such a showing would *pro tanto* be justified in an administrator or tutor.

But the same can surely not be said of the amounts allowed to Joseph Garidel, the chief expert, and to a following of minor experts whose mission seems to have been to perform the duties which were incumbent on the judge himself.

The decree under date of February 23, 1881, which appointed Garidel, who was then the minute clerk of the Court of Appeals, as expert in the premises, and under which he qualified by taking an oath, restricted his authority to report to the court "the amount of taxes and charges due on the properties now owned by Elizabeth Buras, natural tutrix, and on which a general mortgage rests in favor of the minor, Arsene Adelaide Quiazzaro."

As it appears from the record that the statement of taxes due was complicated and required special knowledge and diligent search, the appointment of a competent expert to that end can be justified in law. C. P. 441, 442, 443. But it appears from the defendant's evidence that Garidel was not the proper person for such a duty, and that the task was performed by two other distinct and competent experts, John T. Dufour and Wm. C. Cole, who were paid for their services \$45, not out

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of the allowance made to Garidel, but out of the funds accruing to the minor under the original order of the court.

From the record it appears that the scope of the chief expert's authority grew with time, and that he gradually assumed the function of a general adviser of the Court. With few exceptions, the matters contained in his reports, were a review or synopsis of the pleadings and proceedings in the succession of Quiazzaro, which had been finally settled and wound up since 1870; of his views of the evidence; of the contingent rights of certain parties; and an indorsement of the reports of subordinate experts. During all the time covered by these reports, the widow Quiazzaro, who had been legally retained as natural tutrix in anticipation of her second marriage, was before the court by her counsel, John Lemonnier, who received a fee of \$180, from whom the judge could have required and obtained all necessary information to shape his course in dealing with the matter in hand. That was simply to legalize the sale of the property of the tutrix, free of the minor's general mortgage, to settle the taxes and law charges, and to secure the residue for the minor. There was no necessity of investigating the previous condition of the Quiazzaro succession further than to ascertain the amount which the tutrix owed to the minor. But the investigation of such matters was peculiarly and exclusively within the judge's province. A district judge has no more right or authority to employ experts, at the expense of litigants, or of a succession, or of a minor, to examine into and report on the pleadings or evidence in any record, than would have the judges of this court to have similar examinations at a like expense, made of the transcripts which contain the matters submitted to their review.

Yet it appears that out of the very small pittance accruing to the Quiazzaro minor, the expert Garidel was allowed fees aggregating \$95 for researches and reports reaching far beyond the scope of his authority, under the very text of his appointment, and that between the experts together they received as fees \$150. Such an allowance was not only an act of malfeasance on the part of the judge, but it was an act of spoliation.

The next disbursement in the order of discussion is the sum of \$147.26, covered by the order of February 10, 1882, which order is in the following words: "On account presented for taxes due on the property sold in the succession of Nicholas Quiazzaro and still unpaid, it is ordered that the same, amounting to the sum of \$147 26, be paid by B. Onorato, administrator, and charged to said succession."

That is followed on the same day by an order which reads:

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"Succession of Nicholas Quiazzaro," * * * "It is ordered by the court this day, that B. Onorato, administrator, do render an account of balance of funds in his hands belonging to the succession of Nicholas Quiazzaro."

From the report of Onorato and from the books of the judicial depositary it appears that the order was presented and paid; but nothing shows to whom the funds were delivered, as Onorato's checks in this matter were all made payable to "Bearer." The clerk of the bank testifies that the check and accompanying order were returned to Onorato on the subsequent occasion that his bank book was balanced, which was on the 14th of the same month; but Onorato testifies that notwithstanding a prolonged and a diligent search among his papers, he has been unable to find that particular check and the accompanying order, or any of the checks or orders previously executed in this matter. Hence, the record fails to connect the order with any person as the recipient of the money which it called for.

On the other hand, it is in proof, and, indeed, it is conceded on both sides, that no taxes were then due on the property, and that none were paid in the year 1882.

In his testimony, the defendant stoutly repudiates the legal existence of both orders, positively denies that he has ever issued either, and intimates his belief that both were fraudulently interpolated in the minutes of that day by his minute clerk, F. A. Luminais, since deceased, in whose hand-writing they were entered.

In argument, the defense advanced the theory that Luminais had forged both orders, had collected and appropriated the amount called for by the first order, and that having obtained possession of the bank book, he had it balanced on the 14th of February, thus obtaining the spurious order, which he destroyed with a view to escape detection.

But that theory finds no support either in the evidence or in any of the equities or circumstances of the case, when brought to the test of human experience, or of the known springs of human action.

In the first place, the defendant admits the authenticity of the orders, in his sworn answer, from which is culled the following averment:

"Additional payments for taxes and costs were subsequently made therefrom, and on February 10th, an order was entered directing Ben Onorato to render an account of the balance of the funds in his hands belonging to the succession of Nicholas Quiazzaro. This order was not complied with, possibly because it does not seem to have been served on him."

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In the next place, the minutes of all courts of record throughout the civilized world are uniformly recognized as evidence of the very highest rank, and never allowed to be contradicted by parol testimony unless, perhaps, under an allegation of fraud and forgery. No such charge is made in the pleadings in this case; on the contrary, as far as the answer goes, the minute entries are held up as correct.

In our jurisprudence the minutes of a court have always been clothed with an authenticity which borders on sanctity.

In the case of *Williams vs. Hooper*, 4 N. S. 176, this Court refused to entertain parol testimony to show that a new trial had been granted in a cause where the minutes were silent on the subject. Speaking of judicial records and minutes, the Court said: "The object the Legislature had in view, in directing them to be recorded, was to avoid the danger of trusting to the memories of men to prove them. That which was attempted here was still more dangerous. It was not only to establish, from the recollection of witnesses, the judgment of the court, but do so in contradiction to what was written. It is far better to bear with cases of individual hardship than violate a rule, the preservation of which is so important to the best interests of society."

The same views are expressed in the cases of *Nolan vs. Bobin*, 12 Rob. 531, and *State vs. Fuller*, 14 Ann. 726.

In the latter case the Court held that minutes were in the nature of a citation and need not be offered in evidence, as they make proof of themselves. In the instant case the most wonderful feat on record is attempted: the denial of the existence of an order by a judge, when the minutes of his own court show its entry, when a like showing is made by docket entries made by a person entirely different from the minute clerk, taken from the original order itself; and all that in the face of an admission of the order in his own pleadings in a cause to which he is a party.

In the case of *State ex rel. Railroad Company vs. Henry L. Lazarus*, judge, 34 Ann. 1117, the present Bench had to deal with a similar contention urged by this very respondent, who therein denied the verity of the minutes of his court. The Court held: "However great our confidence in any statement that might be submitted by a judge, nevertheless our knowledge of the facts must be derived from the record, and we can only take cognizance of them as there shown."

But he says that he scarcely ever signed his minutes, and never caused them to be read, adding that neither formality could deter a dishonest clerk from making false entries. This, if true, is a sad blow at the legal efficacy and binding force of judicial proceedings.

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The following is taken from his testimony on that point:

Q. Do you sign your minutes, judge?

A. No, sir.

Q. Do you have your minutes read every day in open court?

A. No, sir; there is only one judge in the building that does it. I don't think I was ever in Judge Houston's court when it was done, but I understand that he has his minutes read to him every morning.

Q. Is there any rule about it?

A. No, sir.

In his answer to the last question the defendant commits a grievous error. There is a wise and a salutary rule of court on the subject. It reads thus: "The minutes of each day's proceedings shall be signed by the judge." (Rule V.) A compliance with that far-reaching provision by the judge would place it beyond the power of the most dishonest of clerks to interpolate in the minutes any order which did not emanate from the court.

And if it be true that any number of the judges of the Civil District Court, or of any other court in the State, omit to sign their minutes, or to cause them to be read in open court every day, it is sincerely hoped that the complication which is now under discussion will suggest the propriety of a return to a practice which will afford great and equal protection to judges, litigants and their attorneys, and to minute clerks themselves.

But if it be true that Luminais did rob the fund out of that sum of \$147 26, by forging an order which he subsequently destroyed, it is difficult to appreciate the motive which could have prompted him to spread the order on the minutes, which would at any time afford conclusive proof of his guilt. And if he was guilty as charged, it is impossible to conceive why, on the 2d of March, as shown by the answer and by the testimony of the defendant, he should have reminded the judge of the propriety of investing the minor's residue in bonds. Thieves are not in the habit of recurring to subjects and of agitating questions which are intimately connected with one of their recent operations, an investigation of which would inevitably lead to their detection and conviction. As a rule their memories are defective in the premises.

This complete demolition of the theory advanced by the defense, leaves the respondent judge in the attitude of utterly failing to account for a disbursement which he had authorized and directed, and for a purpose which he himself proves to have had no existence or reason. Hard indeed would it be to prove more glaring malfeasance.

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The question now recurs to the disposition made of the sum of \$291.54 as the final balance of the fund remaining in the judicial depository.

The pivotal testimony on that point is that of Charles E. Sel, then a recording clerk in the Civil District Court, and subsequently a notary public, exercising his functions in the office of two of the defendant's counsel in this case.

His testimony was taken by consent of parties, at the side of his dying bed, a circumstance which gives great weight to his statements. He was entrusted by the judge with the execution of the order of the 3d of March, 1882, and he states in substance what is related of him in the defendant's answer hereinabove referred to.

But he states in addition that he was instructed by the judge to *cash* the check which he would receive from Onorato, and to *bring the money to him* (the judge). That he counted the money as it was delivered by the paying teller, and that he handed the identical amount received by him to the judge in the court-room after the court had adjourned, the amount being \$291.54 as shown by the check of Onorato, attached to the order of the court, and produced in this case by the judicial depository in answer to a *subpoena duces tecum*.

He then states, not positively, but as an impression, that the judge put the money in his pocket.

He further testifies that on the 6th or 7th of the same month, he was called by the judge and sent to Henry Bier's office for the bonds which the latter had purchased for the judge, and that he brought the package of bonds to the latter, having noticed, from a memorandum attached to the package, as customary with brokers, that the sum invested in bonds was not equal or equivalent in amount to the money which he had handed to the judge on the Friday previous.

He then swore, and reiterated under a very rigorous cross-examination, with the corroboration of two unimpeached witnesses, that the judge then and there asked him to retain the bonds, of which he was made the custodian, on a promised compensation of five dollars, and that he then had possession of the bonds for several days, until they were called for by the judge, at which time he went for them at his house and brought them to the judge, from which time he had not heard of them until the troubles of July, 1886.

Now, from the books and from the testimony of Henry Bier, it appears that the amount which he bought in bonds was \$330 at 60½ cents costing \$199.65, which is all the money which he received in the transaction. But both himself and his bookkeeper entirely fail to remember

by whom the funds were brought to the office, or how they reached there. A most unfortunate incident which has added one of the most serious complications to the innumerable mysteries which cloud this controversy.

Bier's books show that the entry of the transaction was in the name of the "succession of N. Quiazaro," in keeping with the style of all entries made in the orders, the minutes, and the dockets of the court from August, 1880, to the end: and it is truly deplorable that neither Bier nor his bookkeeper can now remember from whom the money invested was handed, or the instruction as to the style of entry, given.

Any information on that score would have solved the mystery of the disappearance of the sum of \$91 89, the difference between the amount received by the judge and the amount actually invested in bonds.

No denial has been made, nor has even an intimation of a doubt been thrown out, touching the precise amount of money which Sel delivered to the judge. In this connection the defendant testifies: "I had no occasion to count the money. I took it for granted that what Mr. Onorato gave to Mr. Sel, Mr. Sel gave to me, and that I gave Jack. I gave Jack exactly what Sel handed to me without disturbing the package at all. I had every confidence in Mr. Sel; every confidence in Mr. Luminais."

It is, therefore, perfectly safe to conclude that the amount of money received by the judge from the judicial depository, as representing the balance to the credit of the Quiazaro fund, was the sum of \$291 54. It is equally clear that the legal effect and result of such conclusive proof is to throw the burden on the defendant to account for the sum thus received. That proposition rests on foundations too sound and too secure to require any support from authority. It is elementary in all systems of jurisprudence.

It is recognized in fact, if not in terms, by the defense, who proposes to account for it by the statement that the money was at once handed to Luminais, the minute clerk, since dead, with instructions to hand it to Henry Bier for investment in "baby bonds," in compliance with the original order of the court in the premises. What are the functions of the minute clerk of that court, and whence comes his legal mandate to receive, handle and dispose in any way, of the funds under the control of the court?

Under Article 138 of the Constitution he is appointed by the judge of the court, holds his office at the pleasure of the appointing power, and his duties are to be regulated by law.

Act No. 30 of 1880 defines his duties to be to "keep the minutes of

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the court, issue all notices, copies of rules and orders entered on said minutes, which are required to be issued, and make due entries on the dockets of the causes and of the proceedings therein, and, shall perform such other duties as said judges may direct."

No intimation anywhere that he can be made the official custodian or depository of any money under the control of the court, and no suggestion that he is anything more than the ministerial officer of the court.

If the framers of the Constitution had had the remotest intention of entrusting the clerk of that court with the custody of funds of litigants or of successions pending in the court, they surely would not have adopted article 133, which reads: "The Civil District Court for the parish of Orleans shall select a solvent incorporated bank of the city of New Orleans as a judicial depository. Therein shall be deposited all moneys, notes, bond securities (except such notes or documents as may be filed with suits or in evidence, which shall be kept by the clerk of the court), so soon as the same shall come into the hands of any sheriff or clerk of court, such deposits shall be removable in whole or in part, only upon order of court." * * *

Act No. 33 of 1880 inflicts a penalty of imprisonment of six months and a fine of \$500 on any clerk, sheriff or officer for failing to make such a deposit, hence any construction of the provision which would leave the judge free to violate the same with impunity, must be repugnant to all sense of justice, as well as to common sense.

It is therefore impossible to deny the proposition that in handing this money to his minute clerk, the respondent did not discharge the responsibility which attached to him at the moment that he assumed and took upon himself the personal administration of that fund, and especially when he took manual possession of the same.

The selection of Luminais, the minute clerk, as the custodian of the fund, or as the messenger to transmit the same to Bier, could no more operate in favor of the judge as a legal discharge of his assumed responsibility than would have been done by selecting any other unauthorized person or private citizen.

It does not, therefore, lie in the mouth of the defense to advance the theory that Luminais, the trusted agent of the judge, embezzled and squandered the sum of \$91.89, which was purloined by some one out of the original package, as a legal accounting on the part of the judge for the amount which he received from the judicial depository. That glaring illegality, and other reprehensible methods adopted in this case, all have their common source in the one great original mischief, which

consists in the judge's assuming the personal administration of that fund.

From the moment that such a responsibility was fastened upon him as a result of his violation of the law and of the rules of his court, that burden follows him like a phantom, not to be driven away by anything but uncontrovertible proof of a full accounting to the legal proprietor of the fund.

These considerations apply with equal force to his disposition of the bonds sent to him by Bier.

According to the testimony of Sel, which is not successfully contradicted, these bonds finally came to the hands of the judge some four or five days after the 7th of March, the day on which they were obtained from Bier, and it was therefore on the 11th or 12th that they were handed by the defendant to Luminais to be paraphed. Now, in his own testimony, the judge shows that on the 17th of the same month, Luminais was discharged by him from his office for habitual drunkenness and for consequent neglect of his duties—the minutes of the court having not been posted up for more than a week.

Can the Court now entertain such a transaction as a legal accounting of the bonds, even if they were thus delivered to a person held up as so eminently disqualified for the trust, *at most ten days* before his discharge as minute clerk for the causes stated by the defense? He must be met with the answer which would be given to any ordinary administrator or tutor under similar circumstances.

But there are many mysterious movements connected with all these transactions which the defense has not even attempted to explain.

An impartial but practical mind would naturally like to know, and no effort has been made to explain, why the judge who issued the order of March 3, 1882, for the avowed purpose of carrying out his agreement of that very morning with Bier, did not send the order directly to the latter who could as well as Mr. Sel have obtained the check from Onorato and the funds from the bank; or why Sel was not instructed to take the check or the money directly to Bier.

Conceding that the investment of that balance in bonds was the end in view, the defendant has not explained why he ordered the money to be brought to him at the court, or why he persisted in that design on Onorato's refusal, by interpolating additional words in the order, and to send for the money when he knew, as he states, that it could not be received before three o'clock p. m., after the broker's offices were closed.

No more has he undertaken to explain the legal reason or even the

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propriety of removing those funds from the vaults of the judicial depository, after three o'clock on the eve of a legal holiday, the 4th of March, which itself was followed by a Sunday, and when he knew, as he admits, that the investment could not be made before Monday, the 6th., on which day the investment of a part of the fund was actually made. He must have known that from Friday, "a few minutes after three p. m.," (his own testimony) until Monday, the 6th, at 10 a. m., the fund thus converted into currency was to remain in his possession or in that of his clerk—certainly not as safe a custody as the vaults of the bank.

Why did he take that risk with money which was not his own, and which, as he pretends, he did not even take the trouble to count, as a check on the person to whom he was about to entrust it? No effort has been made by the defense to lift that cloud so full of suggestive darkness.

From that mode of dealing, from the omission to call his discharged minute clerk, on the 17th of March, to an account for the bonds which he had so recently intrusted to him, and from all the illegal acts of the defendant disclosed by the record, and recounted in this opinion, there flowed a result, the most natural to expect: a total loss of the small pittance accruing to the minor, Arsene Quiazzaro, for whom the respondent claims to have had the most paternal solicitude, and for whose ostensible benefit so many bold measures had been inaugurated. What does this conduct amount to in law and under the terms of the Constitution?

The answer is easily suggested. It clearly amounts to malfeasance and gross misconduct.

But, in order to leave no doubt as to the correctness of that conclusion, the record throws additional light on the conduct of this respondent. In April, 1886, Arsene Quiazzaro, who had, in the meantime, been emancipated, employed counsel to look into the claim which she had been informed she had once had to a certain fund in the custody of B. Onorato. As the record of the Quiazzaro succession, to which had been added the papers of the proceedings hereinbefore detailed, could not be found, and as no satisfactory information could be obtained of Onorato, a rule was instituted against the latter as acting administrator, in defendant's court for an account of the minor's homestead of \$1000, or in default thereof, for an account of a similar amount of baby bonds, in which the said fund had been invested under orders of that court.

That rule was fixed for trial on the 7th of May, 1886, and continued from that day, and from week to week, until the 11th of June follow-

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ing, when the respondent judge entered an order continuing the rule indefinitely, over the urgent objections of counsel for Miss Quiazzaro. With the exception of two instances, these various continuances were ordered by the court on the ground urged by the defendant in rule, that he could not be forced to trial in the absence of the record, or in the absence of certified copies duly stamped (at a cost which Miss Quiazzaro was unable to meet), of all the minute entries of all the proceedings which were connected with the fund, which had been placed in the custody of Onorato.

These different rulings of the respondent are charged by relator to be glaringly erroneous and to amount to a denial of justice, and as intended to suppress knowledge of his connection with the fund.

As our jurisprudence has long since settled the doctrine that the minutes of a court are part of the record to which they may refer, and need not be offered in evidence (*State vs. Fuller*, 14 Ann. 726), it was a gross misconduct in the judge to refuse a hearing of the rule on the minute entries. If they were insufficient to make out a case, the judge could have so decided, and his judgment could have been reviewed on appeal. But it was manifestly not a ground for the refusal of a hearing.

From the record, it appears that on the 28th of May, the defendant, who claims to have forgotten all about the transactions of the year 1882, particularly of the 3d of March, was reminded of his connection with the fund, notwithstanding which information he persisted in his previous rulings both on the 4th and the 11th of June following.

And in November of the same year he entered an order of recusation in the matter, which is now pending before another division of the Civil District Court.

In the light of preceding events these acts speak for themselves, and confirm the conclusion of malfeasance and gross misconduct against the defendant.

In this connection it is due to the memory of Charles E. Sel to make the following statement:

On the 5th of May, 1886, while Onorato was trying to explain his defense to the rule to his attorney, in the same office in which Sel occupied a desk, the latter, overhearing their conversation and desiring to assist Onorato, volunteered the statement that he knew the history of the last check drawn by Onorato, and that it had been handed to, and collected by, him; and the proceeds delivered to the defendant judge, in obedience to his order of the 3d of March.

That circumstance is a complete refutation of the theory advanced by the defense to the effect that the missing sum of \$91.89 had been

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appropriated by Sel and Luminais, and had been by them both and together spent during the festivities of the 4th of March.

The charge is absolutely unfounded and is not supported by a single word of testimony in the record. There is no proof that either of them participated in those festivities, while on the other hand it is shown by the testimony of Theodore Marks, the principal witness for the defense, that the respondent was a marshal in the procession of that day.

If Sel had been guilty of the charge hurled at him on his dying bed, it would be passing strange that he was the first person to awaken the dormant memory of all other participants in incidents connected with his guilt.

In view of his statement in that connection, in which he is fully corroborated by Onorato, it is very unfortunate, and it is extraordinary that Onorato or his attorney did not at once confer on the subject with the judge whose order was his shield, and before whose court he was prosecuted for an account of that identical fund.

The law which governs the case is very plain and free of all ambiguity.

The Constitution provides that a district judge may be removed by this Court for "high crimes and misdemeanors, for non-feasance or malfeasance in office, for incompetency, for corruption, favoritism, extortion or oppression in office, or for gross misconduct or habitual drunkenness.

It is clear that the evidence implicating the judge on trial with guilt of any one of the causes therein detailed, is sufficient to require a decree of removal.

The contention of the defense that the malfeasance or non-feasance or gross misconduct charged must, as a condition precedent to removal, be proved to be criminal or corrupt is manifestly erroneous. It is absolutely untenable either in reason or on authority. It is answered by the mere fact that in the Constitution the contemplated causes of removal are disjunctively connected.

All the authorities which are to the effect that a criminal intent must underlie the commission of impeachable offenses are predicated on the provisions of Sec. 4, Art. 2 of the Constitution of the United States, which reads: "The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors." That authorities which comment on that language have no bearing on the contention here is as clear as the difference between the two constitutions is palpable.

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Now, malfeasance is defined to be "evil doing," "ill conduct," "the doing of what one ought not to do." (Worcester.)

Also "the unjust performance of some act which the party had no right, or which he had contracted not to do." (Bouvier.)

Or "the commission of some act which is positively unlawful." (Abbott.)

It was the undoubted intention of the framers of the Constitution, as of all other legislators, that the words which they used should be understood in their plain ordinary meaning.

Hence they left it to the sound and legal discretion of the Supreme Court to give in proper cases a more precise definition, if it became necessary, and to see to it that none but able, conscientious and irreproachable judges should by their decree be ever retained as magistrates in the State of Louisiana.

They acted on the idea contained in the paternal recommendation of the first, the great Chief Justice of Louisiana, Judge Martin, when he said: "All those who minister in the temple of justice, from the highest to the lowest, should be above reproach and suspicion. None should serve at its altar, whose conduct is at variance with his obligations."

The trust to enforce this lesson of wisdom has been confided to the Supreme Court, and although the task is unpleasant, it must be performed impartially and fearlessly.

Relator's petition contains several other specifications of a serious character against the respondent, but as the larger number of these charges involve rulings and other matters which have already, and in a different form, been submitted for judicial action before this court, and as the foregoing considerations so forcibly point to the irresistible conclusion of the removal of the defendant, it becomes unnecessary to discuss any of these additional charges. After the evidence had been taken, and ten days of the trial had been consumed in hearing it, the defendant filed a plea in bar, denying the authority of the court to entertain charges of acts alleged to have been committed by him prior to the month of August, 1884, at which time he had been reappointed judge by the executive of the State, on the ground that said alleged acts had been committed under a different and distinct term of office, and under a different and distinct commission. Considering the nature of the answer which the defendant had filed, and in which he had joined issue on the merits of all the charges brought against him, considering the stage of the trial at which that defense was invoked, and considering the tone of a letter, which he had

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written to the Attorney General, urging the latter to institute this proceeding, in which he manifested his intention to waive all matters of form, as well as his desire that that officer should assume that there was *prima facie* evidence of every charge that was made against him, it must be confessed that the resort to such a plea was a great surprise to all, that it came rather late, and that it was exceedingly ill-advised.

The entire absence of any argument in its support by the defense, either orally or in writing in the brief submitted by counsel, is a tacit acknowledgment of the innate weakness of the plea as a means of defense.

Leaving open the question as to its applicability to any of the charges which are not discussed in this opinion, it is quite plain that it cannot apply to the matters and things charged in connection with the fund accruing to the Quiazaro minor, the only charge which has been herein discussed.

This charge is formulated on a continuity of acts not publicly known before July of the year 1886, and alleged to have been committed under both terms and both commissions of the respondent judge. Hence the plea falls under its own weight.

And the charge of malfeasance and gross misconduct having been fully made out by the evidence, the proper decree must be entered.

It is therefore ordered, adjudged and decreed that the respondent, Henry L. Lazarus, Judge of the Civil District Court for the parish of Orleans, Division E, be, and he is hereby removed from said office; that said office be and is hereby declared to be vacant, and that the said defendant be condemned to pay all the costs of these proceedings. And it is further ordered that a certified copy of this judgment be forwarded to his Excellency the Governor of the State of Louisiana.

CONCURRING OPINION.

BERMUDEZ, C. J. In my judgment, the answer convicts the defendant of malfeasance and gross misconduct and incompetency.

The evidence conclusively establishes that he has of his own motion, without the slightest shadow of authority in law or jurisprudence, nay, in utter violation of both, and even of the rules governing his court, handled and disposed of a fund deposited in a bank selected as the judicial depository and under the control of his court, and that he has utterly failed to legally account for it.

It is no doubt the law, that the funds of a minor may be invested in State bonds; but it is not the law that the judge, though he be the tutor of tutors, shall attend to the investment *himself*.

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It is no defense to urge, in exoneration, that those to whom he entrusted it, for that purpose, have dissipated it some way or other.

The defendant is officially and personally, morally and legally, bound for the tortious acts of mandataries; selected by himself and not designated by law, as the proper persons to be entrusted with such investment.

The elaborate, lucid and unanswerable opinion just read, in which I concur, demonstrates beyond peradventure that the respondent is clearly guilty of flagrant malfeasance, gross misconduct, or is incompetent; and that, in either case, he must be removed.

A judge who uses, or misuses, the powers with which the law clothes him, and who, by unwarrantable acts, imperils and annihilates fortunes and rights which he ought sacredly to protect, cannot be permitted to continue on the Bench as the representative and dispenser of justice among his fellow beings.

The decree removing the defendant is fully justified, and I assent to its rendition and enforcement.

CONCURRING OPINION.

FENNER, J. Article 196 of the Constitution of the State authorizes the impeachment of various public officers named therein for the following specified causes, viz: "For high crimes and misdemeanor, for nonfeasance or malfeasance in office, for incompetency, for corruption, favoritism, extortion or oppression in office, or for gross misconduct or habitual drunkenness."

Article 200 provides as follows: "For any of the causes specified in article 196, judges of the courts of appeal, of the district courts throughout the State, and of the city courts of New Orleans, may be removed from office by judgment of the Supreme Court of this State issued in a suit instituted by the Attorney General or a district attorney in the name of the State, on his relation. The Supreme Court is hereby vested with original jurisdiction to try such causes; and it is hereby made the duty of the Attorney General or of any district attorney to institute such suit, on the written request and information of fifty citizens and taxpayers residing within the territorial limits of the district or circuit over which the judge against whom the suit is brought exercises the functions of his office. Such suits shall be tried after citation and ten days' delay for answering, in preference to all other suits, and wherever the court may be sitting; but the pendency of such suit shall not operate a suspension from office. In all cases where the officer sued, as above directed, shall be acquitted, judgment

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shall be rendered jointly and in *solido*, against the citizens signing the request, for all costs of suit."

This suit is brought against the defendant judge under the foregoing provisions, on the relation of the Attorney General, acting on a petition signed by eighty-eight citizens and taxpayers, including one judge of the same court of which defendant is a member, and thirty reputable members of the New Orleans bar.

The petition charges that the defendant "has been guilty of non-feasance and of malfeasance in office, of favoritism and oppression in office, and gross misconduct, and that he is incompetent for the duties of his office and should be removed."

These charges are supported by eight distinct specifications.

The first specification, enlarged as it is by the elaborate answer of respondent and by the reception of evidence without objection, involves the judicial conduct of respondent in a certain cause pending in his court under the title of the succession of Nicholas Quiazaro. The following is a history of the proceedings in the case:

Nicholas Quiazaro died in September, 1868, leaving a considerable estate, a widow in community, two living minor children and another who was born after his death.

The succession was opened in the then Second District Court. The widow was appointed and qualified as tutrix of her minor children, and an under-tutor was appointed. The succession, however, was administered by an administrator, who was duly discharged in June, 1870, when he handed over to the tutrix the residue of the estate, consisting of \$17,715.17 in cash, and about \$6,000 in promissory notes.

Under the law of this State, the tutrix, as surviving widow in community, was the owner of one half the estate and the usufructuary of the remaining half belonging to her children. And in so far as the estate consisted of money, her usufruct made her the owner of the whole, subject to the duty of accounting to her children at the termination of the usufruct. The minor's rights were also secured by a general mortgage on all the immovable property of the tutrix.

We have no further concern with the case until December 28, 1880, when the cause had passed into the division of the Civil District Court, presided over by respondent, and when two of the heirs had reached the age of majority and only one remained a minor, to wit: Arsene A. Quiazaro. We extract from defendant's answer his account of the proceedings then had:

"On December 28, 1880, the tutrix presented another petition, averring her ownership of the two lots of ground in this city, which

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had been bought since her appointment as tutrix, her indebtedness to her children, the large tax encumbrance on these properties, their unprofitableness as a source of revenue, the advisability of selling the same, and asking for the appointment of experts to appraise the property, and for the convocation of a family meeting to advise about the rights of the minor. On December 29th, respondent entered the proper order on this petition, appointing experts and convoking the family meeting. On December 30, 1880, the deliberations of the family meeting held that day, approved by the undertutor, appraising the property at \$3000, and advising the sale at public auction for one-half ($\frac{1}{2}$) cash, and the other half at one year's credit, were presented to respondent, and by him homologated. No adjudication having been made under this order, the tutrix, on February 8, 1881, filed her petition stating her indebtedness to her children, and her desire to settle with them; that she was utterly destitute of means, except the two properties above mentioned, which were a burden rather than a source of revenue, they being out of repair, and seldom rented on that account, and encumbered with taxes to such an extent that they were about to be sacrificed at sheriff's sale; that she had caused them to be offered at public sale, but that she could not sell them unless authorized to sell them free of the minor's mortgage. She prayed for convocation of family meeting to authorize erasure of minor's mortgage in case of sale, and to receive funds of minor realized from sale, to be reinvested by her. On February 12, 1881, respondent endorsed on said petition an order convoking a family meeting. The family meeting was held the same day. Two days afterwards, on February 14th, the tutrix filed the *proces verbal* of this family meeting, recommending the erasure of said minor's mortgage in case of sale, accompanied by a petition asking the homologation of the same, and for authority to erase the minor's mortgage."

Before acting on this petition the judge very properly considered that it was his duty to examine into matters in order to determine whether the reception and investment of any funds resulting to the minor could be safely trusted to the tutrix, whose usufruct had been terminated by a second marriage, or whether he should himself supervise their control and investment. To that end, he says:

"That respondent accordingly, thereupon, on the 23d day of February, 1881, appointed Joseph Garidel, Esq., one of the experienced deputy clerks of the court, as expert, to inquire and report to the court the amount of taxes and charges due on the properties aforesaid. He also instructed said Garidel to examine and report upon the manage-

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ment of the estate, *and to whom the net proceeds of the property should go—to the major heirs or to the minors.* Respondent also had the testimony of Garidel, and of Ben Onorato, auctioneer, taken as to the value of the property and as to whether the taxes and penalties could be paid at a discount.

"On April 5th, 1881, Garidel presented his report, showing privileged taxes and charges against the estate amounting to \$2,317.65, setting forth the mismanagement of the estate, *and reporting against the claims of the majors to participate in the net proceeds, if any, of the sale of the property.*

"Thereupon, respondent entered the following order upon the above mentioned petition of February 1st, 1881:

"It is ordered, adjudged and decreed that the *proces verbal* of the 12th of February, 1881, be homologated and approved, and the recorder of mortgages directed to erase and cancel the general mortgage in favor of Arsene Adelaide Quizzaro, in so far as the same affects or operates upon the property described in the petition and *proces verbal* of the date aforesaid.

"It is further ordered, adjudged and decreed that the property described as aforesaid be sold for cash, by Ben Onorato, auctioneer, to the highest bidder, after usual advertisements prescribed by law.

"It is further adjudged and decreed that a *proces verbal* of the sale be filed in court, and the price realized from said sale be deposited in the judicial depository, there to await the order of the court for the payment of taxes and charges, upon the court's approval.

"It is further ordered, adjudged and decreed that Henry Bier be authorized to settle the taxes due on said property; first filing a statement at what rates said taxes can be settled, and subject to the court's approval.

"It is further ordered, adjudged and decreed that any surplus remaining from the amount realized from said sale, after payment of the taxes, charges and costs due by said property, *up to the amount of the general mortgage, in favor of Arsene A. Quizzaro,* be invested in State registered bonds, under Act of 1857 and Article 348 of the Civil Code.

"And it is further ordered that a fee of fifty dollars be taxed in favor of Jos. Garidel, as costs."

We are compelled to say that, in referring to an expert the question "to whom the net proceeds of the property should go, to the major heirs or to the minor;" in accepting and acting upon his report "against the claims of the major heirs to participate in the net proceeds, if any, of the sale of the property;" and in entering, in effect,

a judgment divesting the major heirs of their interest and appropriating the whole to the minor, without any notice to, or hearing of, said majors, the judge exercised powers utterly foreign to the judicial office as constituted under the laws of Louisiana. The powers confided to masters in chancery and judicial referees under the systems prevailing in some other States do not exist, to the same extent, in Louisiana. Except in the case of arbitrators, who can only be appointed by consent of all parties, experts are appointed only for the purpose of stating intricate accounts, or furnishing the judge with information as to facts, never to ascertain or report legal conclusions from such facts. C. P. Arts. 441 to 462.

We must say, however, that we find, neither in the order of the court nor in the report of the expert, any reference of such question to the expert or report thereon by him; and if such reference and report were made, as stated by respondent, they must have been in oral form.

It is very certain that the judgment of the court directing the entire residue of the proceeds of the sale to be devoted to the satisfaction of the minor's mortgage, to the exclusion of the major heirs, was *ex parte* null and void, and rendered without any authority of law, and that it is supported by no fact or reason apparent on the record. This act had an important sequence, which will be hereafter alluded to.

The judge proceeds in his answer as follows:

"Under this decree the property was sold, realizing the sum of \$2025; the money was deposited by the auctioneer to his credit in the Branch Depository of the State National Bank, the authorized depository of the Court; the widow, on her petition, was authorized to sign deeds of sale; the tax liens were, on her petition, transferred to the fund in Court; the State tax collector was ordered to strike off the illegal penalties and interest; and orders were from time to time entered, directing the payment of taxes, costs, fees and charges."

The funds having thus reached the judicial depository, it is important to examine the provision of the law and of the rules of the Civil District Court, with reference to the handling of such funds.

Art. 133 of the Constitution declares: "The Civil District Court for the parish of Orleans shall select a solvent incorporated bank of the city of New Orleans as a judicial depository. Therein, shall be deposited all moneys, notes, bonds and securities (except such notes or documents as may be filed with suits, or in evidence, which shall be kept by the clerk of court) so soon as the same shall come into the hands of any sheriff or clerk of court; such deposits shall be re-

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movable, in whole or in part, only upon order of Court. The officer making such deposits shall make immediate and written return to the court of the date and particulars thereof, to be filed in the cause in which the matter is pending, under penalties to be prescribed by law."

The rules of the Civil District Court (rule 24), contain the following provision :

"The _____ Bank of the city of New Orleans is selected as the judicial depository, under Article 133 of the Constitution, and Act No. 33 of 1880.

2. All moneys, bonds, notes, etc., coming into the hands of any clerk, sheriff, liquidator, receiver, syndic, commissioner, administrator, curator, executor, tutor, *auctioneer*, notary or other officer of court, under any order or process of court, or arising from the sale or administration of any property under control of court, or from any party to a suit, unless the order or judgment of court under which the same is realized direct the same to be otherwise deposited or disposed of, shall be deposited in said judicial depository, in the name and to the credit of the court and such officer, and due and immediate return thereof shall be made to the court and filed in the cause.

3. Drafts or orders on the bank for the payment of money or delivery of property, shall be made *to the order of the person entitled thereto, or his attorney duly authorized*, and shall specify in what particular suit, or on what account the money or property is to be paid out or delivered.

4. Such orders or drafts shall be drawn by the officer, pursuant to an order of the judge of the division having control of the cause, wherein the property or money has been received.

5. *No order, unless by consent, shall be granted, except on regular notice or order to show cause duly served on the attorneys of all parties who have appeared therein.*

6. No order shall be granted, based upon consent, unless such consent be reduced to writing, signed by all parties and filed in the cause.

These rules of the Civil District Court were adopted by all the five judges thereof acting as one body, and rule 29 provided : "The rules shall not be altered or amended except by the vote of a majority of the judges." It is not claimed that rule 24 had ever been changed. It was, therefore, of binding force and effect upon the judge, and having been a participant in its confection and adoption, he could not plead ignorance thereof.

The important and salutary objects of the Constitutional provision and of the rule are evidently to destroy the possibility of the diver-

sion or miscarriage of any funds subject to judicial control by the following provisions:

1st. All such funds, of whatever character, are required to be deposited, as soon as realized, in the judicial depository and the performance of this duty is secured by requiring an immediate return of such deposit to the court, failure to make which is, by Act 33 of 1880, made a criminal misdemeanor, punishable by fine and imprisonment.

2d. Once in the judicial depository, such funds cannot be withdrawn, except upon an order or draft made payable directly to the order of the person entitled to receive it, and specifying on what account the payment is made, pursuant to an order of the court which, necessarily, in order to enable the officer to comply with the rule, should specify the person and the account.

3d. In order to protect parties interested and the court itself from improvident orders granted on *ex parte* representations, the rule forbids the granting of such orders, unless by consent, without regular notice or order to show cause, served on the attorneys of all parties.

4th. Even consent orders are forbidden unless the consent be in writing, duly signed, and filed in the cause.

From the moment that these funds reached the judicial depository, the course of the judge is marked by a conspicuous disregard of every provision of the foregoing rule, as well as of all sound principles of judicial conduct.

He has utterly ignored the existence of the tutrix, the under-tutor, the major heirs and the attorney of the tutrix, and has acted precisely as if the law constituted him personally the sole administrator of the minor's estate, without responsibility to anybody but himself.

He appoints various experts, fixes their fees and orders their payment, to an aggregate amount of one hundred and fifty dollars, without application by, or notice to, anybody.

He settles the fees and expenses allowed to the attorney of the tutrix to the amount of \$181.80, and directs their payment by *ex parte* orders without any application therefor on the part of the tutrix, so far as the record shows, and without notice.

In like manner, various other costs, charges and expenses, besides taxes, are allowed and paid.

All formalities of contradictory proceeding, of filing account, of giving notice thereof by publication and otherwise, of legal delays for opposition thereto and for final judgments of homologation, are entirely dispensed with.

Where is the legal authority for such proceedings? None is referred

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to and none exists. No precedent is produced; and, although the judge declares that he has pursued a like "course in other cases with beneficial results," not even a precedent of his own court is referred to; and the allegation, if true, would certainly not support or mitigate the illegality of the proceedings.

In the disbursement of these funds, he has violated the rules of the court by granting orders without written consent, and without notice or order to show cause.

He has further paralyzed the protective operation of the rules by interposing between the person entitled to receive the money and to whose order alone the checks should be payable, irresponsible agents of his own selection, who draw the money and are intrusted with the duty of conveying it to the party entitled. Thus the very danger which the rule was intended to avert is incurred and aggravated; and funds, which even bonded public officers are not trusted to take or hold in their possession, are passed into the possession of individuals having no title to them and furnishing no security for their faithful custody and appropriation.

If the funds of this estate have been misappropriated and lost under such proceedings, whose fault is it?

Let us now examine a few of the most important of these orders, to exhibit more clearly the manner in which this business was transacted.

On September 16th, 1881, the following order is entered on the minutes:

"Let the Judicial Depository be and it is hereby ordered to pay out of the funds of this estate the sum of \$396.85, the same to be applied to the payment of State taxes and of F. A. Luminais for services rendered herein under the appointment of the court, viz:

To State taxes	\$386 35
To F. A. Luminais	10 00

\$396 35"

It is obvious that the only person entitled to receive payment of the State taxes was the State tax collector, and the order should have directed the payment to be made on check to his order. If this had been done, there could have been no risk of loss. But it is admitted that the judge entrusted to his minute clerk the direct collection of the money paid under this order, and the duty of paying therewith the State taxes. What was the result? Although the clerk collected the money on September 16, 1881, it is shown that the taxes were not paid until November 3 following. No care was taken by the judge to see

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to the performance of the duty confided by him to his agent, by requiring the return or exhibition of the tax receipts. And, in fact, the entire sum narrowly escaped loss; for it appears that the clerk, after getting the money, went on a spree and lost or gambled it away, and was only able to replace it later through the kind offices of a friend, who, after full confession of his fault, lent him the sum on pledge of his future salary, from which source, be it said, the loan was duly repaid.

On February 10, 1882, the following order appears duly entered on the minutes of the court.

"On account presented for taxes due on the property sold in the succession of Nicholas Quiazaro and still unpaid, it is ordered that the same, amounting to \$147 26 be paid by B. Onorato, administrator, and charged to the succession."

Onorato paid this money, to whom is not apparent.

Although the conduct of the judge in this succession had been the subject of investigation by two grand juries, and although the entries upon the minutes had been all the time open to scrutiny, the genuineness of this order was never disputed by the judge, and even in his answer in this cause no such dispute is presented, but, on the contrary, the orders generally are referred to and admitted. But, after the cause was at issue, investigation disclosed the fact that no such taxes were due or had ever been paid. And, thereupon, the defendant is driven to the necessity of disputing the correctness of the minutes of his own court, of denying that he ever issued such an order, and of charging that it was forged and fraudulently entered upon the minutes of the court by his then minute clerk, who is now dead. This may be true. I will not say even that I believe it to be untrue. But, surely, under the most charitable construction, it is a desperate predicament for a judge to be placed in, when, in defense of his own character, it is necessary for him to falsify the minutes of his own court, and to fasten upon a dead man the guilt of such a crime, with no evidence to support the charge except his own, which cannot be contradicted.

Charity for the living and for the dead closes my mouth against the expression of an opinion on this subject, when it is not, in my judgment, necessary to the decision of this case.

One thing is certain: the money was paid on the order; the money has been made away with, and is lost to the estate. Whose ever the crime, the possibility of its commission and the consequent loss, are directly attributable to the fault of defendant.

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But for his habit of granting orders in this illegal form and of delegating to his subordinates the duty of collecting them, the thought of attempting such a fraud would never have suggested itself to any one.

We come now to the winding up of this extraordinary administration.

On February 10th, 1882, an order was entered on the minutes, "that B. Onorato, *administrator*, do render an account of the balance of funds in his hands belonging to the succession of Nicholas Quiazzaro." The genuineness of this order is expressly admitted in defendant's answer herein, with this statement, that "this order was not complied with, possibly because it does not seem to have been served on him."

The peculiarity of this order and the foregoing one, in styling Onorato (who received and disbursed these funds simply in the capacity of auctioneer who sold the property) *administrator*, does not appear to have struck the mind of the defendant until the necessity arose, as above indicated, of destroying the genuineness of the first order, when this feature is seized upon as a reason why respondent could not have framed either of said orders, because he could never have styled Onorato administrator, although in one former order drawn, however, by an attorney, the same style was used, and although the books of the judicial depository show that the account stood in the name of "B. Onorato, administrator," and although the only extant check of Onorato is signed "B. Onorato, administrator."

On March 3, 1882, the following order was entered on the minutes:

"More than six months having elapsed since the sale of the property in the above succession, and *no opposition to the distribution of the same having been made, and no one claiming any interest in the proceeds of said property* other than the minor Quiazzaro, it is ordered that the proceeds of said property belonging to the succession of Quiazzaro, be invested in State consols, or bonds, of the State, known as 'Baby bonds,' and that said bonds be registered by the Auditor of the State under Art. 348 of the Civil Code."

The recitals of absence of opposition to the distribution and of no one's claiming an interest in the proceeds, afford a sufficiently slender support for this final order, when it is considered that the whole proceedings of distributions had been, not *ex parte* (for that suggests at least *one party*), but without any party at all, and with no pretence of notice in any form.

However, the order was made, and a certified copy of it having been supplied, the judge sent for one Charles E. Sel, a subordinate deputy in the record department of the Civil District Court, handed him said

copy, and directed him to go to Mr. Onorato, get an order for the money, collect it and bring it to him.

It indicates the utter carelessness of the judge in such important matters that he should have supposed that Onorato would have paid out money on an order framed as this one, not even directing any such payment to be made either by him or by the judicial depository. Of course Onorato refused to pay, and Sel returned to the judge and reported the refusal with the reason given that the order did not specify any person whom he was to pay. Thereupon the judge interpolated in the certified copy, with his own hand, the words "and that said B. Onorato be ordered to pay the same over, to make said investment."

This addition was never entered on the minutes, and the certificate under the seal of the court that it was a true copy from the minutes was thus converted into a falsehood.

With the order thus amended, Sel returned to Onorato, received from him a check payable to bearer, with the order of court attached, for the sum of \$291.54, collected the money, returned and handed the money to the judge, who received it into his own hands. Although he had not advised himself of the state of Onorato's account, and although his order did not specify the balance due, he did not count the money, but, as he states and as stated by Marks, another witness, he sent for his minute clerk, handed him the money, with instructions to go to Henry Bier, a broker of this city with whom defendant had already arranged to buy the bonds without commission, and invest in "Baby Bonds."

This was on Friday, March 3d, after business hours; the next day was Saturday, March 4th, a legal holiday; the next was Sunday; and so Bier was not seen until Monday, March 6th, when it appears that an investment was made in "Baby Bonds," but only of the sum of \$199.65, and the difference of \$91.89 had disappeared and has never been traced.

Let any one read the article of the Constitution and the fourteenth rule of the Civil District Court, and imagine any contingency in which this money could, during this period, have been lawfully out of the judicial depository, and first, in the hands of Sel, then in the hands of the judge, then in the hands of a minute clerk. What necessity was there for such proceedings? How easy and natural it would have been to have complied with the law by ordering the payment to be made in a check to the order of Bier, on delivery of the bonds?

Hence, if loss occurred, whose was the fault?

The defendant, in his answer, says:

"At the next session of the court on Monday, March 6, 1882, re-

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spondent asked Luminais about the bonds aforesaid, and was informed that Bier still had them, and that he was too busy to go up that day and get them.

"On the following day he made the same inquiry, and received substantially the same response; and thereupon, respondent again sent for the said Charles E. Sel and directed him to go up to the office of said Bier and get the said bonds. That said Sel went to the office of Henry Bier, received from him a package of "baby bonds," and delivered them to respondent."

I will not enter into the painful conflict of testimony which here ensues between the testimony of Sel and that of the judge, because, in my view of the case, it is not essential to the decision of the cause.

Sel brought the bonds in a package, with a memorandum attached showing the number of the bonds and the amount invested, viz: \$199.65, which he says he read and observed the difference between the amount and the sum he had collected on the order. But this difference did not attract the attention of the judge, who, as he states, did not know the amount of the money which had been collected and handed to him. He states that he handed the bonds to the minute clerk with instructions to paraph them with an endorsement to this effect:

"SUCCESSION OF N. QUIAZZARO. { No. 842,
Civil District Court,
Parish of Orleans.

"This bond is the property of the minor, Arsene Adelaide Quiazaro, purchased by virtue of a decree rendered in this succession, and is not transferable, unless by virtue of a decree authorizing the same;" and then "to sign and seal the same with the seal of the court, and when so written upon, signed and sealed, to deliver the same to the counsel for the tutrix, who, from the time of the sale of the property in June, 1881, had besieged respondent with requests to direct the payment of the fund in court to the tutrix."

This direction is in conflict with the plain requirements of Art. 348 of the Civil Code, which requires that, in case of such investments of minors' funds, the bonds shall be registered in the office of the Auditor of the State in the manner specifically directed.

The excuse given for this departure from the law, is the impression of the judge that the Auditor would charge \$3 for the registry of each bond, and that, the bonds being only for \$5 each, this would consume their value; but it is clear under the law that the Auditor has no right to charge for such registry, and it does not appear that it is the practice to do so.

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This is the last that has ever been heard of these bonds; and although only ten days afterward, the judge discharged his minute clerk for intemperance and neglect of duty, it does not appear that he ever concerned himself about the question whether his directions had been complied with.

The minutes and the record of the case contain no trace of any of these proceedings touching the money and the bonds after the order of March 3, 1882.

The minute clerk is dead; Lemonnier, the counsel of the tutrix, is dead; the records of the court are silent; and the defendant's account of his conduct in reference to the money and the bonds admitted to have passed into his manual possession, is established only by oral testimony of himself, corroborated in some points by Marks and Doran, but contradicted, in very important particulars, by Sel.

I do not deem it necessary to dwell upon this conflict of evidence, or to draw inferences which must be unfavorable to the veracity either of defendant or of Sel, who testified in his death-chamber, and who, since the trial of this case, has gone to give his account before a Tribunal infinitely higher than any earthly one.

No further proceedings were had in the cause until April, 1886, after the lapse of four years.

It appears, however, that, in the meantime, Mr. Soubit, the husband of one of the major heirs of Quiazzaro, had made some inquiries into the matter and had called on the judge in person to inquire what had become of the money of the estate; but the judge dismissed him with the statement that the major heirs had no concern in the matter, or words to that effect; thus carrying out his *ex parte* decree of April 5th, 1881, already commented on.

Soubit employed a lawyer, who, after examining the record and ascertaining the position of affairs, advised him that the assertion of the rights of the major heirs would be troublesome and expensive, and that the amount involved did not justify his undertaking the case. Soubit also consulted other attorneys, who did nothing.

And so matters rested until April, 1886, when the minor, Arsene A. Quiazzaro, having been fully emancipated, employed counsel to look after her rights.

The record of the Quiazzaro case was now lost and, after the most diligent search, could not be found. Counsel could get no information except what was contained in the minutes of the court.

On April 29th, 1886, the following rule to show cause was filed and made returnable Friday, May 7, 1886:

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"SUCCESSION OF N. QUIAZZARO. } No. 824.
Civil District Court for Parish
of Orleans, Division "E."

"Rule on administrator filed April 29, 1886.

"On motion of A. Briegne and Sambola & Ducros, of counsel for Miss Arsene Adelaide Quiazaro, now duly dispensed from the legal age of majority.

"It is ordered by the Court, that Ben Onorato, acting administrator of the aforesaid succession and depository of its funds, do show cause on Friday, the 7th of May, 1886, at 11 o'clock a. m., why he should not pay her in cash, her orphan's homestead of one thousand dollars, or else deliver or cause to be delivered to her, in lieu of the cash, State bonds, known as Baby bonds, for the like total amount, duly registered and made non-negotiable according to law, into which said homestead was to be invested, in pursuance of an order of his honorable court by the said B. Onorato, from whom mover has never been able to have a satisfactory account of his acts and doings in the premises, and who was in law and in duty bound to cause said investment to be made."

The extraordinary character of this rule is freely commented on by counsel, but we think it is easily accounted for: Why should the minor's counsel not have supposed that Onorato was administrator when they found him so characterized in three orders on the minutes? And, since the minutes furnished no suggestion of any other reason why the judge should have allotted the whole residue of the estate to the minor to the exclusion of the major heirs, the error of assuming that it must have been, in some way, a recognition of the homestead right, was not inexcusable. And, inasmuch as the minutes do not show the amount ordered invested in "Baby bonds," the claim of \$1000 was not unreasonable.

The judge says that all memory of the transactions had passed entirely from his memory. Onorato was equally oblivious, and could find none of the orders or checks on which he had disbursed the money, except the last check for \$291 54, and that was payable to bearer, and he had no recollection to whom it had been delivered.

Onorato carried the rule to his counsel and was explaining his situation, when Charles E. Sel, who at that time occupied a desk as a notary in the counsel's office, overhearing the conversation, interrupted it and informed them that he was the person who got that check, and then told all about the transaction.

It does not appear, however, that Onorato communicated these facts either to the counsel of the minor or to the judge, until May 28th. The

rule, in the meantime, had been thrice continued for various reasons, when, on May 28th, it was fixed and continued for the fourth time to the 4th of June, upon the objection of Onorato's counsel to go to trial without the record. As the minor's counsel was leaving the court he met Onorato, who then conveyed to him the information received from Sel, to the effect that he had collected the money and received the bonds and handed both to the judge in person. Thereupon the counsel returned into court and informed the judge of what Onorato had said.

This, for the first time, seems to have occasioned a flash of recollection in the mind of the judge. He then sent for Sel and possessed himself of the facts, as he has detailed them in his answer.

He thus became aware that his administration had resulted in the loss of the last remnant of the minor's estate, and that Onorato, who had acted in strict obedience to his orders, was now being prosecuted, *before him*, to make good this loss.

That he should ever have sat again in the cause, for any purpose, I must pronounce utterly improper and unjustifiable. Whatever may have been his confidence in the correctness of his own conduct, and whatever his opinion on the question of his own legal or moral responsibility *to the minor*, the question raised by the rule was as to Onorato's legal responsibility; and it is clear, beyond dispute, that if Onorato was legally responsible to make good this loss, the judge was morally, if not legally, bound to hold Onorato harmless.

On the 4th of June, before the rule was called for trial, he called the counsel for the minor into his private office, and there held a long interview with them in which he narrated and justified his conduct in the premises, invited their opinion as to whether he was morally or legally responsible for the loss, and received from them the plainest intimation that they so considered him. Nevertheless, he acted in the case by continuing the rule until June 11, when he stated that Mr. Bier would be in court.

The 11th of June came, but Mr. Bier was not there. The judge called the rule, and on objections, the nature and validity of which are, in my view, immaterial, against the strenuous protest of the minor's counsel, he ordered the rule *continued indefinitely*. And so matters stood until the adjournment of the then session of the court. The conduct of the judge now became the subject of public gossip and scandal.

The matter was under investigation of two grand juries of the parish and, though no indictment was found, the second grand jury, in its published report, censured the official conduct of the judge.

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Matters finally culminated in the bringing of this suit.

The trial was remarkable for the length of time consumed, for the large amount of evidence taken, for the contradictions in the testimony, for the variety and number of circumstances which favored different theories of the facts, for the array of distinguished counsel appearing on either side and for the eloquence and ingenuity of the arguments. One listening to these arguments, so far as the Quiazaro case is concerned, would have supposed that the main, if not the only, issue was the guilt or innocence of the defendant of the crime of embezzling and converting to his own use the funds and property of the estate. The most ingenious and plausible theories of the facts and circumstances of the case were presented by opposing counsel on the one side inconsistent with his innocence, on the other precluding the possibility of his guilt. His enemies will readily accept the first; his friends, the last; the indifferent will be divided.

I do not find it necessary to decide that question, but I give the defendant the benefit of the statement, that if the success of the State's case depended on proof of embezzlement by the judge, I should vote for his acquittal. If the Constitution had meant that judges were removable only for "crimes and misdemeanors," Art. 196 of the Constitution would have stopped with those words, and would not have enumerated the other nine distinct causes of removal, including "malfeasance in office" and "gross misconduct." In the use of these terms it obviously referred to acts which were not "crimes or misdemeanors." It does not declare that any judge who shall be convicted of "malfeasance in office" or "gross misconduct" *shall* be removed; but it clearly means that such offenses may be proper causes for removal, and it throws upon this court the grave responsibility of determining what kinds and degrees of malfeasance or misconduct should incur the penalty.

In discharging this duty, we must pay due regard to the nature of judicial duties, and to the broad shield of protection which is extended over the errors of judges in the exercise of their jurisdiction; but we must, at the same time, be mindful of the dignity of the office and of the deep interest which the public has in the proper administration of justice, and in having judges whose conduct occasions no just cause for reproach or for loss of confidence in their integrity and reasonable discretion.

By "malfeasance," under all definitions, is meant the doing of things which one ought not to do, or the doing of illegal acts.

See Webster, Worcester, Abbott, Bouvier. The recital we have

given of the proceedings in the Quiazzaro case exhibits a long trail of illegal acts, in clear violation of law and of the rules of his own court, and in excess of any jurisdiction conferred by law on any court in this State. Jurisdiction is defined to be the function of judging causes wherein rights are disputed; the power of hearing and determining a cause. Wells on Jurisdiction of Courts, p. 1; U. S. vs. Arredondo, 6 Peters, 709.

The jurisdiction which the judge had over the matters involved in the case entitled the succession of Quiazzaro, gave him authority to determine all questions which might be presented to him for decision by the parties thereto; but it gave him no authority to assume the personal administration of the estate, to enter judgments and grant orders without notice and of his own motion, to expend moneys, to handle funds and to commit them, for any purpose, into the hands of mere ministerial officers of his court.

If the law had committed to him such functions they would have been ministerial, and not properly judicial functions.

The case is made worse by the reckless carelessness with which the functions were discharged and by his disregard of the rules of his own court in the methods adopted.

The result of this malfeasance has been the entire loss of the estate, of the administration of which he thus took charge. The auctioneer, who acted strictly under his orders in disbursing the proceeds of the property sold, is sued to make good the loss.

The circumstances surrounding the loss of the funds have been of a character to subject the judge to grave suspicions of his integrity, and have led to investigation by grand juries. The scandal has been such that one of his fellow-judges, and thirty reputable members of the bar, who practice before his court, have felt justified in joining in the petition for his removal. The Attorney General of the State, who is an involuntary actor in the proceeding, after hearing all the evidence in the case, has felt authorized to address the court and argue in favor of his removal.

If malfeasance of this kind, attended with such results, does not support the action for removal of the judge, what malfeasance, short of proven crime, would support it? Would any citizens hereafter feel justified in initiating an action for removal of a judge for any malfeasance not criminal, if the present demand were rejected? Would any court of impeachment, who respected the opinions of this tribunal, feel authorized to convict any judge or other officer for any malfeasance in office?

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Would we not, in effect, be obliterating from the Constitution the offense of malfeasance in office as a ground for either impeachment or removal by this Court?

To anyone who will calmly reflect upon the facts of this case, it must plainly appear that the only doubt as to its proper disposition arises from the simple fact that the officer involved is a judge.

If any other officer in the State were subject to removal by judicial process for malfeasance in office and gross misconduct, and were proven guilty of such clear violations of law and of the rules of his own office adopted by himself, resulting in such injury to others and in such imputations upon his official integrity, few would doubt the judgment of the court. So any administrator, executor, syndic or other judicial officer, charged with functions similar to those assumed by this defendant, who had been convicted of like offenses would, unhesitatingly, be removed.

But the law, in the exercise of a wise policy, has hedged around judges of courts with peculiar immunities.

The Supreme Court of the United States holds this language in regard to the subject of judicial liability:

"It is a general principle, of the highest importance to the proper administration of justice, that a judicial officer in exercising the authority vested in him shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge would be inconsistent with the exercise of this freedom and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries. Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. * * * Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feeling, are being constantly determined in the courts. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in impu-

tations of this character; and, from the imperfections of human nature, this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality or maliciously or corruptly, the protection essential to independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action." *Bradley vs. Fisher*, 13 Wall. 347.

Judge Cooley after elaborating, with his usual perspicacity, the reasons underlying this doctrine, and after showing that the only authority to whom the judge owes an account of his conduct is the State, concludes as follows:

"Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the State and the peace and happiness of society; that, if he fail in a faithful discharge of them, he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer." *Cooley on Torts*, p. 408.

Such is the law of this State, as of all other well-ordered countries.

Prior to the adoption of the present Constitution, with the exception of liability to removal by an address of two-thirds of all the members of both houses of the General Assembly, judges could be impeached only for "crimes and misdemeanors." Constitution 1868, Art. 81.

Thus, except for "crimes and misdemeanors," judges, in the exercise of their official functions within their jurisdiction, were responsible to no earthly tribunal. Hence, no doubt, arise the theory and assumption upon which this case has been mainly defended, and the impression shared, perhaps, by the public, that the State, in order to maintain the demand for the removal of the judge, must establish, beyond a reasonable doubt, his guilt of a crime or misdemeanor.

Such theories and impressions have no foundation under the provisions of the present Constitution, on which this suit is based.

The framers of that instrument, prompted, no doubt, by then re-

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cent experience, determined that the responsibility of judges could not be safely left confined within such narrow limits. They, therefore, to "crimes and misdemeanors," added various other causes for removal, including malfeasance, non-feasance and gross misconduct; and they confided to this tribunal the discretion of determining what acts of that character would support a judgment of removal. In so doing, they doubtless supposed that, as judges ourselves, we would extend due protection to the rights, privileges and immunities of other judges; that we would jealously guard them against the malice of disappointed litigants, and the base suspicions of censorious scandal-mongers, who, out of the corruption of their own natures, are prone to soil the purity of the most blameless with the slime of their foul imputations; and that we would cover their errors with that mantle of charity of which we ourselves deeply feel the need.

But, at the same time, it was certainly and confidently expected that we should carry, "full high advanced," the standard of judicial dignity, honor and propriety; that we should exact of judges, in the control and disposition of funds confided to their judicial superintendence, a reasonable compliance with those rules of law and of their own courts which are provided to protect the interests of all parties concerned against improvident dispositions and to secure the funds themselves from embezzlement and loss; and that, in such matters, as in all others, they should pursue a line of conduct so clearly void of offense and so distinctly stamped upon the record, that their dealings with such funds, in case of loss, should not expose their integrity to suspicion, and be remitted for their vindication to conjectural inferences from contradictory testimony and to theories based on circumstantial evidence which support the innocence of the judge only by assaulting the integrity of his agent, who is dead, to whom he entrusted these funds without the slightest authority of law and who, if guilty, could only have accomplished the crime through the grossest carelessness of defendant.

If defendant be civilly responsible to make good the loss occasioned to the minor, it could only be by reason of his having acted in such entire absence of jurisdiction as would emphasize the malfeasance and misconduct.

If he be not responsible, then so much greater is the necessity for enforcing against such malfeasance the only penalty provided by law.

Under a profound sense of my duty, under the Constitution, to the petitioners, to the State, to the people, and to the judiciary, I am compelled to write what are to me "a few of the unpleasantest words that ever blotted paper," when I announce that I concur in the decree of the court.

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DISSENTING OPINION.

WATKINS, J. At the request, and upon the information of fifty citizens and taxpayers, this suit was brought against respondent, for his amotion, and removal from office, in pursuance of the provisions of Articles 196 and 200 of the Constitution, on the grounds that he "has been guilty of nonfeasance and of malfeasance in office, favoritism and oppression in office, and *gross* misconduct, and that he is incompetent for the duties of his office, and should be removed from office," etc.

I.

The question presented at the threshold of the controversy is:

What is the character of this proceeding? Is it a criminal, civil or political one?

Sec. 4 Art. 2 of the U. S. Constitution declares: "The President, Vice President and all civil officers of the United States shall be *removed from office*, on impeachment, and conviction of treason, bribery or other *high crimes and misdemeanors*.

Article 196 of the Constitution provides: "The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Attorney General, Superintendent of Public Education and the judges of all the courts of record in this State shall be liable to impeachment for *high crimes and misdemeanors*, for *nonfeasance or malfeasance in office*, for incompetency, for corruption, favoritism, *extortion or oppression in office*; or for *gross misconduct or habitual drunkenness*."

Article 200 provides that "for *any of the causes specified in Article 196*, judges of the Court of Appeals, of the district courts throughout the State, and of the city courts of the parish of Orleans, may be *removed from office* by a judgment of the Supreme Court of this State," etc.; but such judgment shall not, as in case of impeachment, have the effect of disqualifying the respondent for office.

No prior Constitution designated the impeachable offenses *eo nomine*.

By the quoted provisions of our Constitution, this Court is given *concurrent, original* jurisdiction, with the Senate, of impeachable offenses and misdemeanors committed by those officers enumerated in Article 200. Either impeachment or suit is a constitutional mode of removing constitutional officers from office.

The provisions of the State and Federal Constitutions are, essentially, the same. The former is more specific as to what are impeachable crimes and misdemeanors. The constitutional power of this Court is exactly commensurate with that of the Senate. For whatever offenses the former may adjudge the latter may convict. The evidence

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to be adduced before each is the same. The proceedings in each tribunal are of the same character. The suit and impeachment must be grounded upon the commission of *some* high crime or misdemeanor enumerated, or upon some gross misconduct or habitual drunkenness.

In relator's brief, p. 2, we find the following, viz: "The question presented here is, as to the issue, whether or not your Honors have jurisdiction of acts committed by the defendant prior to his present term of office. We alluded, in the oral argument, to the principle that the courts, in such matters as the present, were bound by the precedents in impeachment trials. * * * The rules applicable to impeachable offenses are the same as those cognizable by judicial tribunals." The italics are ours. See also p. 7, a similar paragraph.

Mr. Evarts, for respondent, on the Johnson impeachment trial, said: "You must have the crime *definite*, under the law and Constitution; and, even then, it is not impeachable, unless you affect it with some of the public, general and important qualities that are indicated in the definition of the learned managers." P. 286, vol. 2.

Senator Johnson, in his official opinion, said: "That the term crimes and misdemeanors, in the quoted clause, mean *legal* crimes and misdemeanors, is further obvious, from the provisions contained in the third section of the first article of the Constitution, that, notwithstanding the judgment in the impeachment, the party is liable to indictment, trial, judgment and punishment according to law. This proves that an officer can *only* be impeached for acts for which he is liable to criminal prosecution.

"Whatever acts, therefore, could not be criminally prosecuted under the general law, cannot be ground for impeachment."

On the impeachment trial of Lord Melville, in 1806, the opinion of the judges was required by the House of Lords, as to whether the charges against the respondent, of an improper withdrawal and use of funds entrusted to his care, as treasurer of the navy, were high crimes and misdemeanors within the law of England, and their answer was that they were not high crimes and misdemeanors.

Johnson's trial, vol. 3, p. 51:

Mr. Nelson, for the respondent, argued that, in order to ascertain "what are impeachable crimes and misdemeanors, it is necessary to go to the common law for the definition; and when you go to the common law for the definition, nothing is impeachable, in this country, within the meaning of the Constitution, except a crime or misdemeanor, known as such at the time the Constitution was adopted." 2 vol., p. 143.

Mr. Groesbeck said: "What is the issue before you? Allow me to say, it is not a question whether this or that *thing* were done. You are not here to try a mere *act*. By the very terms of the Constitution, you can only try, in this tribunal, *crime*. Let us repeat the jurisdiction—'treason, bribery or other *high crimes and misdemeanors*.' The *jurisdiction is shut within that language*, and the issue that this Court can try is *only* an issue of *crime or no crime*."

"What is crime?"

"In every grade of it, senators, there must be *unlawful purpose and intention*. When these are wanting there cannot be crime. There must be behind the act the *unlawful purpose* prompting its commission, otherwise there can be no crime." Vol. 2, p. 192.

Mr. Evarts concurred in the views expressed by Mr. Groesbeck, and in support of them quoted the opinion delivered by Lord Chancellor Thurlow on the trial of Warren Hastings:

"My lords, with respect to the laws and usage of Parliament, I utterly disclaim all knowledge of such laws. It has no existence."

"True it is, in times of despotism and popular fury, when to impeach an individual was to crush him by the strong arm of power, of tumult, or of violence, the laws and usage of Parliament were quoted in order to justify the *most iniquitous and atrocious acts*. But in these days of light and constitutional government, I trust that no man will be tried except by the laws of the land; a system admirably calculated to protect innocence and to punish crime. * * *

"I trust your lordships will not depart from recognized established laws of the land."

"The Commons may impeach, but your lordships are to try the cause; and the *same* rules of evidence; the *same* legal forms which obtain in the courts below will, I am confident, be observed in this assembly." 2 Vol., pp. 269 to 277.

Mr. Buchanan, chairman of the managers on the trial of Judge Peck, said: "Official misbehavior, therefore, in a judge, is a forfeiture of his office; but, when we say this, we have advanced only a small distance. Another question meets us: What is a *misdemeanor in office*? In answer to this question, and without pretending to furnish a definition, I *freely admit* we are bound to prove that the respondent has violated the Constitution and the known law of the land."

"This, I think, was the principle fairly deduced from all the arguments on the trial of Judge Chase and from the *votes of the Senate* on the articles of impeachment against him." Peck's trial, p. 427; Johnson's trial, Vol. 2, p. 287.

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In his Commentaries on the Constitution, Mr. Justice Story says:

"The doctrine, indeed, would be truly *alarming*, that the common law did not regulate and control the powers and duties of the court of impeachment.

"What would, otherwise, become of the rules of evidence, the legal notions of crimes, and the application of principles of public or municipal jurisprudence, in the charges against the accused ?

"It would be a *most extraordinary anomaly*, that while every citizen of every State, *originally composing the Union*, would be entitled to the common law, as his birthright, and at once his protection and his guide, as a citizen of the Union, he would be subjected to *no law*, to *no principle*, to *no rules of evidence*.

"It is the boast of English jurisprudence—and without it the power of impeachment would be an *intolerable grievance*—that, in trials by impeachment, the law *differs not* in essentials, for *criminal prosecutions before the inferior courts*.

"The same rules of evidence, the same notions of crimes and punishments, prevail." Sec. 798.

Again: "It seems to be the settled doctrine of the high court of impeachment that, though the common law cannot be a foundation of a jurisdiction not given by the Constitution and laws, that jurisdiction attaches, and is to be exercised according to the rules of the common law; and that, what are, and what are not, high crimes and misdemeanors, is to be ascertained by a recurrence to the great basis of American jurisprudence." Sec. 799.

Mr. Justice Blackstone says: "A crime or misdemeanor is an act committed or omitted, in violation of a public law, either forbidding or commanding it." 4 Black. p. 5.

"In the English law, misdemeanor is generally used in contradistinction to felony; and misdemeanors comprehend all indictable offenses which do not amount to felony, as perjury, battery, libel, conspiracy," etc. * * * "The word 'crime' has no technical meaning in the law of England. It seems, when it has reference to positive law, to comprehend those acts which subject the offender to punishment.

"When the words 'high crimes and misdemeanors' are used in *prosecution by impeachment*, the words '*high crimes*' have no definite signification, but are merely used to give *greater solemnity* to the charge." 4 Black. p. 5, and note.

This concordance of authority and precedent establishes conclusively that the terms "high crimes and misdemeanors," employed in the Federal as well as the State Constitutions, indicate *legal crimes* and

misdemeanors; and that an officer can *only* be impeached, or suit be brought against him, for amotion, for acts for which he is liable to *criminal prosecution*, under the principles of the common or statute law.

It further establishes that an officer cannot be tried in an impeachment tribunal for *acts*, but only for *crimes*. That the "jurisdiction is shut within" the language of the Constitution. That in every grade of crime there must be *unlawful purpose and intention* prompting its commission. When these are wanting there can be no impeachable crime or misdemeanor.

It further establishes that in impeachment trials, the same rules of evidence, the same legal forms, prevail as in other courts of the land; and that the respondent may claim the benefit of the rule in criminal cases that he may *only* be convicted, when the evidence makes the case clear, beyond a reasonable doubt.

It further establishes that misdemeanors in office are the violations of some known law of the land, and that in trials therefor, by impeachment, the law *differs not* in essentials from criminal prosecutions before the courts, and the same notions of crimes and punishments obtain therein. That the remedy and redress thereof, by impeachment, must be exclusively ascertained and exercised in conformity with these laws, which lie at the foundation of American jurisprudence.

This collation of authority and precedent was rendered imperative, by reason of there being no adjudicated case, to which we have been referred or that could, after diligent research, be found.

For the first time since the organization of the State government, this Court was given, by the Constitution of 1879, jurisdiction of such a proceeding as this; and this case is the first one that has been instituted under it.

II.

The next important question to be determined is: What are non-feasance and malfeasance in office? What are corruption, favoritism, extortion and oppression in office?

We will treat of "*gross misconduct*" in a separate paragraph.

A statute of this State declares that "all crimes, offenses and misdemeanors shall be taken, intended and construed, according to and in conformity with, the common law of England." Another statute declares that any oppression, or extortion in office, is punishable; and that any one guilty of a misdemeanor in office, shall suffer fine or imprisonment. R. S. 976, 868, 869.

To ascertain what are the constituent elements of misdemeanor, extortion and malfeasance in office, the criminal law must be consulted.

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For the same manner and character of evidence must be adduced as before the courts of *ordinary criminal jurisdiction*; and that this court, sitting on the trial of a suit for the amotion of a civil officer, jurisdiction of which is given thereto, by the same constitutional provisions, which confer upon the State Senate jurisdiction of impeachment trials, against same officer, must be governed thereby also.

Dr. Wharton, in the ninth edition of his criminal law, announces the following principles:

"It is a misdemeanor at common law for a public officer, in the exercise, or under the color of exercising, the duties of his office, to *abuse* any discretionary power with which he is invested by law, *from an improper motive*." Sec. 1572.

"In an indictment against an officer of justice, for corrupt misbehavior, it is necessary that the act, imputed as misbehavior, be distinctly and substantially charged to have been done with *knowingly corrupt, partial, malicious and improper motives*, though there are no technical words required, in which the charge of corruption and knowledge shall be made." Sec. 1573.

"Malice, corruption, or evil intent, when essential to the case, may be inferred, as presumptions of fact from the evidence." Sec. 1590.

In Mr. Bishop's recent edition of his work on Criminal Procedure, we find the following precepts laid down:

"In general, *corruption*, in some form of words, ought to be averred. It is believed to be always necessary in indictments at common law. It is commonly, if not always, so under statutes," etc. Vol. 2, sec. 834.

"The question of malice is for the jury. A sufficient presumption of it may arise from a *wrong act, intentionally done*. But a mistake of law, especially in a *judicial officer*, is *inadequate proof of corruption*." Vol. 2, sec. 836; 2 Bishop's Crim. Law, secs. 966, 977.

"One serving in a *judicial*, or other capacity, in which he is required to *exercise a judgment of his own*, is not punishable for a mere error therein, or for a *mistake of the law*. His act, to be cognizable *criminally, or even civilly, must be wilful and corrupt*." 1 Bishop's Crim. Law, secs. 460, 299.

"*Extortion*, in its general sense, signifies any *oppression* by color of right; but technically, it may be defined to be the *taking of money by an officer*, by reason of his office, either when none is due, or none is yet due." 2 Whar. Crim. Law, sec. 1574.

"But to extortion, at common law, and under most of the statutes, *corrupt motive is essential*. And if there be no such motive, and the

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money be voluntarily given, for *extra* work, the indictment is not sustainable at common law." Ditto Sec. 1576.

"A mere agreement to pay is void, and will not sustain a charge of extortion." Ditto Sec. 1577.

The same principles are announced in Russell on Crimes, p. 135, 142.

Applying these principles, we find that a misdemeanor in office, or under color of an office, necessarily involves an *improper motive*, and the act must be done with *corrupt, malicious* or *improper intent*, or be infused from a wrong act, *intentionally* done.

We also find that extortion or oppression in office is the taking, by a civil officer, of money when none is due, or none is *yet* due, with a *corrupt* motive; but that a mere *agreement to pay money* will not sustain such a charge.

In such case, the question is not whether the act might be found correct upon full investigation; but did it proceed from *dishonest, oppressive* or *corrupt motive*.

To make out the charge of corruption, extortion or oppression in office, the proof must show an unlawful taking, by a public officer, by color of his office, of money, or some valuable thing, that is not due him. A promise to pay money to an officer is simply void.

III.

The first specification in the complaint, epitomized, is that on the 3d of March, 1882, the respondent caused an order to be entered on the minutes of his court in the matter of the Succession of Nicholas Quiazzaro, directing the proceeds of property belonging thereto to be invested in bonds of the State, known as baby bonds, and thereafter procured a copy of same on same day and gave it to Charles E. Sel, and directed him to collect the balance of \$291.54, to the credit of said succession in the hands of Ben Onorato, auctioneer, and offered him a reward for so doing; but on Onorato refusing a check on the presentation of said order, and same having been returned by Sel, respondent wrote on said copy at the foot thereof and before the seal of the court additional words, directing Onorato to pay said sum to bearer, to make said investment—said alteration having been made out of the presence of counsel and when court was not in session.

The further specification is made that, by the respondent's direction, Sel procured said balance in money and handed same to him—the respondent—and that he has never accounted therefor to the heirs, tatrix or other representative of the succession.

"And that said Lazarus thus illegally and *without any color of law or right, and in violation of his duty as a judge, obtained possession of the money of said Quiazzaro-succession.*"

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This charge and specification are susceptible of division into two heads, and each head may be separately considered :

1st. A charge of embezzlement or larceny of the money by respondent.

2d. The liability of the respondent to amotion for the taking and disposing of the money, although he may have been actuated by honest intentions and proper motives—upon the theory that the act was not a lawful one, and respondent was guilty of “*vicious intromission*” or its equivalent.

IV.

In order to eliminate all unnecessary issues, we will first dispose of the charge of “*vicious intromission*” and intermeddling with the succession, pretermittting discussion for the present as to whether or not there was a succession, as a matter of law.

There is a law of this State on the subject, which furnishes the only correct guide in the premises. It is found in R. S. sec. 3685, which provides that “in case any person shall take possession of a vacant estate, or a part thereof without being duly authorized to that effect, *with the intent of converting same to his own use,*” he shall be liable to prosecution and punishment by fine, and made liable for the debts of the estate.

But when that statute was, in its revision in 1870, incorporated into the Civil Code, as Article 1100, that clause appertaining to criminal prosecution was omitted therefrom.

The history and interpretation of those statutes will be found in 12 Ann. 245, Walworth vs. Ballard; 12 Ann. 344, Carl vs. Poleman; 30 Ann. 949, Peet, Yale & Bowling vs. Nalle & Cammack; 34 Ann. 326, Succession of Trosclair.

But civil liability cannot be enforced without proof of the intermeddler's *intent to appropriate* the effects of the succession. Unless such proof is administered the accused cannot be convicted. That is the *sine qua non*.

German to this is the further contention of relator's counsel that respondent is guilty of malfeasance in office, because he undertook the investment of the funds of the minor, without being thereto authorized by law.

The investment was authorized by the express terms of R. C. C. 348.

It is as follows: “The investment of the funds of the minor must be made by public act and secured by mortgage, *unless such investment be made in bonds of the State, or in bonds for the payment of which the faith of the State of Louisiana stands pledged*; and this investment shall *only*

be made under *decree of the court* having jurisdiction of the tutorship ; nor shall such investment be changed, or *the bonds alienated*, except by a decree of same court, etc."

The investment in bonds cannot be made without a decree of court. This is a new article of the Code, and embraces the substance of the act of the 19th of March, 1857, but it makes an important addition thereto of the phrase, viz: "and this investment in bonds shall *only* be made under a *decree* of the court having jurisdiction of the tutorship."

Antecedent to the revision of the Code in 1870, a tutor was authorized to make such an investment in bonds by that statute ; but, under the Civil Code of 1870, it was perfectly immaterial whether the tutrix was faithful or unfaithful to her trust, she was without legal authority to make an investment in bonds of the funds of her ward without a *decree of court*.

The funds were not, indeed, in the hands of the tutrix of Arsene Quiazzaro. They were in the judicial depository, and had been therein deposited to await the adjustment of the taxes and costs of selling the property of widow Quiazzaro, the proceeds of which the funds were ; and on which the minor *only had a tacit mortgage*, postponed in rank to the liens of the State and city, and auctioneer.

The surplus of \$291.54, now in controversy, was realized only by scaling the tax penalties and interest, and was quite as much under the control and destination of the respondent as that portion which had been expended on his orders previously made.

If there had been any serious doubt as to the rightfulness or propriety of the respondent's orders for the investment of the funds under the circumstances related herein, they were dispelled by the evidence of a leading member of the New Orleans bar, who testified on behalf of the relator. He said :

"In my answer to the question of the grand jury, in reference to the power of probate judges, I stated that, as a general rule, the tutor made the investment of minor's funds ; that I considered *there were cases* when the minor's funds were in danger ; when there was no tutor appointed to take charge of them ; or when there were *other* circumstances which endangered the funds, I considered that the probate judge *might with propriety*, as a conservative measure, *direct the investment of the funds*.

"I stated in that conversation (with the respondent), that I recalled a case of my own, Judge Lea being on the bench, * * * and I stated that this case was one which occurred under Judge Lea's ad-

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ministration, in which *I had been directed myself to make the investment,*" etc.

Judge Lea became a member of this court in 1852, hence that occurrence happened prior to the enactment of the statute of March 19th, 1857.

If it was excusable in Judge Lea to authorize the attorney for the tutor to make the investment, why might not the respondent authorize the minute clerk of his court? The only difference consists in the choice of agents to effect the investment.

No importance should be attached to respondent's selection of one of several persons for the performance of the duty.

So far as the principle involved is concerned, it was quite immaterial whether respondent had selected the bank, the broker, or the attorney of the tutrix in lieu of his clerk.

V.

But the point is made that the bonds in which the investment was made never reached their destination, and respondent is responsible on that account.

His counsel insist that the burden of proof was on relator to clearly establish that fact; and not having done so, a presumption is raised in favor of their safe delivery. That it was the duty of the relator to have introduced the tutrix, and to have shown by their testimony, their *non-delivery to them*.

The decisions are to that effect. "One who charges another with a *culpable omission or breach of duty* must prove the fact, *although it involves a negative.*" 90 S. 48; 3 N. S. 576; 2 Ann. 503; 6 Ann. 175; 13 Ann. 215.

"The burden of proof is on him who has to support his case by a fact, of which he is supposed to be most cognizant, and the evidence of which *is more within his power* than of his opponent." 11 O. S. 4, 194; 13 La. 534; 10 Ann. 639; 13 Ann. 379; 15 Ann. 509; C. C. 3.

"A fact material to the plaintiff's case, and susceptible of proof by him, he must prove, though negative in character." 14 Ann. 207, *Bonus vs. Robichaux*.

"The best evidence which, from the nature of the case, must be supposed to exist, and be within a *party's control*, must be produced." 8 N. S. 289; 5 R. 330; 9 R. 381; 2 Ann. 387.

The burden of proof was on the relator to establish the *non delivery* of the baby bonds to the tutrix or her attorney of record.

The further argument was made by relator's counsel to the effect

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that there was no occasion for the respondent making the investment in \$5 baby bonds, as he might have selected those of a greater denomination.

That is error. The debt ordinance authorized but one denomination of baby bonds, and that is \$5. The ordinance relative to the State debt does authorize several denominations. But the baby bonds are the better security, because they bear a better rate of interest, mature at an earlier date, and enjoy a preference for other payment in taxes.

Further complaint is made of the respondent's failure to have the bonds registered by the State Auditor.

R. C. 384 only makes it the duty of the judge to make the necessary decree, and to restrict the negotiability of the bonds.

But it makes it the *duty of the tutor* to furnish the Auditor * * * with a copy of the decree of court authorizing such investment, and to *cause* the bonds to be registered in the office of the Auditor.

It is provided by R. S. sec. 203 "that any tutor * * who shall fail to have the bonds, so purchased, registered and countersigned, * * shall be deemed guilty of a misdemeanor, and shall suffer fine and imprisonment."

As we have already held that, presumably, the bonds had reached the hands of the tutrix, that duty devolved upon her to have them registered.

VI.

This brings us to the discussion of the charge brought against the respondent of having stolen, or embezzled, the balance of \$291 54, as the property of the succession of Nicholas Quiazzaro.

It is necessary to a clear understanding of the question that a brief statement of facts be made. Nicholas Quiazzaro died in 1868, and one Pioggio administered his succession, which was appraised at \$29,752 97. His widow, Elizabeth Quiazzaro, qualified as natural tutrix for the three children, Ernestine, Gilbert and Arsene Adelaide.

In June, 1870, the administration was completed, final account filed, the administrator discharged, and the residue of \$23,642 97 turned over to the tutrix.

In 1869 Widow Quiazzaro purchased, *in her own right*, the two improved lots, the balance of the proceeds of the sale of which is the subject of this controversy.

In 1870 the widow married a second husband, and thereby lost her usufruct of the children's share of the estate, and—notwithstanding she had been retained in the tutorship—she owed interest on same, \$11,821 48, to them.

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In February, 1881, the tutrix presented to respondent a petition in which she stated her indebtedness to her children and her desire to settle with them, and that she was *utterly destitute of means* outside of said property, and that *same was about to be sacrificed for taxes*, but that she could not effect a sale thereof without the *minor's tacit mortgage was raised*, and she desired the authority of a family meeting to that effect, *which, on proper proceedings, was granted*.

Respondent declined to homologate the deliberations thereof until a trusted expert had examined and reported the amount of taxes and costs of sale, which were found to be *in excess of the probable sale value* of the property. The taxes were adjusted and *reduced*, and sale was ordered on the terms proposed. The proceeds were deposited in the Branch Depository and disbursed on orders of court in payment of taxes and cost of sale, and the resulting balance is the \$291.54 in controversy.

On the 3d of March, 1882, the following order was entered on the minutes of respondent's court, viz:

"More than six months having elapsed since the sale of the property in the above succession, and no opposition to the distribution of same having been made, and no one claiming any interest in the proceeds of said property other than the minor Quiazzaro,

"It is ordered that the proceeds of said property belonging to said Succession of Quiazzaro, be invested in bonds of the State known as baby bonds, and that said bonds be registered by the Auditor of the State, under R. C. C. 348."

It was in pursuance of this decree that the investment of the \$291.54 was to be made.

Respondent, as witness in his own behalf, makes substantially the following statement of the transaction:

He says that he had forgotten about the Quiazzaro matter until F. A. Luminais, his minute clerk, invited his attention to it on the 2d of March, 1882, and suggested that the balance of about \$200 should be invested under a previous order of court; and that on account of his suggestion he made the preceding order of the 3d of March, 1882. He states that on the same date, on his way to court, he called on Mr. Henry Bier, a bond broker, and induced him to make the investment without any commissions being charged therefor.

On that day he directed Mr. F. A. Luminais to make a copy of his decree and take it to Mr. Onorato, and get a check and go to Mr. Bier's and invest the amount of it in bonds, mentioning the arrangement he had made with him. He pleaded business, and suggested that

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Charles E. Sel be sent in his place. He was given the copy of the order and sent to Onorato, who declined to give a check *until the order was made more specific, as it was*. Soon after, Mr. Sel returned with a roll of bills, which he handed to respondent, and which he immediately and without counting handed to Luminais, and requested him to go to Bier's and purchase the bonds.

He states that on the Monday morning following, the 6th of March, 1882, he inquired of Mr. Luminais if he had purchased the bonds, and he told him that he had, but had left them with Mr. Bier. On Tuesday morning, the 7th of March, 1882, he again made inquiry of Luminais for the bonds, and he again pleaded business, and suggested that Sel be sent; and he was dispatched for them, and procured them and brought them to court, and *delivered them to him* (respondent); and that he immediately handed them to Luminais, with instructions to verify or paraph them, and hand them to counsel for tutrix. Luminais requested some additional instructions in paraphing them, and that he withdrew one from the package and wrote an indorsement thereon as a guide, and Mr. Luminais took the package of bonds and walked out.

He states that he never examined or counted the bonds. That Mr. Sel said they were correct. He said he met Mr. John Lemonnier, counsel for the tutrix, a few days afterward, and notified him of Mr. Luminais being in possession of the bonds.

The books of Mr. Bier show that the amount actually invested was only \$199 63, in lieu of \$291 54. There was a deficit of \$91 91 *unaccounted for by any one*.

The essential variations between the testimony of the respondent and that of Charles E. Sel are, viz:

1st. Selswears that the respondent appointed him a custodian in that matter, and promised him a fee of \$5.

2d. That when he collected Onorato's check, he counted the money paid him by the paying-teller; that he returned with the money to court and handed it to respondent, and that he put it in his pocket, he thinks.

3. That on the morning he was sent by respondent to Bier's for the bonds, he procured them and returned to court with them, and delivered them to the respondent; and that he *handed them back to him* with the request that he should keep them for the present, saying: "You are custodian." That he took them and kept them several days, until the respondent called for them.

The testimony of Theodore Marks corroborates respondent's statements on the last two points, and contradicts that of Sel. The testi-

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mony of Doran substantiates that of the respondent in regard to the surrender of the bonds to Luminais to paraph, and Marks, also.

Marks does not fix the precise date on which Sel brought the bonds to the respondent; but he details the circumstances of Sel being sent for the bonds, and of his return within *three-quarters of an hour* with them *and at once delivering* them to the respondent, and immediately going away—all on the same day, and about the same hour of the day.

Relator's counsel place strong reliance on the evidence of Sel. They state in argument that "the man who got the money used the \$91; that the man who *bought* the bond used the \$91. *The turning point in the case is*, who purchased the bonds? Whoever purchased the bonds did not invest the full amount of \$291 54. If Luminais purchased the bonds he retained the money.

"If Judge Lazarus purchased the bonds then he retained the money. There is no escape."

It will be necessary to make an examination of the testimony, and the collateral facts, and transactions, in order to determine which witness has the stronger support—Sel or Marks.

Their testimony cannot be reconciled one with the other.

In speaking of his custody of the bonds he said, Miss Annie B. Fisher knew of his having them in possession. On interrogation, she said Mr. Sel called her attention to a roll he had in his pocket, one evening about 7 o'clock. "It was in March. I think about the 6th—first part of March. * * * He just lifted his coat to one side, and showed me the bonds: it was in the side pocket. * * * He simply said they were baby bonds." * * *

"He said that he had them for Judge Lazarus; that *he had been sent to buy them for Judge Lazarus.*"

This evidence was offered for the purpose of supporting Mr. Sel's custody of the bonds; but it supports respondent's theory, instead. It is in keeping with Mr. Bier's books, as to the date of purchase. It accounts for Luminais' reluctance to go, on Monday, the 6th, of March, for the bonds; and corroborates respondent's statement to the effect that Luminais stated to him, on that occasion, that the bonds had been purchased of Bier, but that he had left them.

If Luminais had received the money of respondent, as stated by him and Marks, on the 3d of March, and Sel had been sent to purchase the bonds for respondent, and had been by him purchased on the 6th of March and same were in his possession on that day, from what person could he have received the money other than Luminais?

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If the money had not been delivered to Luminais, as related by respondent and Marks, but had, on the contrary, been retained by the respondent, as stated by Sel, at what time and place did Sel obtain it from respondent?

If, in point of fact, Sel had purchased, at Luminais' request, the bonds of Mr. Bier on the 6th of March, and had them in his possession on the evening of that day, was that not a good reason why Luminais should, on the morning of the 7th of March, have excused himself to respondent and requested that Sel be sent? Does not that condition of things harmonize with Mr. Upton's and Miss Fisher's statement; and yet be reconcilable with the statement of respondent and Marks? I think it does.

If Sel was the guilty party, the reason is apparent why he so frequently consulted his friend, Mr. Upton, and appeared to have so much dread of the grand jury.

The same reason might be assigned why Sel so quickly understood the purport of an interview between Mr. Hart and Mr. Onorato, and influenced him to *intervene* therein so promptly.

On the contrary, relator's counsel argue that, on the 10th of February, 1882, respondent granted an order on Onorato, administrator, for the payment of \$147 26 taxes, when none were due, and therefrom argue his guilt. Respondent disavows all knowledge of, or responsibility for this entry on the minutes. The books of the bank show the payment of that sum on February 11, 1882; but it is in possession of no voucher therefor, and why? Because the bank account with Onorato shows that the books of the bank were *balanced on that date*, and the vouchers for all payments made since last previous settlement—the 16th of September, 1881—had been withdrawn, including the one for \$147 26 paid that day. The books were balanced on the 16th of September, 1881, and all previous orders withdrawn, including the one for \$396 85, that represents the payment of the State taxes, with which Luminais had been specially entrusted by the respondent.

During this period of time Mr. Luminais was evidently in possession of the pass-book, or bank-book, in which the Quiazzaro account was kept. This is evidenced in a variety of ways:

1st. By the report of Garidel.

2d. By the negative testimony of Ben Onorato to the effect that *he did not keep one, and had not been furnished with one.*

3d. By the testimony of Doran, Cazelar and Johnson, who saw Luminais with it.

4th. By the report of Luminais himself, entered upon the minutes

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in November, 1881, in which he carefully detailed the status of the account with the bank; and which he could not have known otherwise.

The Quiazaro record appears to have been lost since December, 1881, when Mr. Sabourin took a *minute* inventory of its contents.

Upon an examination of it, when produced and offered in evidence, there were found the various reports made by Mr. Garidel, for the payment of taxes and costs and the attorney's fees of Mr. Lemonnier; but there was no trace of the order for the payment of the \$147 26. *It had disappeared.*

An examination of the entries on respondent's court docket of February 10, 1882, show no entry of any proceedings taken or order made in the matter of the Quiazaro succession on that date.

An examination of that particular entry on the minutes, as of the 10th of February, 1882, *discloses an ill-disguised alteration*, evidently made since the original execution, and the addition of the words, "*and still unpaid.*"

The fact was certainly well-known to Luminais, of all other persons, that all taxes had been paid, as his own report, entered on the minutes, will show. Is it not more likely that this fraud was perpetrated by him, and that those words were employed as a means of concealment, than that the respondent would have displayed such an order in the minutes, as a means of accomplishing a theft, when the minute clerk had himself paid those very taxes, and to the respondent's knowledge.

In connection with this state of circumstances may be considered the statement made by Doran, Cazelar and Johnson, to the effect that Luminais on another occasion spent the money of this succession he had withdrawn from the bank, to pay taxes, and had to borrow money of Johnson to supply the deficit, a month or two previous.

While these circumstances do not demonstrate that Mr. Luminais was guilty of the asportation of the \$147 26, it creates a much stronger presumption against him than against respondent.

It certainly does not show that the respondent either received or converted same to his own use.

Luminais was discharged on the 17th of March, 1882, and subsequently died; and Mr. John LeMonier died of apoplexy on the—day of August, 1884.

There are some serious discrepancies in the testimony of Mr. Sel, which we will now review.

On cross-examination he was asked:

"Q. Were you not sworn before the grand jury?"

"A. Yes, sir.

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"Q. Two grand juries?

"A. Yes, sir.

"Q. Did you state before either or both of those grand juries that you had those bonds in your possession?

"A. Yes.

"Q. From four to eight days?

"A. Yes.

"Q. Both of them?

"A. To both of them."

Mr. W.W. Sumner, who was foreman of the grand jury that assembled in the fall of 1886, states that when Mr. Sel came before the grand jury, he was apparently ill. "He made his statement to *me and I repeated it word for word after him.* His statement was: That on the 6th of March, he was again called by Judge Lazarus and told to go up to Mr. Bier's and get some bonds, for the purchase of which Judge Lazarus had arranged. That he went up to Mr. Bier's; was handed a package which, from its nature, he presumed contained bonds-- in fact, he was certain of it; brought them back and handed them to Judge Lazarus, who was at the time in his private office, and *he went off about his business.*"

He says that he is positive the question was asked Mr. Sel as to the day he delivered the bonds to Judge Lazarus. Mr. Sumner says, on cross-examination: "I recollect that in repeating the dates after him, *I particularly called his attention to the dates, and the fact of three days intervening between his being sent for the money and his being sent for the bonds, and he was asked about those dates, and he was positive in regard to them.*

"It was on the 6th of March that he delivered the bonds.

"Q. It was on the 6th of March?

"A. On the 6th of March that he delivered those bonds.

"Q. That he delivered the bonds?

"A. Yes, sir.

"Q. Are you *sure* of that fact; or was it not an inference?

"A. No, sir.

"Q. From the fact that he said he had delivered the bonds, and you *thought* it was on the same day?

"A. No, sir.

"Q. You are sure of that?

"A. Yes, sir; *I am positive about that.*

* * * * *

"Q. Did he make the statement that Mr. Stern testified to that that was the last he had seen of the bonds?

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"A. Yes, sir."

Mr. Stern, the clerk of the grand jury and who heard Mr. Sel's evidence, said :

"Mr. Sel stated that he went to Mr. Henry Bier's office; he got the bonds, and he showed us how they were wrapped up; in what shape they were, and stated that he handed them to Judge Lazarus in his office, and *and that was the last he had seen of the bonds.*"

On cross-examination Mr. Sel was asked :

"Q. Were you not called upon last summer before myself (E. H. Farrar), and Mr. Parker, of the Picayune, and four or five newspaper reporters, and asked to give a statement of your connection with this matter ?

"A. Yes, sir.

"Q. Did you, on that occasion, make any statement about the length of time you had those bonds in your possession ?

"A. No, sir.

"Q. Why did you conceal it on that occasion ?

"A. Well, I didn't think it was necessary.

"Q. Were you not asked on that occasion to make a full and complete statement of your connection with the Quiazzarro matter, from beginning to end ?

"A. Yes, sir.

* * * * *

"Q. Mr. Sel, did you not, on that occasion, specifically state, in the presence of all those gentlemen, that you brought those bonds down to court and delivered them to Judge Lazarus *on the same day that the order was given you to get them ?*

"A. Yes; that is my impression.

"Q. And that you did make that statement on that day ?"

"A. Yes; I made that statement."

He made like admissions in regard to similar statements he had made to Mr. Denegre, Mr. Miller and Mr. Dinkelspiel.

There can be no doubt of the fact that Marks' evidence has been supported, and that of Sel seriously impaired by the evidence quoted.

The charge against the respondent of having embezzled these funds is not made out.

VII.

Having disposed of all the charges which, in our opinion, involved either crime or misdemeanor, we will now discuss the remaining charges which may be considered as following under the denomination

of "gross misconduct," that is, culpable, offensive misconduct—equivalent to a *quasi* criminal act.

R. C. C. 3556, No. 13—Fault: "There are three degrees of faults: the gross, the slight, and the very slight fault.

The *gross* fault is that which proceeds from *inexcusable negligence*; it is considered as nearly equal to *fraud*, etc.

Beach on Contributory Negligence says:

"What is termed *gross* negligence the better authorities now call wilful negligence or wilful wrong-doing." P. 102.

The same author says: "By negligence is meant ordinary negligence, the significance of which is reasonably well fixed. By *gross* negligence is meant extraordinary negligence—that which is mere ordinary negligence in the superlative degree."

Unlike negligence, "misconduct" implies an act of the will, in the performance of an unlawful or wrongful act; and "*gross* misconduct" is a culpable, wilful, oppressive act, possessing a *quasi* criminal character.

The difference between "*gross* negligence" and "*gross* misconduct," is distinctly drawn in *Milwaukee R. R. Co. vs. Ames*, 91 N. S., 495.

"But the want of observance of the care, whether called *gross* or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted.

"To do this there must have been *some wilful misconduct*, or the entire want of care, which would raise the presumption of a *conscious indifference to consequences*."

Judge Pickering was convicted on impeachment for drunkenness and profanity *while on the bench of his court*.

On the trial of Mr. Justice Chase, Manager Buchanan said: "I admit that if the charge against a judge be merely an *illegal decision*, or a question of *propriety* in a civil cause, his error ought to be *gross and palpable*, indeed, to justify the inference of a *criminal intention*, and to convict upon an impeachment," citing the case of Judge Pickering.

Mr. Blake, in discussing Judge Prescott's case defines misconduct thus:

"To misconduct is to misbehave; to misbehave is to *misdeemean*; to *misdeemean* is to be guilty of a *misdeemeanor*—nothing more, nothing less. The term is technical, signifying a *crime*; hence, it follows, as a conclusion from these premises that misconduct and misbehavior, in the legal interpretation, cannot be anything else." Johnson's Trial, Vol. 2, p 24.

Board of Liquidation vs. Waterworks Company.

All of the various other charges against the respondent fall under this *resumé* of authority and precedent.

The statement of them is quite sufficient, under the authorities cited, to defeat them, except, possibly, the cases of *Martin vs. Aldige*, and *Hill vs. Chicago R. R. Co.*, which cannot be maintained under the evidence in the record; and relator admitted in argument that "the charges in reference to the *Hill*, *Walshe & Woods* cases would not have been sufficient to remove the respondent."

The charges have not been made out, and the demands of the relator, in my opinion, should be rejected.

I therefore dissent from the opinion of the majority of the court.

No. 9816.

THE BOARD OF LIQUIDATION VS. THE NEW ORLEANS WATERWORKS COMPANY.

In an action for the transfer of stock and the payment of dividends, brought against the stockholder in whose name the shares stand, and against the corporation, the latter has no interest at stake, and has no right to prosecute an appeal from a judgment rendered contradictorily with both parties defendant, in favor of plaintiff, where the real party in interest—the stockholder—has not appealed, and the judgment has become final and executory.

In such a case the Court, *proprio motu*, will dismiss the appeal.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

Henry C. Miller for Plaintiff and Appellee.

J. R. Beckwith for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action for three thousand shares of the capital stock of the Waterworks company, and of the dividends declared thereon, under allotment of same to the city by the charter of the company.

Both the city and the company were cited and answered.

The city filed a general denial, while the company urged that the board has no authority to claim the stock and dividends, and that the same are to be affected to a special trust, etc.

There was judgment in favor of plaintiff. From this judgment the city does not appeal. It is brought up for review by the Waterworks company only.

The judgment against the city has become final and executory.

State vs. Wilson.

In this matter the Waterworks company is a mere stockholder and has no interest to attack the correctness of the judgment, where the city, to whom the stock and dividend belong, does not.

Undoubtedly a stock corporation has the right to require the transfer of its stock to be made by the party in whose name it stands, or by his authority. This right it has to protect itself from the injury which it might be subjected to, in case the transfer was unwarranted. The company, in an action against it for such transfer, would have a right to ask that the stockholder be made a party; but this is unnecessary in the present case, in which the city and the company were both cited and joined issue, and where the judgment was contradictorily rendered.

We therefore conclude that the company, under the circumstances,—the city, the real party concerned, not having appealed, and the judgment in favor of plaintiff having become executory,—has no interest in the controversy, and that, by making the transfer and payment decreed by the judgment appealed from, the company is fully protected. State ex rel. Plaisent vs. Railroad Company, 38 Ann. 312.

It is therefore ordered, *proprio motu*, that the appeal in this case be dismissed at appellant's cost.

No. 9812.

THE STATE OF LOUISIANA VS. HENRY WILSON.

Sections 790 and 791 R. S. are designed to punish a generic offense—shooting with a dangerous weapon, with intent to commit murder, and they define its grades.

In certain circumstances death is the penalty; in others hard labor is inflicted.

The sections may be regarded as one law justifying a verdict under either.

A PPEAL from the Ninth District Court, parish of Concordia.
Young, J.

M. J. Cunningham, Attorney General, and *Hugh Tullis*, District Attorney, for the State, Appellee:

1. When the crime prohibited by one statute is greater in degree and includes the crime punished by the other statute, the greater crime denounced in a single count necessarily embraces the prosecution of the lesser crime, for which, therefore, the accused may be convicted under the count. 35 Ann. 734; 6 Ann. 286.
2. The verdict, being "the finding of lay people," need not be framed under the strict rules of pleading, or after any technical form. Any words which convey the idea to the common understanding will be adequate. And all fair intendments will be made to

39	203
45	1432
39	203
51	934

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support it. * * * * * if it sufficiently finds anything, whether for or against the defendant. 1 Bish. Crim. Pro. Section 1005.

G. F. Bowles and Elam & Luce, for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. On the indictment presented in this case, the jury returned the following verdict :

" We, the jury, find the accused, Henry Wilson, guilty of shooting Chas. Zerkosky with a pistol, with intent to kill and murder."

The district judge sentenced the accused to ten years at hard labor.

From the verdict and sentence the defendant appeals.

The Record contains several bills of exceptions and a motion in arrest of judgment.

The bills are to the charge of the court and to the refusal of the district judge to give certain special charges. They all rest on the assumption that the defendant could not be convicted of a crime *lesser* than that charged in the indictment, a theory which the trial judge would not accept.

Sections 790 and 791 of the Revised Statutes are to be considered under the issues presented.

Section 790 reads as follows: •

" If any person lying in wait, or in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall shoot, stab or thrust any person with a dangerous weapon, with intent to commit the crime of murder, he shall, on conviction thereof, be punished with death."

Sec. 791 provides, that: " Whoever shall shoot, stab or thrust any person with a dangerous weapon, with intent to commit murder under any other circumstances than those mentioned in the preceding section, shall, on conviction, suffer imprisonment at hard labor, or otherwise, for not less than one nor more than twenty-one years."

Those two sections, for a proper understanding, have to be considered together, as it is impossible to ascertain under what circumstances a conviction under Sec. 791 can take place without consulting Sec. 790, which, by the reference made to it, by Sec. 791, forms part of it.

Both sections were evidently designed to punish a general offense, viz: " Shooting with a dangerous weapon, with intent to commit murder," defining its grades. But as the act or offense might be aggravated, when done by one lying in wait, or in the perpetration, or attempt to perpetrate, arson, rape, robbery or burglary, the first section

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provides that on conviction the penalty shall be death; and, as the act or offense might be committed under other circumstances, of less gravity, the second section provides that, on conviction, the punishment shall be hard labor only.

For the purposes of prosecution, the indictment needed not to be framed necessarily under the first section to secure conviction under the second section: for the same reason that, on an indictment for murder, a verdict of manslaughter can be legally found and returned.

The two sections may be treated as one and the same law, justifying a verdict under either the first or the second section, the moment that the jury find a state of facts under either.

Similar views have been entertained in germane cases. *State vs. Gregory*, 38 Ann. 738; *State vs. Frances*, 38 Ann. 387. What was said in the *Scott* case, 38 Ann. 387, on the question of *form* of the indictment there does not in the least militate against the ruling now alluded to in the *Frances* case.

It is true the jury did not find the accused guilty as charged, which, had they done so, would have warranted the infliction of death. From the fact, however, that they omitted those words, or a statement of facts found by them, it is inferable that they negatived the circumstances constituting an offense under section 790, and that they found the accused guilty under the second section.

Such was the construction put by the district judge, who instead of sentencing the defendant to death, merely condemned him to hard labor for a *medium* term, of which he here complains with little grace. *State vs. Stouderman*, 6 Ann. 286; *State vs. Green*, 37 Ann. 382; 30 Ann. 313, 116, 215, 1173; 28 Ann. 434; 40 N. Y. 1, 348; *Bishop Cr. L.* 7 ed., vol. 1, sec. 794; *Ib.* vol. 1, sec. 1005; *Wharton, Cr. L.* 384.

The record does not show that any illegal evidence was received.

These views are a sufficient answer to the motion in arrest, which charges that the accused was found guilty of no crime under the laws of Louisiana; that the verdict was not responsive to the indictment or the charge of the court; that it does not set forth the facts and elements constituting the crime for which they find.

As to the objection that the verdict does not find that the shooting was done with a dangerous weapon, it suffices to remark that it says that the shooting was done *with a pistol*, and that a pistol *eo nomine* is declared by law to be a dangerous weapon. Sec. 932 R. S. See, also, *State vs. Jackson*, 37 Ann. 467.

Judgment affirmed.

Shattuck & Hoffman vs. New Orleans et al.

No. 9798.

SHATTUCK & HOFFMAN VS. CITY OF NEW ORLEANS ET AL.

The tax payer, before bringing suit for the reduction or correction of an assessment, must, as a condition precedent, make the preliminary opposition thereto and application for redress, provided for by law.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. F. & D. C. Mellen for Plaintiffs and Appellees:

1. A lumping assessment, including "money loaned on interest, all credits and all bills receivable for money loaned or advanced"—\$175,000—does not enable the tax collector to ascertain the tax due on any class or article of property, and is void. *Thibodaux vs. Keller*, 29 Ann. 510; *Clinton and P. H. R. R. vs. Collector*, 30 Ann. 626; *Desty on Taxation*, Vol. 1, pp. 564 and 565; *San Francisco vs. Mackay*, 21 Fed. R. 539; Constitution, 1879, Art. 210; Act 96, 1882.
2. Under the State Constitution of 1879, and the various acts of the legislature passed since that Constitution went into effect, neither the assessment of taxes nor the filing of the tax rolls in the mortgage office, affects the property of the tax payer who is assessed, with a general lien or privilege or legal mortgage. Each piece of property is liable for the tax assessed on it and no other. Const., Arts. 210 and 218; Act 107, 1884; Act 96, 1882, secs. 32, 33, 34.
3. A general privilege or legal mortgage affecting all the property of the tax payer assessed would be a vain thing, for a suit to enforce such privilege or mortgage could not be maintained. The right of seizure and sale is expressly limited to the assessed property for the amount of tax assessed thereon. Const., Arts. 210 and 218; 35 Ann. 301; *Ib.* 329; 36 Ann. 812; Act 96, 1882, secs. 40, 41, 42, 44, 45, 46, 47, 48.
4. Only such property can be seized and sold for taxes assessed upon it as has been assessed in such manner that it can be identified by the owner, by the tax collector, and by the purchaser. Act 96, 1882, secs. 6, 12, 13, 14, 18, 21, 24, 25, 26, 27, 34, 35, 41, 43, 44, 45, 46, 47, 48.
5. A tax on moneys loaned on interest, is incapable of being enforced. "Moneys loaned on interest" cannot be identified or seized and sold.
6. A tax on "all credits and all bills receivable for money loaned or advanced," cannot be enforced. It is possible to identify a particular bill when properly described in the assessment; but the general designation "bills receivable" in an assessment is an insufficient description, and meaningless.
7. Bills receivable, whether properly described or not, are transitory things. They may be paid and surrendered after assessment and before the time for the collection of the tax arrives. The collector cannot, as to such property collect the taxes in the manner pointed out by the Constitution.
8. The Constitution, Art. 210, in providing: 1st., that taxes should be collected without suit; 2d., that they should be collected by advertisement and sale; 3d., that the advertisement and sale should be confined to the property on which the taxes are due; 4th., that the collector should sell such portion of the property assessed as the debtor should point out; 5th., and that if the debtor should fail to point out sufficient property, the collector should forthwith sell the least quantity of property which any bidder will buy for the amount of the taxes, interests and costs; has excluded from taxation all property on which the taxes assessed cannot be collected by seizure and sale.
9. Under the Constitution and laws of this State, the Bureau of Assessments is the complement of the Bureau of Collection, and there is no authority in the General Assembly to

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require that the assessors shall do the vain thing of listing and assessing "moneys loaned on interest, and all credits and bills receivable for money loaned or advanced," since the Constitution permits of no legislative provision for the collection of taxes assessed thereon.

10. A suit to annul an assessment on the ground of its unconstitutionality or illegality is different from a suit to revise or correct an assessment, because of errors in description or valuation. The right of action to correct an assessment, conferred by Art. 203 of the Constitution, and recognized by sec. 27 of Act No. 96 of 1882, and sec. 9 of Act No. 107 of 1884, does not depend upon a previous application to the Board of Assessors or the Committee of Revision. *A fortiori*, such application is not a condition precedent to a suit to annul an assessment as unconstitutional or illegal. Act 107, 1884, sec. 9; Act 96, 1882, sec. 27; Act 77, 1880, sec. 51; Act 96, 1877, secs. 87, 88 and 89; Gay vs. Board of Assessors, 34 Ann. pp. 370, 372, 373; Const., Art. 203.

W. H. Rogers, City Attorney, and B. K. Miller, Assistant City Attorney, for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. Plaintiffs were assessed in 1885 on "money loaned on interest, all credits and all bills receivable for money loaned or advanced, \$175,000," in value, and they sue for the annulment thereof on the ground that the assessment is "vague, indefinite and uncertain, and does not sufficiently describe the property assessed. That it is meaningless and confuses property of different kinds, each kind insufficiently described. That it shows nothing, no property of any kind, that, under the Constitution and laws of the State, can be seized and sold by the collector of taxes."

In the alternative, they pray that, if it be held that said assessment is not null, it be reduced to \$25,000, for the reason that a proper assessment of all the effects of said firm would not have exceeded that sum.

The State and city affirm the validity of the assessment; and all the defendants—including the Board of Assessors—except to plaintiffs' action, because "it does not appear that the plaintiffs ever applied to the Committee of Revision of the City Council for the correction of this assessment, antecedent to the institution of this suit.

This exception seems not to have been passed upon by the judge *a quo*; but, on the merits, he annulled the assessment, and from this judgment the defendants have appealed.

I

The exception must be first disposed of.

Section 27, of Act 96 of 1882, provides: "That all taxpayers shall have the right to appear before the Board of Assessors in the parish of Orleans, during the sessions of said board, and be heard concerning the description of the property listed and the valuations of the same

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as assessed, and they shall have the right of testing the correctness of their assessments before the courts of justice, in any procedure which the Constitution and laws may permit, but the action to test such correctness shall be instituted on or before the first day of November of the years in which the assessment is made."

That law was amended by Section 9 of Act 107 of 1884, so as to read as follows, viz: "That all taxpayers shall have the right to appear before a standing committee on assessment of the City Council of New Orleans, as provided in the aforesaid act, during the sessions of said board, and be heard concerning the description of the property listed and the valuation of same, as assessed, and they shall have the right of testing the correctness of their assessments before the courts of justice in any procedure which the Constitution and laws may permit, but the action to test such correctness shall be on or before the 1st day in November of the year in which the assessment is made. Said committee shall determine upon said application and report their action at once to the City Council for its approval or rejection, and such decision of the Council shall be final, unless set aside, in accordance with Article 203 of the Constitution."

In *City of New Orleans vs. Canal and Banking Company*, 32 Ann. 157, the Court construed the provisions of Act 96, of the extra session of 1877, which are quite similar to those above quoted, and said: "As regards the methods adopted by the assessors to ascertain the value to be taxed, we think that the objection, even if well founded, comes too late. After assessments have been made, the law directs the rolls to be exposed and advertised for thirty days, and requires all persons objecting thereto to come forward and claim correctness. Ample opportunity and efficient means are provided to enable the taxpayer to have all errors corrected. If he does not urge his objections within the time allowed, he is thereafter precluded."

That act permitted any taxpayer who conceived himself aggrieved by an assessment, to make an appeal in writing to the assessor, within thirty days after same had been filed and advertised, "stating particularly the correction desired;" and made it the duty of the assessor to "proceed to hear and adjudge his case." It gives to the taxpayer the right of appeal to the courts on his taking an oath "that gross injustice has been done him." Sections 5, 15 and 29 Act 96 extra session of 1877.

In *Gay vs. Board of Assessors*, 34 Ann. 370, the Court had under consideration the provisions of Article 51 of Act 77 of 1880, which are identical with those of Section 27 of Act 96 of 1882, above quoted, with the

exception of the limitation of time within which the action should be brought, which, in the former, was "prior to the day of tax sale, as advertised, and not afterward."

The Court said of the Act of 1877: "The complaint to the board and a resort to arbitration were conditions precedent to the appeal to the courts."

There was no like phraseology employed in either the law of 1880 or 1882; but in that of 1884 it was expressly provided that the standing committee on assessment, shall determine, upon the application of the taxpayers," and report "their action at once to the City Council, for its approval or rejection; and such decision of the City Council shall be final, unless set aside, in accordance with Article 203 of the Constitution."

This we consider as a condition precedent to the taxpayer's right of action to test the correctness of an assessment before the courts, and its non-observance is fatal to the plaintiff's action.

II

But plaintiff's counsel argue that this is not a case to test the correctness of an assessment, the constitutionality or legality of which are otherwise admitted; but one to annul, to declare void the whole assessment. It says: "The right to institute it was not conferred by the tax laws of 1882 and 1884. It existed independent of those laws, under the general jurisprudence of the State."

Again: "Besides Art. 203 of the Constitution gives to the taxpayer the right of testing the correctness of their assessments before the courts of justice. It is an absolute and unconditional right, and the legislature cannot take it away."

This argument is fully answered by the statute of 1884, which has placed an interpretation on that article. It clearly states that the report of the standing committee shall be final, unless set aside in accordance with Art. 203.

The right of the taxpayer to appear before the standing committee, and be heard concerning the description of the property listed and the valuation of the same as assessed, and the report of the standing committee on assessment of the City Council, are proceedings preparatory and prerequisite to the taxpayer's right of action to test the correctness of the assessment in the courts of justice. This was certainly a wise precaution taken by the legislature to prevent unnecessary and vexatious embarrassment and delay in the collection of the revenues. We think the revenue laws must be consulted in determination of plaintiffs' right and cause of action. They afford the taxpayer ample

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justice. We cannot assume that the committee on assessment would not or could not have afforded plaintiffs ample and speedy relief—if indeed they were entitled to any, and if they had not, they could then readily have applied to the courts of justice for relief.

Conceding all that plaintiffs urge against their assessment, for the purpose of argument, we can see no reason why the committee did not have ample authority under the statute to correct any errors shown to have existed in the description of the property listed, and the valuation of same as assessed; and that is the substance of their demands.

The case of *Adler, Goldman & Co. vs. Board of Assessors*, 37 Ann. 507, is conclusive against the plaintiffs as to the character of their action.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, and proceedings to render such judgment as should have been rendered by the judge *a quo*, it is ordered, adjudged and decreed, that the exception taken by defendants be sustained and plaintiffs' suit dismissed, and all costs of both courts be taxed against them.

Rehearing refused.

No. 9869.

JEAN M. LEVET VS. ANTOINETTE AND CHARLES LAPEYROLLERIE.

The servitude of drain through a canal is continuous and apparent and may be acquired by possession of ten years.

When such a servitude is established in favor of an estate owned by a partnership over a contiguous estate belonging to one member of the partnership, the possession by the firm for ten years will sustain the ownership.

In absence of any stipulation to that effect, such right will be presumed to be a real servitude.

A PPEAL from the Twenty-sixth District Court for the Parish of St. John the Baptist. *Rost, J.*

T. J. Semmes & Legendre for Plaintiff and Appellee:

Servitudes are divided into two classes: personal and real. C. C. 646.

A personal servitude is one established for the benefit of a person, such as usufruct, use, habitation and antichresis.

A real servitude is one established on an estate for the benefit of another estate.

Examples: right of drainage, right of pasturage, right of watering. C. C. 721.

Servitudes are continuous or discontinuous, apparent or non-apparent.

A servitude of drainage is continuous and apparent. C. C. 727, 728.

It can be acquired by ten years' prescription. C. C. 765; 34 Ann. 568; 33 Ann. 797; 7 La. 53. Prescription attaches to a right the moment it can be exercised. Hence, in matters of real

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servitude (drainage), it begins to run from the time that the right is exercised, and from the time that the works necessary for the exercise of it are constructed. C. N. 642; Marcadé, p. 561; Demolombe, vol. xii, pp. 268, 269; Aubry & Rau, p. 80; Zacharie, p. 79; Toullier, vol. iii, p. 479, § 479; Laurent vol. vii, p. 236; Hennen, vol. ii, p. 1227.

A partner may establish on his individual property a real servitude in favor of an estate belonging to a partnership of which he is a member. In such a case the respective estates are held by different owners, the partnership being distinct from the members composing it. Aubry & Rau, p. 63; Demolombe XII, § 696; Zacharia, Vol. III, p. 63, § 47; 16 Ann. 275.

In cases of doubt, the court is to decide in favor of the real servitude. Dalloz, Servitude, No 28.

The destination made by the owner is equivalent to title with respect to continuous, apparent servitude. C. C. 649; 6 R. 16; 1 Ann. 407; 3 Ann. 166.

If the owner of two estates between which there exists an apparent sign of servitude sell one of the estates, and if the deed of sale be silent respecting the servitude, the same shall continue to exist in favor of the estate which has been sold. 35 Ann. 469; 29 Ann. 633; 5 Ann. 590; 5 R. 16; 16 Ann. 275; 12 Ann. 108; Marcadé, p. 642; Aubry & Rau, p. 86.

A right of servitude is indivisible by its nature and is inseparable from the estate to which it belongs. C. C. 656-657.

Warranty is implied in partitions of property between co-owners, in the same manner and to the same extent as between co-heirs. C. C. 1290, 1384 to 1397.

He who receives part of the proceeds of a sale, ratifies it and is estopped from questioning the title of the purchaser. 32 Ann. 121;

He who, by his words or conduct, causes another to believe in the existence of a certain state of things, on the faith of which the latter has acted, is estopped from averring a different state of things. 4 Ann. 293; 5 Ann. 366; 6 Ann. 274; 30 Ann. 30.

J. D. Augustin, L. DePoorter and G. Leche for Defendants and Appellants:

Possession *nomine proprio* is of the essence of the possessory action. 32 Ann. 192, Dooley vs. Gibson; see also 2 Ann. 749; 4 Ann. 525; C. C. 3441, 3510, 3511, 8514.

Prescription (if applicable at all here which is denied) is governed by the same rule as to the possession necessary to initiate its starting point. R. C. C. 3478, 3479, 3489, 3490; see also as to title and requisites for prescription. 12 Ann. 730; 12 M. 17; 5 Ann. 594; 6 Ann. 683.

One who holds as agent cannot prescribe. 30 Ann. 808.

A possessor by a precarious title cannot, by selling and buying back the property, acquire a title as a basis for prescription. 10 Ann. 580.

A partner is only the agent of the partnership for purposes of administration of its affairs and property. C. C. 2870.

In actions of partitions involving a settlement of claims and accounts, no prescription is applicable except that which is a bar to the partition. 16 Ann. 170, Chapman vs. Woodward; 14 Ann. 740.

The same rules of partitions, and the same as to the obligations of the partners *inter se*, apply as in cases of successions. C. C. 2890.

If the use only of specified property has been brought into the partnership, and that property is such of a nature that it may be used and enjoyed without destroying it, the ownership remains in the partner who brought it in and is at his risk. C. C. 2863; see also on partnership, C. C. 2808, 2801; 22 Ann. 503; 3 R. 488; 3 Ann. 319.

Statutes of prescription and limitation cannot be extended from one action to another, nor to analogous cases beyond the strict letter of the law. 15 Ann. 143, Garland vs. Scott.

In the absence of a title, and exclusive adverse individual possession thereunder, plaintiff could only prescribe by thirty years, for a continuous apparent servitude, the others being imprescriptible. C. C. 3504; Troplong de la Prescription, Vol I, sec. 408, p. 519; Ib. Vol. II, sec. 556, p. 439; Toullier 3, par 61 *et seq.*; Servitudes, pars. 356, 373, 443, 458, 450, 461.

A use for the benefit of a partnership, through the estate of an individual partner, cannot be presumed to have been intended by the partner as being a dismemberment of a real

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nature in favor of the partnership estate itself, said use lapsing with the closing and end of the partnership. C. C. 647, 648, 753, 768.

A servitude is not a servitude; and a servitude may be personal as a service, even if the estate belonging to the person be benefited in some way by the service; the real character of the service cannot be presumed, and cannot be created by lapse of time unless the estates belong to distinct persons, and an adverse, uninterrupted, exclusive, public possession can be predicated. Above authorities and R. C. C. 640; C. C. 3483, 3489, 3490, 3514

Prescription is not favored, but is *strictissimi juris*, like homestead laws and never supplied. This is elementary.

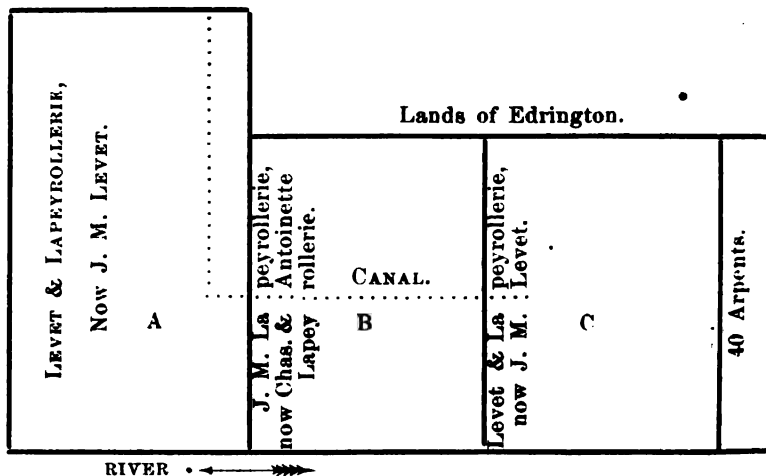
At any rate, the restoration of the natural drainage of tract C by Mr. Edrington opening the dam and leaving it so for over two months, was an interruption of the prescription of the cross drainage, if any such could ever have been either intended, contemplated or imagined. 37 Ann. 250.

The essence of the partnership bond is good faith and honesty like in marriage; and the attempt to convert into a prescriptive title, after the death of a partner, a service granted previously to the firm, is in bad faith and should be discouraged.

A natural servitude by the situation of the estates in the peculiar position of the alluvial lands of Louisiana especially, need not be by title nor prescription, of course; but artificial servitudes of a real and perpetual nature must be by contract; or may be by prescription in case of continuous, apparent servitudes, if the possession be adverse, exclusive, notorious, public and uninterrupted, during the period expressly fixed by law. C. C. 471, 2440, 2275; 32 Ann. 839, Bailey vs. Ward.

The opinion of the Court was delivered by

FENNER, J. This case involves the claim to a servitude of drain, and the following diagram exposes the situation of the estates concerned:



The facts are as follows:

In 1866 the partnership of Levet & Lapeyrollerie acquired the tract A. In 1867 the same partnership acquired the tract C.

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In the same year J. M. Lapeyrollerie, a member of said partnership, became the individual owner of the tract B.

The natural drainage of tract C was to the rear, but the owners of the rear lands having obstructed the same, in 1871 the partnership of Levet & Lapeyrollerie, with the consent of Lapeyrollerie, dug the canal indicated in the diagram, running from the tract C across tract B, and emptying into a canal in tract A. which conducted its waters to the rear.

From that date the waters from tract C have enjoyed uninterrupted outlet through this canal.

In 1883 the partnership of Levet & Lapeyrollerie was dissolved by the death of the latter.

A judicial partition was effected between the heirs of Lapeyrollerie and the surviving partner, Levet, which was made by sale of the common property, and the tracts A and C were adjudicated to Levet, to whom the said tracts were duly transferred, "with all the rights, ways, privileges, improvements and appurtenances thereunto belonging.

In 1884 the heirs of Lapeyrollerie, owning tract B, attempted to close the canal, when the present plaintiff, claiming a servitude of drain in favor of tract C, through said canal, acquired by a possession of ten years, brought the present suit for a perpetual injunction, restraining defendants from any acts interfering with it.

The servitude claimed is a *real* servitude. C. C. 646, 714. It is *continuous*. C. C. 727. It is *apparent*. C. C. 728.

The Code provides that "continuous and apparent servitudes may be acquired by title or by a possession of ten years." C. C. 765.

There is no dispute that the servitude here has been possessed or enjoyed for more than ten years, without interruption.

The defendants contend, however, that the owner of tract C cannot claim the benefit of such possession, because, up to the death of Lapeyrollerie, said owner was a partnership, of which their said ancestor was a member. The proposition has no support in reason or authority. The partnership was a distinct entity entirely separate from the individual members, capable of acquiring such a servitude by title from the member Lapeyrollerie, and equally capable of acquiring it by possession for the requisite length of time.

It is next claimed that the right of drain here involved is not a real servitude properly so-called, but a mere personal right established in favor of the partnership, and expiring with it, under C. C. 758.

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This contention cannot be sustained under the plain language of the Code, Arts. 754, 755, 756, 757.

Where a servitude is acquired by title, the act stipulating it may validly declare whether it is in favor of the estate or only in favor of the owner, and such stipulation will receive full effect. But Art. 755 says that in case of silence of the act, it is to "be considered whether the right granted be of real advantage to the estate, or merely of personal convenience to the owner." And Art. 756 provides that "if the right granted be of a nature to assure a real advantage to an estate, it is to be presumed that such right is a real servitude, although it may not be so styled."

Plaintiff is entitled to the full benefit of this presumption in this case, where there was no express title, and where the evidence conclusively shows that the servitude was established for the benefit of tract C, and is of such advantage to it that, without it, the tract could not be successfully cultivated.

Defendant's pretensions are the less worthy of consideration when raised, for the first time, after the partition sale, at which the price paid for tract C would have been doubtless reduced had it been supposed that its established servitude of drain would be disputed. We think the district judge did justice in the case.

Judgment affirmed.

No. 9829.

THE STATE OF LOUISIANA VS. GEORGE MORGAN.

Where the case shows lack of diligence, and where the motion for continuance exhibits no reasonable certainty of being able to procure the attendance of the absent witness at a future day, the ruling of the court refusing continuance will not be disturbed. In an indictment charging in a single count both burglary and larceny, verdict for larceny alone sustained.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

M. J. Cunningham, Attorney General, and *L. D. Beale*, District Attorney, for the State, Appellee :

Due and proper diligence must be shown in order to obtain a continuance on the ground of the absence of a witness, and the judge *a quo* must use his discretion in such cases. 28 Ann. 46. The ruling of the judge *a quo* on a motion for continuance in a criminal case involves both questions of law and fact, and cannot therefore be examined on appeal, because the jurisdiction of the appellate court in criminal cases is limited to questions of law alone. 23 Ann. 558.

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The general rule is that two distinct offenses cannot be charged in *one count* of an indictment. But "the most prominent exception is to be found in indictments for burglary, in which it is correct to charge the defendant with having broken into the house with intent to commit a felony, and also with having committed the felony intended." Wharton's Criminal Practice, sec. 244. Same principle recognized in 34 Ann. 48, and authorities there quoted. On the same point we refer to 37 Ann. 780, *State vs. Nichols*. One indicted for burglary and larceny may be acquitted of burglary and found guilty of larceny. Wharton's Criminal Law, 8th ed. sec. 819.

H. N. Sherburne and *G. W. Buckner* for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The defendant moved for a continuance on the ground of the absence of a material witness, who, he alleges in his motion, had been duly summoned. The name of the witness was Jim Smith, and one Jim Smith had been summoned and appeared, but defendant said it was not the man he referred to.

The judge allowed the sheriff to explain his action in the premises. He stated that on reception of the *subpœna* for Jim Smith he called on defendant for instructions, who told him he did not know his residence, but that he was "the Jim Smith who had been in jail in this parish and stayed around a woman named Bella Cannon," and could give no further description or direction. The Jim Smith summoned had been recently in jail and did stay about Bella Cannon and he had been unable to find any other Jim Smith.

Exception was taken to admission of this statement of the sheriff, but as it was, in fact, simply a full return of his action on the *subpœna*, the objection has no force.

The judge refused the continuance on the ground that the case had been fixed two weeks in advance, and the *subpœna* having been issued only two days before the trial, there was want of due diligence. This reason taken in connection with the absence of any suggestion in the motion that defendant knows, or has any means of ascertaining, the whereabouts of his witness, is sufficient.

I.

The indictment is for burglary and larceny charged in a single count. The accused asked the court to charge the jury that it "could find a verdict of burglary alone;" but the court charged that they could find a verdict for "both burglary and larceny, or either."

The jury found a verdict for larceny. This is assigned as error under an exception to the charge, and also in a motion in arrest.

We have twice sustained indictments assailed on the ground that charging burglary and larceny in the same count avoided them for duplicity. *State vs. Johnson*, 34 Ann. 48; *State vs. Nicholls*, 37 Ann. 779.

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But in both of those cases the verdict was for burglary, or for burglary and larceny.

In the last case we suggested that, "had the verdict been for larceny alone, a different question might arise."

That question is directly presented in this case, and upon it we encounter a direct conflict of authorities. Mr. Wharton holds that, under such an indictment, verdict for larceny alone may be sustained. Wharton Cr. L., §§ 383, 560, 617, 1615.

Mr. Bishop, while holding that burglary and larceny may be charged together in a single count, construes such a charge to be only for a single offense, viz: burglary in a particular manner, and holds that it can support only a verdict for burglary. Bishop Cr. L. 1062.

The reason of the matter seems to us to support the principle of Wharton; for if the accused may be validly charged in the same count with both burglary and larceny, we cannot see why, on simple failure to prove the breaking into the house, as for instance, when the accused had simply entered the house through an open door, the accused should go free, although it might be fully proved that he then and there committed the larceny.

We therefore hold that the judge did not err in his charge to the prejudice of defendant.

Judgment affirmed.

No. 9880.

FELIX BOURGEOIS VS. EUPHROSINE CHAUVIN.

The charges of abandonment, defamation and attempt on plaintiff's life, on which the claim of separation from bed and board is claimed, are not proved.

The charge of adultery on which immediate divorce is claimed, is supported by no sufficient evidence after the incident of March, 1884, which was fully condoned by plaintiff.

Where the conduct of the husband indicates a real intention to have his wife transgress or, at least, an intention to allow her to do so undisturbed and unprevented, this constitutes connivance, and operates as a bar to the suit.

A PPEAL from the Twentieth District Court, Parish of Lafourche.
Beattie, J.

David Todd, for Plaintiff and Appellant:

A plea of condonation admits the charge of adultery as true.

The exception of reconciliation shall not avail where the wrong is repeated. C. C. 152-3-4. Positive or direct testimony is not necessary to establish adultery. 16 Ann. 4.

When three facts combine to show the guilt of defendant, it may be taken as proved: first, the criminal intent in defendant; secondly, the same in the alleged *particeps criminis*; thirdly, the opportunity sought with secrecy and concealment. Bishop. Marriage

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and Divorce, Sec. 437; Sec. 439; also, p. 347, Sec. 433; *Bramwell vs. Bramwell*, 3 Hagg. 618, 5th E. E. R. 32. See Phil. on Ev. (Cowan Bill's Notes) p. 600.

Knobloch, Moore & Badeaux, for Defendant and Appellee :

1. The incident of March, 1884, does not establish, even by presumption, any act of adultery.
2. Even if it did, which is denied, the act was condoned; plaintiff, although an eye witness to that scene, continued to live with his wife in matrimonial relationship for five months afterward. See C. C. 152, 154; 22 A. 9; 18 A. 643; 10 La. 251; 14 A. 387 *Bienvenu vs. Buisson*.
3. Nothing has transpired since March, 1884, which throws the slightest suspicion of infidelity on the wife.
4. Every subsequent act or circumstance, although not one can be considered even *suspicious*, is fully explained by the wife, and proves her to have been pure and virtuous throughout.
5. There was no abandonment by the wife, as alleged in original petition. The husband in August, 1884, left his wife.
6. Even if the wife had abandoned her husband, no judgment for separation can be entered, as the abandonment must be shown by the three summons provided for by law. See C. C. 145; 8 A. 14; 14 A. 386; 28 A. 194.
7. No act of impropriety, indiscretion or even suspicion, is sufficient to adjudge a wife guilty of adultery. See *Cooper vs. Cooper*, 10 La. 251; *Hall vs. Caulwright*, 18 A. 414; *Galen vs. Darby*, 36 Ann. 73.

The opinion of the Court was delivered by

FENNER, J. The plaintiff brought this suit against his wife, originally, for separation from bed and board, on grounds of abandonment, defamation, attempting his life and the like.

This part of the case may as well be dismissed with the statement that the evidence fails entirely to support the charges.

He subsequently filed an amended petition in which he claimed an absolute divorce on the charge of adultery against his wife.

The testimony exhibits facts not creditable to either party and as discreditable to plaintiff as to defendant.

In March, 1884, plaintiff, with two other spies procured by himself, were witnesses, through an opening in the window, of a scene between defendant and one Boudro, the salacious details of which need not be mentioned but from which the worst inferences might be drawn.

He had the patience not to disturb this scene which lasted several hours, but suffered the parties, without interference, to pass and remain some time out of his view, from which fact he deduces the commission of the act of adultery.

Notwithstanding this, he condoned the offense and continued to live with his wife until August following, when he left her and she returned to her father's home.

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He was equally forgiving to Boudro with whom he continued to speak and even to take friendly drinks.

It is needless to say that this offense was fully condoned and can only figure as adjuvatory of subsequent causes of complaint.

We find in the record no proof of any subsequent adultery, and no evidence from which such guilt can be legitimately inferred.

It is true that defendant and Boudro continued to speak and to associate publicly with each other; but this is explained and excused by two facts: 1st., the example of her husband; 2d., the fact that Boudro was engaged to be married to defendant's sister.

One note is also shown to have passed from defendant to Boudro, but it was enclosed in an envelope with a note from her sister to him, and its innocent purport is fully established.

There is no evidence of their ever having been alone together except on a single occasion, which is supported only by the evidence of a single witness, who is contradicted by others.

We quote the comments of the judge *a quo* on this witness and his testimony: "An attempt was made to show clandestine meeting at night. One of these meetings is proved by the witness Albert Troups to have taken place in the fall of 1884. He testifies that he crawled upon his 'all fours' for some distance of a moonless night, and through the crevices of a fence, saw two people, the defendant and Boudro, together and heard her call him back. The testimony of this witness is stronger in innuendo than in assertion, and I think he so intended it.

"I disbelieve his testimony.

"I disbelieve it because of his manner in giving it and of his admitted part of a spy employed to procure the testimony; and at the request of counsel for both sides, I went to the *locus in quo* accompanied by them, and from what I saw on a moonless night, I do not believe he could have seen what he says he did see."

The judge had better opportunity of determining the credibility of this witness than we have, and we feel bound to accept his conclusion.

With this testimony blotted out, plaintiff's case has not "a leg to stand on."

There are other features of plaintiff's conduct referred to in the evidence which deprive him of the least claim to consideration.

This evidence need not be detailed; but taken in connection with his conduct on the occasion above referred to in March, 1884, it strongly indicates an intention to have his wife transgress, or at least an intention to allow her to do so undisturbed and unprevented, which

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amounts to *connivance* and operates as a bar to the suit. Cairns vs. Cairns, 109 Mass. 408; Morrison vs. Morrison, 136 ed. 310; Bishop on Marriage and Divorce, *passim*. See authorities collected in American Law Register, Feb'y. No. of 1886, p. 98 et seq.

Judgment affirmed.

DISSENTING OPINION.

TODD, J. I think the evidence in the record fully sustains the charge upon which this action is founded, and I find no ground appearing in the record for impugning the veracity of the witnesses who testified in support of the charge.

I therefore dissent from the opinion and decree rendered.

No. 9837.

THE STATE OF LOUISIANA VS. RICHARD J. ESTOUP.

A declaration made by a wounded man, who subsequently died from his wound, ten minutes after the wound was inflicted, and seventy yards from the place where the fight occurred, charging that the accused had shot him, is no part of the *res gestae*, and is, therefore, not admissible in evidence against the accused on trial.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee :

1. Any statement which is the natural or inseparable concomitant of the principal fact in controversy, is not within the meaning of hearsay, but is an original and independent fact, admissible in proof of the issue. 1 Grenl. on Ev. Secs. 99, 100.
- Where the probative force of the statement offered as part of the *res gestae* rests not on the credit of its maker but on the cogent influence of the circumstances under which it was uttered, it becomes original evidence. Best's Prin. of Ev. Sec. 492, N. 1; Id. p. 470, note (e).
2. These declarations are admissible if, 1st, they so limit, explain or characterize the fact in issue as in a just sense to be part of it, and necessary to its complete understanding; and, 2d, if such declarations be contemporaneous with the fact to which they relate. Best's Prin. of Ev. p. 469, notes; 1 Greenl. Ev. 14th ed., Sec. 108; Starkie on Ev. 9 Am. ed. p. 87; 1 Bishop Crim. Law Secs. 1085, 1086; Whart. Ev. Secs. 262, 263.
3. While it is universally conceded that these declarations are competent evidence if contemporaneous with the facts to which they relate, yet great and irreconcilable differences exist as to the true construction of the term "contemporaneous." In some jurisdictions it is limited to its strictest sense of being *concurrent in time*. To this category belong the decisions relied on by appellant, which are reviewed and their inapplicability shown.
4. But the current of decisions, both in this country and in England, is to admit the declarations if they are so connected with the main fact as to qualify, characterize or explain it, although not strictly contemporaneous with it. In the leading case of Insur-

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39	219
52	644
52	781

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ance Co. vs. Mosley, 8 Wall. (U. S.) 397, the declarations were uttered some minutes after the facts which they characterized had occurred. In Com. vs. McPike, 3 Cash. (Mass.) 181, subsequent declarations were also admitted. In State vs. Mollise, 38 Ann. 383, the declaration of deceased, made ten minutes after he was fatally shot, was ruled to be admissible as part of the *res gestae*. And in accord with these decisions are Best's Prin. of Ev. 469, 1; Starkie on Ev. p. 87; 1 Greenl. on Ev. Sec. 110; 1 Bish. Crim. Proc. Secs. 1085, 1086; 1 Taylor's Ev. Sec. 588; 12 B. 51, p. 60; 9 Bing. 349; 2 Bing. 104; 6 C. and P. 325; Skin. 403; 6 East's R. 193; Cox's Cr. Lw. Ca. 477; 57 Mo. 93; 5 W. V. 510; 2 Allen (Mass.) 136; 4 Tex. App. 202; 2 Dill. C. C. 154; 1 Wall. (U. S.) 637; 35 Cal. 49; 55 Pa. St. 403; 1 How. (U. S.) 219; 47 Mo. 239; 25 Gratt. (Va.) 921; Id. 943; 32 Ga. 672.

5. Upon the trial judge, who heard all the witnesses testify, devolved the duty of determining the relation of the declaration to the litigated act. 1 Greenl. Ev. Sec. 108; State vs. Mollise, 38 Ann. 383. In the exercise of a sound discretion that officer has decided that under all the circumstances of the case the statement was "unconsciously associated with and related to the homicidal act, even though separated from it by a short time."

This judgment should not be disturbed.

W. L. Evans, for Defendant and Appellant:

In all cases where the question arises, whether declarations made are a part of the *res gestae* or not, it is well settled that the facts of each case stand alone and must speak for themselves. State vs. Mollise, 38 Ann. ; Denton vs. State, 1 Swan Tenn. R. 281.

Res gestae are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants, when narrating the events." Whar. Crim. Ev. Sec. 262.

The principal points of attention are, whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they are so connected with it, as obviously to constitute one transaction. 1 Greenl. on Ev. 14th Ed., Sec. 108 and note; 1 Taylor on Ev. Sec. 525; State vs. Carlton, 48 Vt. 642; Reg. vs. Beddingfield, 14 Cox, C. C. 342.

An instance of the doctrine of the *res gestae* rendering admissible declarations of a person wounded, is where they relate to his physical or mental feelings, but not as to who inflicted the wound or with what weapon it was inflicted. 2 Bish. Cr. Proc. 2d Ed. Sec. 626; Jones vs. State, 71 Ind. 81; Denton vs. State, 1 Swan Tenn. R. 282.

The declarations must be so closely connected with the main fact as to be without suspicion of afterthought. Hall vs. State, 48 Ga. 609; State vs. Carlton, 48 Vt. 643, 644.

The declarations, to be part of the *res gestae*, must have been made at a time and place, and under circumstances which preclude the hypothesis of concoction or premeditation. Whar. Crim. Ev. Sec. 263.

"The test is, were the declarations the facts talking through the party or the party's talk about the fact. Instinctiveness is the requisite." Whar. Cr. Ev. Sec. 691.

"The rule before us, however, does not permit the introduction, under the guise of *res gestae*, of a narrative of past events, made after the events are closed by either the injured party or by bystanders." Whar. Crim. Ev. 264; State vs. Melton, 37 Ann. 78; State vs. Williams, 34 Ann. 961.

"An act cannot be varied or explained, either by a declaration, which amounts to no more than a mere narration of a past occurrence, by an isolated conversation held or an isolated act done." 1 Taylor on Ev. Sec. 527.

In the instant case, the declarations admitted in evidence (against the objection of the prisoner) were made after the transaction was at an end, after the parties had separated, after the declarant had been in company with a person other than the witness, after the

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declarant had gone sixty or seventy yards from the place where the event, which resulted in his death, occurred, and after the lapse of about ten minutes. They contained nothing but the words of one of the participants when narrating what had become a past event. R. pp 28, 29.

The opinion of the Court was delivered by

TODD, J. The defendant appeals from a sentence of fifteen years' imprisonment at hard labor, being charged with murder and convicted of manslaughter.

The only question presented for our determination relates to the ruling of the trial judge in admitting in evidence a certain statement of the deceased, made a few minutes after receiving the wound of which he died.

To understand it fully we reproduce the bill of exceptions taken by the counsel of the accused to the admission of the evidence :

"Be it remembered, that, on the trial hereof, one Thomas Herlihy, a witness for the State, being examined by the assistant district attorney, after testifying that he heard four shots fired at the corner of Clio and Howard streets, and that in about ten minutes after he was called out of the house, where he was, by some one, who said to him that his brother was shot, that when he went out he found his brother, John Herlihy, sitting on the steps of the house on Howard street, about 60 or 70 yards from the corner of Clio street. The witness was about to say what his brother, John Herlihy, (*the deceased*) said to him at that time. The defendant objected on the ground that what John Herlihy said after the shooting was all over and the parties had separated, and after John Herlihy had gone away 60 or 70 yards from the place where the trouble and shooting occurred, and after he, John Herlihy, had been with one King, his brother-in-law, who was with said John Herlihy on the steps when this witness went out as testified to by this witness, was not part of the *res gestæ*, but hearsay, and not admissible in evidence. The court overruled the objection and defendant excepted to said ruling and reserved this his bill of exceptions. This witness said that his brother, John Herlihy, then and there told him, in answer to his question, that Estoup had shot him." Rec., pp. 28, 29.

As will be seen this statement was admitted not as a dying declaration but as part of the *res gestæ*.

In this ruling the trial judge was clearly in error. The weight of authority is decidedly against it. This will fully appear by a few references to the authoritative works on evidence.

Thus Greenleaf on this point says: "The principal points of attention are, whether the circumstances and declarations offered in proof

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were contemporaneous with the *main fact* under consideration, and whether they were so *connected with it* as to illustrate its character." 1 Greenl. Ev., 14th ed., sec. 108; and in a note, the author says: "Declarations to *become* part of the *res gestæ*, must have been made at the *time of the act done*, which they are supposed to characterize; and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as *obviously to constitute one transaction*."

Says Taylor: "In all cases the principal points of attention are, whether the circumstances and declarations offered in proof were *so connected* with the main fact under consideration, as to illustrate its character, to further its object, or to form in conjunction with it *one continuous transaction*." 1 Taylor on Ev., sec. 525.

The same author says (sec. 526): "Still, an act cannot be varied, qualified or explained either by a declaration, which amounts to no more than a mere *narrative* of a past occurrence, or by an *isolated conversation* held, or an isolated act done at a later period."

Bishop says: "An instance of the doctrine of *res gestæ*, rendering admissible declarations by the deceased, is where they relate to his *physical or mental feelings*. Thus his statements, after being wounded, explanatory of the *injury* have been held competent; *but not as to who inflicted it or with what weapon*." 2 Bish. Cr. Pro., 3d ed., sec. 626; Jones vs. State, 71 Ind. 81; Denton vs. State, 1 Swan Tenn. R., 282.

"The rule before us, (says Wharton) however, does not permit the introduction, *under the guise of res gestæ*, of a narrative of past events made after the events are closed by either the party injured or by bystanders." Whar. Cr. Ev. sec. 264.

This was the view adopted by this Court in the recent case of the State vs. Melton, 37 Ann. 78. In that case certain declarations of the defendant were offered in evidence as a part of the *res gestæ*, and the reasons given by the trial judge for excluding the declarations were quoted in the opinion of the court and approved.

These reasons were as follows, (quoting): "Because, *it*, the declaration of the defendants, *six or eight minutes after* the killing, and *after* they had left the place and gone sixty or eighty yards and then returned on their way home, or wherever they went; and *was* no part of the *res gestæ*, either in point of time or *connection* with the killing, and was evidently *not spontaneous*, as the defendants had met the same witness a few minutes before, twenty-five or thirty yards from the gate, as they were leaving, and *made no such statement*."

So in the instant case the declaration was made by the deceased ten minutes after the fight ceased, 50 to 70 yards away from the spot where it occurred, and the deceased at the time was sitting by his brother-in-law and in conversation with him and made no such declaration to him, before found by the witness testifying, so far as the record shows, and the circumstances clearly exclude it from the conditions and rules that would make it a part of the *res gestæ*.

This view of the matter is fully sustained to the very letter by frequent adjudications. *State vs. Williams*, 34 Ann. 961; *State vs. Carlton*, 48 Vt. 643; *Hall vs. State*, 48 Ga. 609; *Jones vs. State*, 71 Ind. 81; *Denton vs. State*, 1 Swan (Tenn. R.) 282. The case of the *State vs. Molisse*, 38 Ann. —, is referred to as opposed to this view of the subject.

In that case the question presented in no manner related to any declaration of the deceased, naming the person who committed the offense, but consisted of an admission made by the accused himself immediately after the fight as to his own acts or conduct therein, which tended to justify the accused in making the attack and inflicting the wound.

The conclusion reached compels us to remand the case.

It is therefore ordered, adjudged and decreed that the sentence and judgment of the lower court be annulled, avoided and reversed, that the verdict of the jury be quashed and the case remanded to the lower court to be proceeded with according to law.

No. 9341.

PRESIDENT AND BOARD OF CHURCH WARDENS OF THE CONGREGATION
OF THE ROMAN CATHOLIC CHURCH OF THE PARISH OF ASCENSION
VS. RIGHT REV. N. J. PERCHÉ, BISHOP, ET AL.

Under the *ex parte* showing made by affidavits by the appellees, that the judgment appealed from has been acquiesced in by the appellants, the case is remanded for the purpose of adducing proof of that fact.

A PPEAL from the Twenty-second District Court, Parish of Ascension. *Duffel, J.*

R. N. Sims and E. N. Pugh for Plaintiffs and Appellees.

St. M. Bérault for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. Plaintiffs and appellees move to dismiss this appeal on the ground that the defendants and appellants have acquiesced in the judgment.

Board of Church Wardens vs. Perch , Bishop, et al.

It was signed on the 13th of December, 1884.

In the opinion of the judge *a quo* it is stated that plaintiffs claim, in their corporate capacity, to represent the Catholic inhabitants of the parish of Ascension, who owned, long prior to the charter of 1877, the property known as the "Church property." That the Roman Catholic Congregation of that parish was incorporated by an act of the legislature, approved on the 18th of February, 1817, and which was subsequently renewed and finally expired by limitation on March 1, 1881; but it was again incorporated by notarial act on the 12th of February, 1883, and assumed control and administration of the common property.

They averred the nullity of the action of the *then* Church Wardens, and their transfer by notarial act to the defendants of the administration of the church property and its revenues, and enjoined both the bishop and his curate from interfering with their administration of said property.

Notwithstanding defendants urged the nullity of the act of incorporation of February 12, 1883, their demand was rejected and the act sustained, and the plaintiffs' right of administration of the Church property and its revenues recognized and enforced.

The appellee's motion to dismiss contains the following statement of facts as establishing appellant's acquiescence in the judgment appealed from:

That on the 9th of February, 1885, an agreement in writing, was entered into by the Right Rev. F. X. Leray, Bishop, and the Curate of the Catholic Church of Ascension, on the one part, and the Board of Church Wardens of the Congregation of the Roman Catholic Church of Ascension—plaintiffs herein—wherein it was agreed that a fixed proportion of the revenues of the congregation should be applied to the payment of the curate and his assistant, and that the remainder of said revenues shall be under the administration of the said Board of Church Wardens, to meet the other expenses of the Church and congregation; and that said agreement has been faithfully carried out by them.

They further represent that said curate has participated actually in the deliberations, and at the meetings of said Board of Church Wardens, as organized under their charter of 1883, and with the knowledge and approval of said Bishop.

That, during the year 1886, the said curate, with the knowledge of said bishop, purchased and, with the active co-operation of said Board of Church Warden, erected a building for a school for children and a

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residence for teachers, selected by said curate and said bishop, on the lands of said congregation, towards which a considerable sum of money was contributed by them.

And that, on various other grounds and in various enumerated ways, the authority of plaintiffs has been fully recognized over said church property and its revenues by said curate and said bishop.

Of these averments there is no proof in the record, except the appellee's *ex parte* affidavit; but we think the showing made entitles them to have the case remanded for the purpose of supplying the proof of same.

It is therefore ordered that this case be and the same is hereby remanded to the court *a qua* for the purpose of enabling the parties to adduce proof on plaintiffs and appellees' motion to dismiss on the ground of acquiescence in the judgment appealed from.

Cause remanded.

No. 9860.

THE STATE EX REL. T. L. BROUSSARD VS. THE JUDGE OF THE
TWENTY-FIRST DISTRICT COURT.

An interlocutory decree which admits a reconstructed record to replace a mislaid or destroyed record, does not belong to the class of orders, the execution of which can cause irreparable injury and be arrested by a suspensive appeal.

A PPLICATION for Mandamus.

Felix Voorhies and *Robert S. Perry* for the Relator.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The relator prays that a *mandamus* issue to compel the respondent judge to grant a suspensive appeal from an interlocutory order which was made in the course of the suit of Halphen vs. Guilbeau and Broussard, a contested election case, and which admitted a reconstructed record, to supply one which had been lost, mislaid or destroyed.

The order complained of does not belong to that class of decrees, the execution of which may cause irreparable injury. It simply declares that certain papers and documents shall be taken as substitutes for similar ones which have disappeared, and without which the suit could not be proceeded with. It cannot cause any irreparable wrong,

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and therefore cannot be susp. nsinely appealed from. If it was erroneously rendered, it can be revised and corrected on appeal from a final judgment adverse to relator.

In the case of Halphen vs. Guilbeau and Broussard, 37 Ann. 711, we had occasion to express our views touching the mode of rebuilding or replacing the wanted record.

It is no doubt in furtherance of those views and of the decree in that case that steps were taken to reconstruct the disappeared record, and that the decree now complained of was made.

If an appeal, suspensive in character, was allowable and granted, the whole proceedings would necessarily be stayed, until the final determination of the question presented by it and the delay consumed in the meantime would cause great injury to the plaintiff in the suit, if he be entitled to the office.

The order complained of, not being one which, by its execution can cause irremedial wrong, cannot be suspensively appealed from.

It is therefore ordered that the application for a *mandamus* be refused with costs.

No. 9630.

LAMARQUE M. THIBODEAUX vs. THOMAS. L. WINDER.

A transcript which is shown by the clerk's entry, not to contain all the evidence which had been received and considered below, and which does not show that the appellant took the necessary steps to secure and bring up a statement of facts, cannot sustain an appeal.

An assignment of errors, which does not assign any error of law, appearing on the face of the record, but specifies only errors of fact, does not comply with the requirements of the law.

A PPEAL from the Nineteenth District Court, parish of Terrebonne.
Allen. J.

B. C. Elliott, for Plaintiff and Appellant.

L. F. Suthon, for Defendant and Appellee :

MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff appeals from a judgment sustaining a plea of prescription to his petitory action, and dismissing the same. Appellee's motion is based on the alleged deficiency of the transcript, which does not contain all the evidence, parol and documentary, which had been offered and considered below ; and because it is not shown that appellant had made any effort, as required by law, to obtain a statement of

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facts. Both grounds are supported by the record, and the motion to dismiss must therefore prevail.

Appellant's contention that the omission to bring up the missing evidence is not imputable to him, because it was the duty of the appellees to have reduced their parol testimony to writing, and to have seen to the filing of their documentary evidence, is untenable.

No law compels a party to cause his testimony to be taken in writing; the provision of the law on the subject is simply directory. C. P. art. 601. This Court has held: "Because one of the parties has not caused his oral testimony to be taken down and his written evidence noted, it does not follow that, in the event of an appeal by his adversary, he should be deprived of it and placed at the mercy of his opponent. The appellant should in such a case, have a statement of facts seasonably made as the law directs." *Morrison vs. Lynch*, 36 Ann. 612 and authorities therein cited.

In support of his plea plaintiff relies on a document, which he filed in this Court within ten days after the record was brought up and which he styles an assignment of errors. But an inspection of the document shows that the errors assigned therein are not errors of law appearing on the face of the record, but simply errors of fact, or a complaint that the plea of prescription was sustained on insufficient evidence. Hence the assignment does not come up to the requirements of the law, and it cannot avail the appellant as an assignment of errors, or as a supplement to the evidence, which had been considered below, or of a statement of facts, prepared in compliance with the law. C. P. Art. 897.

In the absence of proof to the contrary, this Court must presume that the judgment of the lower court was rendered on legal and sufficient evidence. The clerk's certificate shows affirmatively that certain designated parol testimony, which had been offered and heard below, and that certain documentary evidence, which had been received at the trial, are not included in the transcript, and it is elementary that such a condition of things fully justifies the conclusion that the defense was sustained by due and necessary proof. *Fowler vs. Smith*, 1 Rob. 448; *Landry vs. Jefferson College*, 7. Rob. 179; *Huffner vs. Hesse et al.*, 26 Ann. 48; *New Orleans vs. Labatt*, 33 Ann. 107.

From the foregoing considerations it follows that this appeal is not legally or properly before us, and that the fault therefore is already imputable to appellant.

It is, therefore, ordered that the present appeal be dismissed.

State vs. Harris.

No. 9833.

THE STATE OF LOUISIANA VS. EMILE HARRIS.

Bills of exceptions attached to the record, but unsigned by the trial judge, will not be noticed by this Court.

The fact that the final report of the grand jury was not drawn by a member of that body, nor by the District Attorney, but by an attorney at law, called to draft the report, will not invalidate an indictment found by the jury, where it does not appear that the attorney was present at any of their deliberations, or otherwise assisted them in their proceedings and findings.

A PPEAL from the Twenty-sixth District Court, parish of St. Charles.
Rost, J.

M. J. Cunningham, Attorney General, *Gervais Lèche*, District Attorney, *Chas. A. Baquie* and *Jules Reine*, for the State, Appellee.

Jas. D. Augustin, for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant was convicted of murder, and appeals from a sentence of life imprisonment at hard labor.

There are a number of bills of exception taken by defendant's counsel to the rulings of the judge *a quo* in the progress of the trial, attached to the record; but as they were not signed by the judge, it is obvious that we cannot consider them.

In this court was filed an assignment of errors, which presents the sole matter for our consideration.

They are:

1. The record shows that the official report of the grand jury was offered in evidence, and the same is not in the record.

It is not in the record because its admission in evidence was refused by the trial judge on objection made by the attorney for the State, and to the ruling of the judge excluding it we find no bill of exceptions. This complaint is, therefore, unfounded.

2. "The extract from the record of the grand jury, copied in the minutes, shows that the indictment is null and void, as the grand jury were assisted by other counsel besides the district attorney, and it was admitted that the official report of the grand jury is drawn up in the handwriting of said assistant counsel."

The extract shows that the assistance received by the grand jury by another counsel than the district attorney, consisted solely in the drawing up of the final report of the grand jury. This report contained simply, so far as the extract shows, the thanks of the jury to the several officers of the court for attentions shown and services ren-

99	228
110	443
111	493

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dered during their session. It does not suggest or intimate that the attorney drafting the report, or any other person named therein, was present, or assisted at the deliberations of the jury, or was in any other way connected with the discharge of their duties.

There is no force in this assignment.

3. "The minute of evidence also shows that the coroner's inquest was read in full to the trial jury to the great prejudice and injury of the appellant, and notwithstanding the protest of his counsel."

It would seem a sufficient answer to this that no bill of exception was taken to the admission of this evidence, and that however earnest the protest of the counsel might have been, it does not appear in such form as to enable us to notice it. Apart from this, however, this process verbal did not contain the evidence of the witnesses testifying at the inquest, and was offered simply to prove the death, and instructions of the trial judge; the effect of its admission was to be confined to this one fact.

This completes the review of the matters urged in defense of the accused on this appeal, and as appears, they cannot afford him the slightest relief.

Judgment affirmed.

No. 9844.

THE STATE OF LOUISIANA VS. HENRY A. BOYCE.

Refusal of new trial will not be disturbed when the grounds assigned consist of alleged irregularities in the course of the trial to which no exception was taken at the time of their occurrence.

A PPEAL from the Twelfth District Court, parish of Rapides.
Blackman, J.

M. J. Cunningham, Attorney General, and *John C. Wickliffe*, District Attorney, for the State, Appellee.

James Andrews, for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Unaided by any argument or brief on behalf of defendant we have, nevertheless, critically examined this record, in search of any error to his prejudice.

No exception having been taken to the ruling of the Court refusing the continuance, it is not subject to review.

The grounds of the motion for new trial are:

1st. The refusal of a continuance above referred to and disposed of.

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80	229
104	45

LeBlanc vs. Rougeau.

2d. A misstatement of the evidence by the district attorney in his closing argument, to which no objection was made at the time, and as to which no ill intent is imputed.

3d. An erroneous refusal by the judge, on the trial, to give a certain charge asked by defendant, to which refusal no exception was taken.

4th. That one R. E. Stuckey served as a regular juror, while the name on the list and in the summons was C. E. Stuckey—unaccompanied by any suggestion of any injury or wrong intent.

Such grounds need only to be stated in order to show their insufficiency as grounds for new trial; and it is needless to consider exceptions to admission or refusal by the judge of evidence offered in their support.

Judgment affirmed.

No. 9881.

ELVINA LEBLANC VS. AMBROISE ROUGEAU.

An appeal will not be dismissed where the bond was furnished before the order of appeal was granted, for an amount corresponding with that fixed in the order.

A married woman, separate in property, is properly authorized by the district judge to sell her paraphernal estate, when her husband is unable and fails to minister unto her necessities, and she has no other means of supporting herself.

The refusal of the husband to give his sanction to such sale being unfounded, can lawfully be supplied by that of the judge.

APPEAL from the Twenty-second District Court, Parish of Ascension. *Duffel, J.*

E. N. Pugh and *P. Leche*, for Plaintiff and Appellee.

R. N. Sims, for Defendant and Appellant.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The appellee contends that the appeal should be dismissed because the bond was furnished before the order of appeal was signed.

The petition for an appeal was filed on the 13th of December, 1886. The district judge, who had recused himself, signed the order of appeal on the same day. The bond was filed on the 15th following for the amount fixed in the order.

On that same day, the judge *ad hoc*, who decided the case on its merits, signed the same order of appeal.

State vs. Smith et al.

In this court, however, his *affidavit* at foot of the motion to dismiss, shows that he signed the order on the 16th.

The appellant is in no way in fault. If the order of the district judge was a nullity, it was a blank order, which could produce no effect. The appellant then furnished a bond for an unauthorized amount, dependent for its validity on the giving of an order of appeal requiring a bond for a like amount.

It so happens that the order made by the judge *ad hoc* fixed *that* amount.

Had the order required a larger amount the appellant would have had to furnish another bond for that amount.

The motion to dismiss cannot prevail, and it is overruled.

ON THE MERITS.

The defendant appeals from an order authorizing the plaintiff, his wife, to sell certain real estate belonging to her as paraphernal property, which is worth more than two thousand dollars. The order was contradictorily rendered. R. C. C. 125.

The evidence shows that the plaintiff is separated in property from her husband; that she has no other means of supporting herself; that her husband lives separate from her, and does not provide for her necessities, or minister unto her wants, no doubt because of his inability to do so.

The judge *ad hoc* did not consider the refusal of the husband justified by the circumstances, and we cannot say that it is founded; to say nothing of the apparent absence of interest on his part in the matter.

Judgment affirmed.

No. 9836.

THE STATE OF LOUISIANA VS. J. MACK SMITH, ET AL.

The Supreme Court has no jurisdiction of an appeal taken by the State from a judgment quashing an information for an offense punishable by fine, or in default, by imprisonment or otherwise than at hard labor, as, in such a case, no fine exceeding \$300 can possibly have been actually imposed, which is the constitutional requirement.

A PPEAL from the Fourth District Court, parish of Jackson.
Bridges, J.

M. J. Cunningham, Attorney General, for the State, Plaintiff and Appellant.

The opinion of the Court was delivered by
POCHÉ, J. The State appeals from a judgment quashing an in-

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State ex rel. Attorney General vs. Budd.

formation against the accused for keeping a grog or tipping shop and retailing spirituous liquors without a license.

The penalty prescribed by law for such an offense is a fine of not less than one hundred or more than five hundred dollars, and in default of payment, an imprisonment of not less than thirty days or more than four months. Now, under the Constitution (Art. 81) our jurisdiction in criminal matters is restricted to cases in which "the punishment of death or imprisonment at hard labor may be inflicted, or a fine exceeding three hundred dollars is actually imposed."

In this case no imprisonment at hard labor may result from conviction, and as no trial has yet taken place, no fine has been actually imposed. It, therefore, follows that we have no jurisdiction of the appeal, as at present brought up, and that our plain constitutional duty is to refuse, on our own motion, to entertain it.

It is, therefore, ordered that this appeal be dismissed.

No. 9845.

THE STATE OF LOUISIANA EX REL. THE ATTORNEY GENERAL, VS. JOHN
B. BUDD, SHERIFF.

A sheriff is responsible for all loss or damage resulting from the malfeasance or gross misconduct of his deputy, but such malfeasance or misconduct of the deputy does not subject the sheriff to the punishment of removal or suspension from office, unless he has encouraged or sanctioned the delinquency of his deputy.

The deputy himself can be punished for his delinquencies by fine and imprisonment, and prohibited from acting in said capacity.

APPEAL from the Nineteenth District Court, Parish of Terrebonne.
Allen, J.

M. J. Cunningham, Attorney General, *W. K. Wilson*, District Attorney, and *Knobloch, Moore & Badeaux*, for the Relator and Appellant.

L. F. Suthon and *T. L. Winder*, for the Respondent and Appellee.

The opinion of the Court was delivered by

TODD, J. This is a proceeding on the relation of the Attorney General under section 3593 R. S., to suspend from office and punish by fine and imprisonment the defendant, sheriff of the parish of Terrebonne, for gross misconduct in the discharge of his official duties.

From a judgment in favor of the defendant discharging the rule taken against him the relator has appealed.

It is suggested in the brief of defendant's counsel that this court has no jurisdiction of the proceeding *ratione materiae*.

On the authority of the case of the State ex rel. vs. Routon, sheriff, 34 Ann. 1256, and the cases therein cited, the appeal must be maintained.

The complaint of the relator is substantially to the effect :

That a writ of attachment was issued from the district court of Terrebonne at the suit of one Grabenheimer, against S. Simon, directing the seizure of a stock of goods of the debtor ; that owing to the delay of the officer in executing the writ a similar writ issued subsequently by another creditor of Simon, was first executed on the property, and fully exhausted it, whereby Grabenheimer's debt was lost.

The facts are briefly these :

The storehouse which contained the stock of goods, directed to be seized, was situated about eleven miles from the courthouse. The sheriff received the writ of attachment, and in the two hours afterwards was on the spot to make the seizure. He found when he reached there that he had been preceded by his deputy about 10 minutes, who had made a seizure of the property under the second writ.

It further appears that these two writs were issued almost simultaneously ; that the second writ was prepared secretly at the instance of the creditor's attorney, and was placed in the hands of a deputy sheriff, who was provided with a fast horse, and instructed by the attorney to proceed and execute the writ as speedily as possible. This writ was not carried to the office where the sheriff was present when it issued, but it was privately handed to the deputy sheriff with the instructions stated.

It is further shown that the deputy never informed the sheriff that he had the writ, or of the instructions given him concerning its execution, but the sheriff was entirely ignorant of the matter until his arrival at the storehouse, where he found the deputy, and ascertained the fact of the prior seizure made by him, and upbraided him for his conduct.

It is clear that there was no collusion between the sheriff and his deputy. If there was a wrong committed against Grabenheimer, it was by no personal act or delinquency of the sheriff ; and the question arises that, granting a wrong was done by the deputy sheriff, did such misconduct or delinquency on the part of the deputy subject the sheriff himself to removal or suspension from office or other penalty.

The district judge held that it did not, and we believe he was right.

The Code of Practice provides that the sheriff may appoint deputies, and that he is responsible for them ; but that the deputies shall be subject to fine and imprisonment for delinquency of duty as provided by special laws. C. P. 764.

State vs. Hanks.

Section 3593 R. S., after providing for the punishment of the sheriff and others for delinquencies in the execution of orders and writs, proceeds, quoting: "If it be a deputy of any such officers, then the deputy shall be subject to the fine and imprisonment or either, above fixed, and shall be absolutely prohibited from acting in the capacity of deputy thereafter."

Our conclusion, from a careful consideration of these several provisions of the Code and the Statutes is, that whilst the sheriff is responsible civilly for all loss and damage that may be caused by the misconduct or delinquency of the deputy, such misconduct or delinquency of the deputy, unless encouraged or sanctioned by the sheriff, cannot subject him to the penalty of removal or suspension from office. The infliction of such punishment can only be incurred by his own personal official acts and delinquencies.

Judgment affirmed.

Poché, J., takes no part in this opinion and decree.

NO. 9832.

THE STATE OF LOUISIANA VS. J. AND H. HANKS.

Sec. 1047 Rev. Stat. authorizes the judge to allow amendment of the information or indictment for larceny, for the purpose of correcting the allegation thereof as to the ownership of the property stolen, when satisfied that such amendment will not prejudice the defense. The ownership of a particular person is not an essential ingredient of the crime of larceny, and when the thing charged to have been stolen is otherwise fully identified, thus putting the accused properly on his defense as to the substantial fact, the error as to the person alleged to be the owner is immaterial and properly subject to correction by timely amendment. The statute is not repugnant to Art. 8 of the Constitution. The decision in *Morgan's case*, 35 Ann. 1139, is not applicable.

The refusal of a new trial on the ground of newly-discovered evidence will not be overruled, when the evidence is cumulative only, and not supported otherwise than by the affidavit of accused; or, when the evidence, which is supported by the affidavit of the proposed witness, must necessarily have been known to accused before his trial.

A PPEAL from the Twenty-fifth District Court, parish of Lafayette.
Debaillon, J.

M. J. Cunningham, Attorney General, and *R. C. Smedes*, District Attorney, for the State, Appellee.

Chas. D. Caffery for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The first and second exceptions are taken to the rulings of the judge. 1st, in allowing the information to be amended after

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trial had begun; 2d, in overruling a motion in arrest of judgment, based on alleged error in said first ruling.

The amendment complained of was the following: The information charged defendants with larceny of a horse, the property of Sévigne Duhon; but it appearing from the evidence that, at the time of the larceny, the horse really belonged to Cecile Duhon, then a minor child of Sévigne, who, however, had subsequently married, the court permitted the information to be amended by substituting the name of "Cecile Duhon, wife of William Harron," as the owner.

The amendment is fully supported by Sec. 1047 of the Revised Statutes, which provides that, "whenever, on or before the trial of any indictment for any crime or misdemeanor, there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof * * * in the ownership of any property named or described therein, it shall be lawful for the Court, before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense, to order such indictment to be amended according to the proof; * * the trial to be had before the same or another jury, as the Court shall think reasonable." It is obvious that the statute casts upon the judge two functions: 1st, to decide whether the amendment can be allowed without prejudicing the defendant; 2d, if allowed, to determine whether the trial should proceed before the same, or be begun anew before another, jury. The only complaint presented under the bill is against the allowance of the amendment. After its allowance, no objection was urged against the continuance of the trial before the same jury, and no application was made for a new jury and a fresh trial. Therefore, the only question before us is the propriety of the amendment.

The judge supports his action by conclusive reasons, showing that the amendment as to ownership did not, in the slightest degree, affect the identity of the particular horse charged to have been stolen, which was a horse branded in a particular way, which had been sold by defendants to one Thomas Smith, who had been previously prosecuted for its larceny, and acquitted on proof that he had bought the animal from these defendants.

The statute obviously contemplates, in this clause, a correction of variance, not merely in the name of the person mentioned as owner, but in the ownership itself.

The ownership of a particular person is not an essential ingredient of the crime of larceny, which is simply the felonious taking and car-

State vs. Hanks.

rying away of the personal goods of *another*; and even if the owner be unknown, the offense may be properly charged and sustained.

The essential facts constituting the crime of larceny of a particular, specified horse, are not, in any manner, affected by the question whether the horse was the property of Sevigne Duhon or of Cecile Duhon. It is sufficient if the horse was the property of another. The identity of the horse charged to have been stolen is the important thing in determining whether the offense proved is the offense charged.

In the case of rape, it is entirely different. A charge of committing a rape upon the person of A cannot, by amendment, be changed into a charge of committing a rape upon the person of B, because such a change would involve the charge of an entirely distinct and separate crime, to be supported only by proof of essentially different facts.

Hence our decision in Morgan's case, 35th Ann. 1189, has no application here.

The statute here under consideration presents no conflict with Art. 8 of the Constitution, which provides that:

"In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and the cause of the accusation, etc." The accused have had full enjoyment of that right in this case; the information charging them with larceny of "one two-year old female horse;" and if the evidence establishes the identity of the particular horse referred to, "the nature and cause of the accusation" are not affected by the question as to whether it was the property of Sevigne Duhon as originally charged, or of Cecile Duhon, as subsequently proved and charged in the amended information.

There is no merit in the exceptions.

The remaining exception was taken to the ruling of the judge on the rule for a new trial based on newly-discovered evidence.

As to all the witnesses named in the motion, except two, the motion is not sustained by their affidavits, and for this reason, as well as for the reason that the defendants had not used due diligence, and the expected evidence would be cumulative only of that which had been given on the trial, the judge considered that it furnished no good reason for the new trial. *State vs. Young*, 34 Ann. 346; *State vs. Washington*, 36 Ann. 341; *State vs. Cotten*, id. 980.

The evidence sought from the witnesses, Primaux and Patin, is, in no sense, newly-discovered, the object being to prove by them that defendants had made certain statements before a jury of which these parties were members. How could defendants have been ignorant of statements made by themselves before a jury, or of the

fact that the members of that jury heard and knew what those statements were, or of the fact exposed by the open records of the Court that Patin and Primaux were members of that jury?

We find no error.

Judgment affirmed.

No. 9883.

CITY OF NEW ORLEANS VS. A. H. SCHOENHAUSEN.

The Supreme Court has no jurisdiction over a tax suit, in which a sum not exceeding \$2000 is claimed, where the constitutionality or legality of the tax sued for is not put at issue, and where the question presented is one of *procedure* only.

If the amount sued for exceeded \$2000, the court would, as in ordinary similar cases, in which money is claimed, have jurisdiction over the question of *procedure*.

A PPEAL from the Civil District Court for the parish of Orleans.
Houston, J.

W. H. Rogers, City Attorney, and B. K. Miller, Assistant City Attorney, for Plaintiff and Appellee.

MacMahon & Pratt, for Defendant and Appellant.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from a judgment condemning him to pay \$1000 for a license, and, besides, certain penalties and costs of suit.

The defense was simply, that the proceeding by *rule* was not "due process of law," and a general denial.

He moved for a suspensive appeal, which the Court allowed on his furnishing a bond for \$1500.

The motion to dismiss is based on the following grounds, viz:

That this Court has no jurisdiction over the matter; and,

That the appeal bond is insufficient in amount.

It is apparent that the issue presented does not involve the constitutionality or legality of the license tax claimed; but only the validity of the proceeding by *rule*; in other words, a question of *procedure*.

It is only when an issue on the *constitutionality* or *legality* of a tax is presented, that this Court has jurisdiction, *regardless of amount*. If the sum in controversy here exceeded \$2000, this Court would have jurisdiction, as it would of any ordinary case, in which a sum exceed-

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State vs. Adams.

ing that amount would be claimed, and it would pass on the question of *form*. Constitution, Art. 81; State vs. Brewer, 9 Ann. 64; Ib. 305; Ib. 350; Stubbs vs. McGuire, 32 Ann. 817; State vs. Tsní Ho, 37 Ann. 50; State ex rel. David vs. Judges, 37 Ann. 898, and cases there cited.

This view of the case dispenses us from passing on the sufficiency of the bond furnished for a suspensive appeal.

Appeal dismissed.

No. 9828.

THE STATE OF LOUISIANA VS. LEVY ADAMS.

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Applications for new trial on the ground of newly-discovered evidence are entitled to no consideration when the affidavit of the party convicted is uncorroborated.

In an information for uttering a forged order for the payment of money the pleader is not required to state the name of the person on whom the order was passed, or that of the person whom the accused intended to defraud.

A PPEAL from the Ninth District Court, Parish of Concordia.
Young, J.

M. J. Cunningham, Attorney General, and *Hugh Tullis*, District Attorney, for the State, Appellee.

P. Hough and *G. F. Bowles*, for Defendant and Appellant.

The opinion of the Court was delivered by

POCHE, J. Appealing from a conviction of uttering a forged order for the payment of money, and a sentence of five years in the penitentiary the defendant submits two grounds of complaint:

1st. A refusal of a new trial prayed for on the ground of newly-discovered evidence, which is alleged to be the testimony of a witness, who would swear that in his presence and hearing, the accused was entrusted by another person with the collection of the order which he did not know to be forged.

If such is the fact, the accused must have been aware of it from the moment that the occurrence took place, and it must have been forcibly reminded to him when he was charged with the crime; it is, therefore, not newly-discovered evidence. Hence, the ground of the motion lacks foundation either in law or reason. State vs. Gauthreaux, 38 Ann. 611. "The credulity of courts cannot be strained to the point of believing that such evidence was discovered only since the trial." If the defendant, as he contends, did not before trial know the name of the witness, he might have asked a continuance of the case for the

State vs. Brooks.

purpose of ascertaining, as he seems to have since done, the name of his important witness; but the suggestion came too late after conviction. But, in addition to these views, there is another obstacle to the relief prayed for.

The affidavit of the accused is entirely unsupported, not even by that of the newly-ascertained witness. It would have been so easy to have procured that important adjunct.

Dealing with a similar question this Court has said: "Applications for new trials on the ground of newly-discovered evidence must always be received with caution. The inducements to false swearing on the part of the person convicted are obvious, and therefore the rule is well established that the application for the new trial must be corroborated by the affidavits of other persons than the party convicted. If possible, the affidavits of the newly-discovered witnesses should be produced." *State vs. Washington*, 36 Ann. 341; *State vs. Cotten*, 36 Ann. 980.

The judge did not err in overruling the motion for a new trial.

2d. The second complaint is a motion in arrest of judgment, in which the information is alleged to be defective, because it failed to allege the name of the person to whom the order was offered, and the name of the person whom the accused intended to defraud.

Most assuredly the person to whom the accused offered the order was the person whom he intended to defraud; and under the very terms of the statute, the pleader is relieved of the necessity to give the name of the person intended to be defrauded. *Revised Statutes*, Sec. 1052; *State vs. Maas*, 37 Ann. 292.

Judgment affirmed.

No. 9813.

THE STATE OF LOUISIANA VS. LOUIS BROOKS.

A motion for a continuance, made at the *first* trial of a prosecution for a capital offense charged to have been committed *nine* days before, ought to be granted, when it appears that it is only on the preceding day that accused could and did secure counsel, and that such counsel had no reasonable time to prepare the defense. Precipitancy, instead of accelerating, at times procrastinates the trial of offenders.

A PPEAL from the Twenty-fourth District Court, parish of Plaquemines. *Livaudais, J.*

M. J. Cunningham, Attorney General, and *James Wilkinson*, District Attorney, for the State, Appellee:

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State vs. Brooks.

1. "In matters of continuance great discretion is always vested in the trial judge, and his rulings thereon are not disturbed except in cases of glaring injustice." State vs. Ford. 37 Ann. 457.
 2. The facts of this case show that the application for a continuance was without merit.
 3. The circumstances of this case are widely different from those stated in State vs. Simpson, 38 Ann. 23.
 4. An overt attempt or act of violence by the deceased against the accused shortly before or at the time of the homicide must be proved before evidence of prior quarrels, threats or of the dangerous character of the accused can be introduced. 35 Ann. 74; 36 Ann. 148; 36 Ann. 862; 37 Ann. 389; 37 Ann. 489; 37 Ann. 644; 37 Ann. 762; 37 Ann. 897; 37 Ann. 443; 38 Ann. 22, and other authorities.
 5. The judge need only charge on questions of law which he deems applicable to the cause. R. S. sec. 891; 35 Ann. 970; 37 Ann. 576, 464.
 6. Where no constable has been elected, or where the constable has resigned, and being *functus officio*, no constable has been appointed or elected to fill the vacancy, the justice of the peace has power to fill the vacancy by appointing a constable *pro tempore* until the Governor exercises his power to appoint a permanent or regular constable. R. S. Sec. 637; C. P. Art. 1158; Const. of 1879, Art. 258.
- The eligibility of an officer *de facto* cannot be questioned collaterally. R. S. Sec. 2593; 21 Ann. 290; 21 Ann. 655; 21 Ann. 710; 26 Ann. 272.
- Where ministerial officers of a court are *de facto* and actually acting as such, their failure to give bond does not deprive them of their official status. 13 Ann. 401; 13 Ann. 607; 2 Ann. 82; 31 Ann. 379.
- Where a court is seized of jurisdiction *ratione materiae*, its process, however erroneous, is voidable not void and its orders must be respected. Holdane vs. Sumner, 13th Wallace 601.
- The quibbling points presented by the defense are not only unsound in law, but have no application, as whether the deceased was a constable or a simple individual, or whether he was a thief, the homicide of the deceased could not legally be justified under the state of facts disclosed in the record. Bishop on Criminal Law, 2d volume, par. 641.
7. The judge having to take cognizance of the facts, in order to frame his charge so as to make it applicable thereto, properly refused to charge the jury as requested by counsel.

R. T. Beauregard and Zacharie & Howard, for Defendant and Appellant:

The accused is always entitled to a reasonable time within which to procure counsel for his defense, and the counsel when so retained is entitled to a reasonable time within which to prepare the defense, regard being always had to the circumstances of the accused and his counsel so to do. 38 Ann. 24; 16 Ann. 425; 26 Ann. 422; Whart. Am. Crim. Law, p. 941, note; 7 Bay, 1; Lord Kilmarnock's case, 2 Foster; Black. Rep. 514; Cons. of 1879, Art. 6.

The recent occurrence of a homicide, and the natural excitement of the community consequent thereon, is a good ground for a postponement and continuance, when the accused is brought to trial at the next term, immediately after the occurrence; 37 Ann. 457, not applicable here, as in that case the continuance was sought many months after the homicide, and did not and could not urge the recency. Bish. Crim. Proc., vol. 1. sec. 951; Wharton's Am. Crim. Law, p. 944, 3d; 9 Ga. 127; 5 Ga. 53; Jollyer's case, 4 T. R. 285; 32 Ga. 581; 14 Ga. 8; Thach C. C. 516; 2 Moody & R. 192; 26 Ga. 277; 18 Ga. 383; 7 Watts & Serg., 420.

The right of the trial judge to decide as to whether sufficient proof of an overt act has been adduced to allow the admission of evidence of threats and character in a homicide, is not an arbitrary one, but must be the exercise of a sound discretion, and is reviewable by the Supreme Court. 37 Ann. 461; 37 Ann. 645.

 State vs. Brooks.

It "is a rule that positive testimony on a given point must always predominate over negative testimony on the same point." 33 Ann. 800; 37 Ann. 258; Selfridge case.

What occurred at a homicide immediately after the firing, is a part of the *res gestae* as throwing light on what had just occurred. What. Crim. Ev. sec. 262 et seq.; Selfridge case.

No man is bound to submit to the execution of a writ divesting him of his liberty or property issuing from a court without jurisdiction. Roscoe's Crim. Ev. p. 750; Wharton's Am. Crim. Law, p. 554; 3 Gilman, 336; Lieber's Civil Liberty and Govt., vol. 1, pp. 131, 134.

An officer is bound to inquire into the authority of the court from which the writ emanates, and is a trespasser if he executes a writ of a court without jurisdiction. 7 N. S. 192; 8 R. 115; 3 Ann. 577; 9 Ann. 350.

One entering on an office, public or private, without proper authority, subjects himself to all the responsibilities, and cannot claim the benefit of the position he usurps. 4 N. S. 525.

A justice of the peace has no authority to appoint a constable pro tem. to a vacancy caused by resignation. Act of 1855, Cons. 1879.

A constable must reside in the ward in which he shall have been elected. R. S. sec. 124. He must give bond before entering on his duties. R. S. sec. 632.

In the trial for resisting of an officer, or of killing him, it is competent for the accused to show that the deceased was not a legal officer nor executing legal process. Wharton's Crim. Ev. sec. 883.

A *de facto* officer in civil cases is one who comes into office by color of right, and performs the duties of the office under a public acquiescence, but is not properly entitled to the office. He must be either appointed or elected by competent authority, or must have for some time acted as such and been publicly recognized. Cooley on Taxation, p. 185; 13 S. and R. 208. But this will only give a *prima facie* right, which may be questioned. Blackwell's Tax Titles, * 93; 1 Dill C. C. 268; 7 Jones N. C. 113; 73 N. C. 550; 37 Me. 428; 5 Wend. 234; 24 Wend. 539; 16 Wend. 144; 60 Barbour, 248; 20 Gratt, 66; 33 Gratt, 513; 4 Vroom, N. J., 201; 6 East, 368; 38 Conn. 476; 3 Bush. 17; 9 Nev. 334; 69 Ill. 529; 7 N. H. 113, 140; 56 Penn. St. 436; 29 Penn. St. 129; 1 Nev. 188; 45 Miss. 151; 16 Peters, 71; 3 Port, 334.

Nor do 1 Ann. 288; 12 Ann. 719; 21 Ann. 336; 25 Ann. 2; 27 Ann. 568; 32 Ann. 1234; 28 Ann. 82; 33 Ann. 1412, or 35 Ann. 521, militate against this doctrine in any degree

"Where a trespasser goes with the intent to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force to the extent of killing the aggressor. Owner is not obliged to surrender possession, but may use as much force as necessary for its protection." 8 Cal. 34; Horrigan, Self-defense, p. 900, and multitude of authorities there cited.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The accused appeals from a verdict of manslaughter and a sentence of eighteen years at hard labor.

The record contains three bills of exception: one, to the refusal of the district judge to grant a continuance; another, to a ruling on a question of admission of testimony, and the last one, to the refusal of the judge to give certain charges to the jury.

It appears from the first bill that the homicide, with which accused is charged, was committed on the 29th of September, 1886; that he surrendered himself the same day, and was committed without bail;

State vs. Brooks.

that he was arraigned on the 4th of October following, and the case was fixed for the 9th ensuing; that when the case was called he moved for a continuance on the following grounds, viz:

That the accused was entitled to reasonable time within which to make the necessary arrangements to retain and secure counsel, and that he has not been allowed the same.

That said counsel, when retained, were entitled to a reasonable time within which to prepare his defense, and that, under the circumstances, they have not been so allowed.

That the evidence elicited and annexed, shows that the public mind is excited against him, so that he cannot have the fair trial which he may, when the excitement subsides.

The motion which was made for a continuance went into details to show the verity of the grounds, and is supported by the oath of the accused, which is fortified by that of the counsel.

It appears from the showing made, that it is not until the 8th of October, the day preceding that fixed for the trial, that the accused could make definite arrangements with counsel for his defense and that the latter could not, in the short delay ensuing between the occurrence of the act and the day assigned for trial, prepare the defense in such a manner as the gravity of the case demanded, involving the life of a citizen; that the counsel could not procure the necessary books in time, although due diligence had been used, and could not safely proceed to trial in this unprepared condition, as the case, it was alleged, involves many nice and intricate questions of law, requiring long, patient and careful study and consideration of authorities.

From the foregoing recital it appears that the accused was convicted on the ninth day following the commission of the offense for which he was indicted, and that the application was made for a continuance on the *first* calling of the case for trial.

In *State vs. Ferris*, 16 Ann. 425, this Court said, in reference to accused in criminal cases:

"The law securing to them the assistance of counsel, did not intend to extend a barren right, for, of what avail would be the privilege of counsel * * * if, on the spur of the moment, without an opportunity of studying the case, the former should be compelled to enter into the investigation of the case."

In a more recent prosecution, *State vs. Simpson*, 38 Ann. 24, this Court held, that the right to be heard by counsel, guaranteed by the Constitution to the accused, is not an empty formality, but an investi-

Breaux vs. Sarvois et als.

mable privilege, and that such counsel should be allowed reasonable time to prepare the defense.

In that case, singular enough, the ruling was made by the same judge, the defendant was represented by the same counsel, and the accused arraigned and tried on similar days, the former on the 5th, and the 9th of October.

The showing then made for a continuance was substantially the same, if not somewhat weaker, than that in the instant prosecution.

If, in that case, the lower court erred in its refusal to continue the trial to some other day, we cannot but rule now, that the postponement of the same ought to have been allowed.

Precipitancy, instead of accelerating, at times procrastinates the trial of offenders.

This view dispenses us from passing on the other grounds for a continuance.

It is therefore ordered and decreed that the verdict herein be set aside, and the sentence and judgment thereon reversed, and that this case be remanded to the lower court for further proceedings according to law.

No. 9875.

LOUIS BREAX VS. ESTIVAL SARVOIE, ET ALS.

To execute voluntarily, under Article 2372 R. C. C., is to execute with the intention to confirm or ratify.

The act from which confirmation or ratification is sought to be deduced, must evince such intention clearly and unequivocally. None will be inferred when the act can be otherwise explained.

In cases of doubt, the party to whom the act is opposed must have the benefit of the doubt.

A purchaser who pays interest on a note of his vendor, in the hands of a third person, assumed by him as part of the price of the lands bought, and which he had bound himself before the sale to pay to such person, cannot be treated as one voluntarily executing an obligation, so as to deprive him of the right to prosecute a suit previously instituted by him against his vendors to rescind the sale.

A PPEAL from the Twentieth District Court, Parish of Lafourche.
Beattie, J.

O'Sullivan & Blake, for Plaintiff and Appellant.

The seller is bound to deliver and warrant thing sold. O. C. 2475, 2476, 2482, 2511; 3 L. 396; 6 R. 506; 3 Ann. 327; 16 L. 185; 24 Ann. 198.

Under C. C., Art. 2372: " * * * The confirmation, ratification, or voluntary execution in due form * * * involves a renunciation of the means and exceptions that might be opposed to the act, * * * The intention must be to ratify by the voluntary execution. 171 L. 286.

The acts of a party from which the ratification of a contract is sought to be deduced must evince clearly and unequivocally his intention to ratify. 21 Ann. 593; 30 Ann. 1290.

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114	211
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All the acts of the plaintiff can be accounted for without a ratification of the sale necessarily resulting from them. 13 Ann. 176.

L. P. Caillouet and Knobloch, Moore & Badeaux, for Defendant and Appellees :

1. The voluntary execution of a contract, with the full knowledge of the grounds upon which it might be rescinded, amounts to a tacit ratification of it, and involves a renunciation of the means and exceptions which might have been opposed to it. C. C. 2272; 5 R. 354; 6 R. 443; 4 Ann. 148; 2 R. 1; 13 La. 175; 10 M. 726.
2. Nor does it make any difference if the voluntary execution be only partial. 2 R. 1; 4 Ann. 148; Duranton, vol. 4, No. 280; Larombière, vol. 4, p. 632, sec. 43.
3. The purchaser who voluntarily pays a part of the price, with full knowledge of the defects for which the sale might be rescinded, ratified the contract thereby. Larombière vol. 4, p. 633; Toullier, vol. 8, No. 503; Duranton, vol. 4, No. 278; 6 Ann. 53; 4 La. 238; 31 Ann. 833.
4. One cannot do an act which he is at liberty to abstain from, and claim immunity from its legal consequences. 18 Ann. 59.
5. Error of law is not presumed. He, who relies on it, must prove it to a certainty, and if there be any doubt left, his adversary must have the benefit of it. 4 R. 145; Larombière, vol. 4 p. 630, sec. 38.
6. A contract entered into, or payment made, to avoid litigation, cannot be rescinded. C. C. 1846, 5 La. 113; 4 R. 207.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action for the rescission of a sale of real estate, on the ground of deficiency in the quantity of the lands sold and those delivered.

It is brought against the vendors and also against parties claiming the deficient lands, as their property.

The vendors filed a plea of ratification, which was sustained.

From that judgment the plaintiff appeals.

The evidence shows that, prior to purchasing the real estate, the plaintiff went to a party who held a vendor's note secured on the property, and obtained from him, in the event of a purchase, that he would allow time—three years—provided the annual interest was paid punctually. On that promise, the plaintiff bought the lands, paying part of the price cash, issuing his notes for another portion and assuming the note then in the hands of the third party, which note had been issued by plaintiff's vendors, and was secured by privilege on the property.

Subsequently, on the allegation that there was a deficiency in the lands sold and those delivered, which lands were in the possession of named persons, who claimed ownership—the plaintiff brought the present suit to rescind the sale.

After the institution of the suit, plaintiff went to the holder of the assumed note and paid him the interest on it.

Aware of that circumstance, the defendants, who are plaintiff's vendors, filed a peremptory plea of *voluntary* ratification of the sale as made and executed and of abandonment of the suit to rescind.

The question presented is therefore: Whether the payment of the interest by plaintiff, on the assumed note, in the hands of the *third* party, does or not operate such ratification and abandonment.

The Code (Art. 2272, § 2), declares that, in default of an act of confirmation or ratification, it is sufficient that the obligation be voluntarily executed, and that this involves a renunciation of the means and exceptions that might be opposed to the act.

We have given the question most serious attention, as the case now presented is without any formal precedent in our jurisprudence.

We have extended our researches to the French law and adjudications, as our article is taken from the French Code; besides examining the authorities to which counsel have referred on both sides.

We have the satisfaction of having reached the conclusion that the payment made by the plaintiff to the *third* party, is not a voluntary ratification of the sale, as executed, and is no bar to the further prosecution of this suit.

It is apparent, at the very threshold, that the plaintiff, when he purchased the property, assuming the note in question which was then in the hands of a *third* person, not party to the act, made himself liable *personally* for the payment of the note, and that the holder of it could, at maturity, in the absence or failure of payment of the interest, as agreed on, have proceeded directly against the plaintiff.

Delisle vs. Succession of Moss, 34 Ann. 164.

The authorities to which counsel for exceptors have referred, do not appear to have any special application to the case at bar, in which the question of ratification or confirmation does not arise on an act done between vendor and vendee, *the parties interested*; but in which the act done by the purchaser charged as being an estoppel, was executed in favor of a *third* person, in furtherance of an obligation contracted, in his favor, *anterior* to the purchase.

It is true that this obligation was suspended until the purchase had taken place, but it acquired binding force and effect, it became final, when the purchase was consummated.

After a full and scientific review of what amounts to a *voluntary* ratification or confirmation, and a discrimination between them, Laurent, in the light of the textual provisions of the Code of France, of the decisions of courts of that country and of the opinions of commentators on the French law, cites a case stronger than that now un-

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der consideration, and reaches the conclusion that it does not amount to a voluntary ratification or confirmation.

"L'acheteur, says he, donne en paiement du prix, des billets à ordre ; le vendeur les endosse au profit d'un tiers. Si l'acheteur paie le billet, dira-t'on qu'il exécute *volontairement* la vente ? *Non*, car il est obligé de payer le billet, à son échéance au tiers porteur. C'est donc une exécution qui n'implique pas la volonté de renoncer à ses droits. Cela est certain * * * L'exécution matérielle ne suffit pas, il faut l'*intention*, c'est-à-dire, un fait qui révèle l'intention de celui qui l'exécute et une intention certaine, car les renonciations ne se présument pas, c'est au juge à distinguer le fait intentionnel du fait matériel." 18, No. 623, p. 634.

He also says :

"On dit encore que l'exécution n'est pas volontaire et par suite, ne vaut pas confirmation, quand le débiteur a exécuté pour arrêter les poursuites du créancier." *Ib.* No. 622, sec. 2, p. 633.

After considering the article of the French code of which ours is a copy. he says :

"Exécuter volontairement, c'est donc exécuter avec l'intention de confirmer." *Ib.* No. 621, end of session paragraph, 622-3.

Duranton supposes a similar case, aggravated by the circumstance of a sale on credit made on fraudulent representations, in which payment to a *third* person is made after the discovery of the fraud.

"Il ne résulte pas, says he, de ce paiement une approbation tacite et volontaire de l'acte, car il (le débiteur des billets) est obligé de les payer au porteur à échéance, sauf son recours contre celui qui l'a trompé. Vol. 13, p. 296, No. 282, § 1.

Larombière says that, as the acts from which confirmation or ratification is sought to be deduced, have no value otherwise than as *indicia* of the intention on the part of him from whom they emanate, that intention can be inferred only from a voluntary execution, which must be enlightened, reasoned, and exempt from all error. Vol. 4, p. 625, No. 35, § 3. A simple demand for time to pay, or an offer to which has not been accepted, and which could be withdrawn, cannot be considered as acts constituting a voluntary ratification. *Ib.*, p. 634, No. 45.

Zacharie, after saying that the voluntary execution must rest on unequivocal facts, concludes that, in case of doubt, the act is not to be deemed ratified. Vol. 2, No. 421, p. 384.

As to the character of the fact or act invoked as a confirmation or ratification, the jurisprudence of this State, gathered from the following authorities, is to the same effect, namely : that the acts from which

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the ratification of a contract is sought to be deduced, must evince such intention clearly and unequivocally.

None will be inferred where those acts can be otherwise explained. *Rivas vs. Bernard*, 13 L. 175; *Bennett vs. Bennett*, 12 Ann. 254; *Copeland vs. Miskie*, 12 La. 293; 11 M. 615; 3 Ann. 230; 15 Ann. 569.

We deem it unnecessary to quote from those decisions, as the facts are not identical, but simply kindred, to those presented in the present controversy. The propositions of law announced may be considered as general in terms, though applicable to a considerable extent to the contentions now before us.

Looking into the facts, not only do we not find in the act charged, an act voluntarily done; that is, an act which the plaintiff could with certain impunity to himself have omitted doing, but also do we find, his formal declaration, when on the witness stand, showing what his intention was at the time that he paid the interest. On that subject, he says, that he paid the interest, because he thought he was in honor bound, in consequence of his agreement to do so, with the holder of the note, and feared a law-suit.

We therefore conclude that the plaintiff has not done a voluntary act, from which it can be legally inferred that he intended to confirm the sale as executed, and to abandon the suit brought to rescind it.

The plaintiff has argued orally and in brief that an exception of no cause of action filed by the defendants had been properly overruled.

The merits or demerits of that defense is not before us in this appeal, and cannot be considered.

It is therefore ordered and decreed that the judgment appealed from be reversed, that the plea set up as an estoppel to the further prosecution of this suit be overruled; and it is further ordered and decreed that this case be remanded to the lower court, to be further proceeded with according to law, and that defendants pay costs of appeal in both courts.

No. 9719.

J. M. VILLAVASO ET AL. VS. LOUIS BARTHET ET ALS.

The pendency of a suit in the Circuit Court of the United States, involving the alleged unconstitutionality and illegality of a city ordinance adopted on the 12th of May, 1885, is not a bar to the right of a State court to entertain jurisdiction of a controversy involving another and a subsequent ordinance of the same Council on the same subject, passed at a date posterior to the institution of the suit in the Federal Court. Article 248 of the State Constitution of 1879 contains a delegation of a complete and exclusive power to

39	247
44	640
39	247
45	1870
39	247
46	1035
39	247
1119	93
119	97
39	247
123	911

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the city of New Orleans, to regulate the slaughtering of animals for food within its corporate limits. It embraces a delegation of the police power inherent in every sovereign government, which cannot be the subject of a contract, and which is not exhausted when once exercised on any subject falling within its scope.

In the exercise of its police power the city of New Orleans has the unquestioned right to restrict the slaughtering of animals for food to certain designated districts or localities. It has also the right to change the designated districts for such business, if the slaughter-houses established under its previous authority should become nuisances to the surrounding neighborhood. But that discretion is not arbitrary, it must be exercised with wisdom and caution.

An unconstitutional provision in a city ordinance does not vitiate the whole ordinance, unless the two provisions are so closely connected in object and meaning, that the one cannot exist without the other. When a municipal corporation passes an ordinance, legislative in its character, importing no private contract or rights, the members of the corporation enjoy the same prerogatives as members of a State Legislature, and their conduct or motives in passing the ordinance cannot be questioned.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

White & Saunders for Plaintiffs and Appellees:

1. The ordinance of September, 1885, changing the limits within which slaughter-houses could be lawfully carried on, was a lawful exercise of municipal authority. *Cons. 248.*
2. The slaughter-house of defendant, being outside of the legal limits, became unlawful, hence a public nuisance, as well as a private nuisance, to those in proximity to whose residences it was established.
3. As a public and private nuisance, the residents of the vicinage were authorized to invoke its suppression by judicial process. *Blanc vs. Murray, 36 Ann. 169.*
4. The ordinance of September, 1885, being a police regulation, the defendant cannot refuse to obey its provisions, under the pretense of vested right. If lawful, when established, his business was subject to the future exercise of the police power. *33 Ann. 934; Butchers' Union vs. Crescent City Co., 111 U. S. 746.*
5. The Court will not substitute its discretion for that of the city, when the city exercises police power delegate to it alone.
6. But if the Court could do so, the facts justify the ordinance, and show its wisdom.
7. The limits designated by the Ordinance of September, 1885, impliedly are those sanctioned by the Constitution. *33 Ann. 934.*
8. Where a municipality exercises a general legislative and police authority, courts will not inquire into the motives of the legislators, in order to avoid the legislation. *Dillon, vol. 1, No. 313, p. 326, 3d ed.; Jones vs. Loving, 55 Miss. 109; Paine vs. Boston, 124 Mass. 486; 59 Penn. 257; Indiana, 458; 3 Denio, 20; 44 Mo. 491.*
9. No tender of proof, as to corruption of the city government, was made.
10. If made and rejected, the ruling was correct, as the evidence was inadmissible. *Cooley Const. Limit. 135, 136, 186, 208.*

B. R. Forman and *E. H. McCaleb* for Defendants and Appellants:

1. While the power is delegated to the municipal authorities to designate the area within which slaughter-houses can be carried on, in the exercise of that power they are prohibited from creating or perpetuating a monopoly, directly or indirectly, or restricting the business of slaughtering animals for food to the lands or houses of any individual or corporation. *Arts. 248 and 258 Constitution.*
2. When the City Council in designating an area in which many competitive slaughter-

houses might be carried on, required permanent and expensive structures to be made such as steam pumps, an abundant supply of cold and warm water, and large closed discharge pipes leading into the river below low watermark, etc., as it did in 1881; and when on the faith of that ordinance defendant has put up such structures, at an expense exceeding \$10,000, and established a business, the City Council cannot arbitrarily and summarily close him up and banish him to an inaccessible point. Such action would deprive the defendant of a vested right, and deprive him of his property without due process of law, and without previous compensation paid to him; in violation of the Constitution of Louisiana, Arts. 155 and 156, and Art. 6, and in violation of the 5th and 14th amendments to the Constitution of the United States.

3. The ordinance of September, 1885, is null and void for the foregoing reasons, and because it designates no place where slaughterhouses may be carried on, and its effect is to perpetuate a monopoly and to restrict the business to the lands or houses of a particular corporation, and it delegates to the majority of the neighbors the decision of questions which must be determined by the Council itself within its power.
4. An area having been designated for slaughterhouses in 1881, which, after much litigation, has been maintained in the courts—contradictorily with a citizen in the same neighborhood—and during the multifarious litigation which followed the plaintiffs kept silent, they are estopped in equity from complaining, and seeking to make defendant tear down his expensive structures.
5. Unless the evidence shows that Barthet's slaughterhouse was in fact a nuisance plaintiffs have no right to complain.
6. That which is legal cannot be a nuisance to be suppressed by injunction. *Howell vs. Butchers' Union*, 36 Ann. 63; *Stearns vs. Chitz*, 13 L. 111; *New Orleans vs. Warden*, 11 Ann. 244; *Leigh vs. Westervelt*, 2 Duer, 618; *Remmick vs. Morris*, 7 Hill, 575; *Lewis vs. Behan*, 28 Ann. 130; C. C. 569 Digest Lib. 8, sec. 5; *Domat*, Part 1, Book I, Art. XII, sec. 2, No. 1048.
7. The Federal Court having first acquired jurisdiction over the cause was entitled to hold it to the exclusion of the State court. *New Orleans vs. Steamship*, 20 Wall. 393; *Memphis vs. Dean*, 8 Wall, 64; *Taylor vs. Taintor*, 16 Wall. 470; *Peck vs. Jannes*, 7 How. 625; *Butchers' Union Co. vs. Crescent City Slaughterhouse Co.*, 37 Ann. 874.
8. The proceedings and decree of the Federal Court are binding upon all the inhabitants of the city represented by the corporate authorities. *Freeman on Judgments*, sec. 178; *Parker vs. Scoggin*, 11 Ann. 629; *Xiques vs. Bujac*, 7 Ann. 499; *Shields vs. Chase*, 32 Ann. 410.
9. Evidence should have been admitted to prove that the city ordinance of 1885 was procured by the Crescent City Slaughterhouse Company by corruption of the Council, and that this suit was instituted and maintained by them. *State ex rel. vs. Cincinnati Gas Co.*, 18 Ohio, 300; *Miners' Bank vs. U. S.*, 1 Green, 553; *Davis vs. Mayor*, 1 Duer, 451.

The opinion of the Court was delivered by

POCHÉ, J. The main object of this suit is to restrain the defendants from carrying on the business of slaughtering animals for food in the immediate vicinity of plaintiffs' residences, in the lower part of the city of New Orleans, in the square bounded by Peters, Flood, Delaronde streets and Caffin avenue. After alleging that the business complained of is in itself a nuisance, and that its close proximity to their residences renders it unbearable to them, plaintiffs charge that defendants' slaughter-house is at the same time a public nuisance, because it

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is carried on in violation of a city ordinance which restricts the business of slaughtering animals for food to another portion of the city.

The grounds of resistance relied on by defendants are substantially as follows:

1st. That the State courts are bereft of jurisdiction in the premises by reason of the pendency of a suit, in the Circuit Court of the United States, between Barthet, one of the defendants herein, as plaintiff, and the city of New Orleans as defendant, in which an injunction had been issued, before the institution of this suit, *pendente lite*, restraining the city from interfering with Barthet's right of carrying on the business of slaughtering animals for food at the point described in plaintiffs' petition.

2d. That the city ordinance of September 12, 1885, which forbids the maintenance of slaughter-houses in the portion of the city described in plaintiffs' petition, is unconstitutional, illegal, unreasonable and oppressive.

The judgment of the district court perpetuated the preliminary injunction issued in favor of plaintiffs, and ignored their demand for damages. Defendants appeal, and plaintiffs have presented no motion for an amendment of the decree, hence the question of damages heretofore incurred by plaintiffs is eliminated from discussion in the present appeal.

I.

The plea to the jurisdiction was urged under the following circumstances:

During the progress of the trial, plaintiffs, in rebuttal, offered in evidence the record of the suit of Barthet vs. City of New Orleans, then pending in the Circuit Court of the United States. The object of the evidence was to contradict Barthet's testimony in this case, as conflicting with his affidavit in the other suit.

At that stage of the proceedings defendants in this case tendered the issue, as a peremptory exception, that the State court was without jurisdiction to hear and determine the issues involved in this controversy, which were the same as presented in the suit pending before the Federal court.

An inspection of the record in that case, and of the opinion and decree rendered therein, shows that the issue in that controversy turned upon the alleged unconstitutionality of a city ordinance adopted on the 12th of May, 1885, the purport of which was to subject the right of maintaining slaughter-houses in the district herein above described, to the express permission of the council in each case.

The court held the ordinance to be unconstitutional, and issued a preliminary injunction restraining the city council from the performance of the threatened unlawful act complained of by Barthet.

That suit was instituted on June 22, 1885, and the decree was rendered in July following. Now the ordinance which is the groundwork of plaintiffs' complaint in the case before us, was adopted on the 12th of September following; and its purport is to restrict the slaughtering of animals for food to the fifth district of the city of New Orleans, situated on the right bank of the Mississippi river, to that district below the depot of the Morgan's Louisiana and Texas Railroad Company, and extending to the lower limit of the parish of Orleans.

It is therefore very clear that an issue arising under an ordinance adopted on the 12th of September, 1885, could not have been presented, and that it could not have been judicially contemplated in a decree rendered in a suit which had begun on the 22d of June previous.

The objection to the jurisdiction of the court *a qua* which was neither a plea of *lis pendens* nor of *res adjudicata*, was properly overruled.

II.

The unconstitutional, illegal and oppressive features of the ordinance of September 12, 1885, are contained in several subdivisions:

1st. It is charged that the ordinance is void because it involves an illegal exercise of power on the part of the city, whose authority to designate places for slaughtering was exhausted by the ordinances of October and November, 1881, after which the city was stripped of the power to make any changes, as such changes would impair the rights of parties who had established slaughter-houses under the effect of the ordinances aforesaid.

Under the ordinances referred to, the city had designated a district which includes the spot on which the defendants have erected their slaughter-house, as the limits within which the business of slaughtering animals for food could be carried on, under the authority of the city.

The main object of the ordinance of September, 1885, is to operate a change in the limits established by the two previous ordinances of 1881. It reads as follows:

"It shall be unlawful to establish slaughter-houses in the parish of Orleans, except in the fifth district thereof, below the depot of the Morgan's Louisiana and Texas Railroad Company; and before the erection of any such slaughter-house, the particular location selected shall be approved by an ordinance of the city council, on a petition of a majority of the neighborhood. The operations in and about all

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slaughter-houses in the city of New Orleans, shall be in accordance with the provisions of Ordinance No. 7336, Administration Series, adopted September 13, 1881.

"Art. 2. That all that portion of Ordinance 7376, A. S., adopted 13th of October, 1881, and Ordinance No. 7437, A. S., adopted November 18, 1881, designating the territory between Poland or Reynes street, the Mississippi river, Good Children street and the lower limits of the parish of Orleans, where slaughter-houses could be kept and maintained, be and the same is hereby repealed."

If the ordinance is legal and binding in its effect, it is clear that the authority granted by the ordinances which it purports to repeal is recalled, and that the slaughter-house erected by defendants is undoubtedly prohibited.

The power of the city council to regulate the business of slaughtering animals for food, within the city limits, is derived directly from the Constitution of the State. Article 248 reads:

"The police juries of the several parishes, and the constituted authorities of all incorporated municipalities of the State, shall alone have the power of regulating the slaughtering of cattle and other live stock within their respective limits; *provided*, no monopoly or exclusive privilege shall exist in this State, nor such business be restricted to the land or houses of any individual or corporation; *provided*, the ordinance designating the place for slaughtering shall obtain the concurrent approval of the board of health or other sanitary organization."

From the language of the article it appears that the framers of the Constitution intended to vest in the enumerated subdivisions of the State, within their respective limits, the whole power inherent to a sovereign touching the regulation of the slaughtering of animals for food.

The power thus delegated is as complete, unrestrained and unshackled as it originally existed in the State itself, and its exercise can be circumscribed by no limits or conditions which could not apply to the State or to the sovereign whence it emanates.

Its description in American jurisprudence is the police power, a governmental attribute which cannot be the subject of a contract, and to the free exercise of which no estoppel can be interposed.

It is therefore error to assert that in its exercise for the regulation of any subject, it can be considered as exhausted—and that it can never undo what it has once done.

In the sovereign, its existence is coeval with the government; in a subordinate State functionary, it lasts as long as the delegation thereof continues.

But its nature and scope, as well as its existence, are subjects long since removed beyond the domain of discussion; they have been well defined and safely consecrated in a long series of adjudications rendered by the Supreme Court of the United States, by our own Supreme Court and by those of many of our sister States.

In the case of the Butchers' Union Company vs. Crescent City Company, 111 United States Reports, p. 746, in which the right of the State of Louisiana, under its police power, to abrogate certain franchises previously granted by the Legislature, was contested by the defendant corporation, the Court, in treating of this identical subject, used the following language:

"The denial of this power, in the present instance, rests upon the ground that the power of the Legislature intended to be suspended is one so indispensable to the public welfare that it cannot be bargained away by contract. It is that well-known but undefined power called the police power. We have not found a better definition of it for our present purpose than the extract from Kent's Commentaries in the earlier part of this opinion. 'The power to regulate unwholesome trades, slaughter-houses, operations offensive to the senses,' there mentioned, points unmistakably to the powers exercised by the Act of 1869, and the ordinances of the city under the Constitution of 1879. While we are not prepared to say that the Legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the *public health* and *public morals*. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

Similar views were expressed by this Court in the case of the Crescent City Slaughter-house Company vs. City of New Orleans, 33 Ann. 934.

In the case of Stone vs. Mississippi, 101 United States Reports, p. 814, that exalted tribunal said very emphatically, on this subject: "No Legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide

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for them. For this purpose the legislative discretion is allowed and the discretion cannot be parted with any more than the power itself." *Fertilizing Co. vs. Hyde Park*, 97 U. S. 659.

It will thus be seen that in the contest of the defendants' predecessors, whose triumph resulted from the consecration of the principle that the police power is a continuing governmental attribute, they succeeded to open a door which cannot now be closed by virtue of the same doctrine.

2d. Defendants' next contention is that the ordinance is without effect as to them because their right to carry on a slaughterhouse at the point designated has been judicially recognized in the two decisions hereinabove referred to. 33 Ann. 934, and 111 U. S. 746.

That argument is practically answered by the considerations advanced by us on the first point of contention.

3d. It is also urged that the ordinance is unjust and arbitrary; that the limits designated by it are not adapted to the establishment of slaughterhouses, and that the designation of the limits fosters a monopoly, in violation of the Constitution.

As already demonstrated in this opinion, the city is clothed with the exclusive and constitutional mandate, to regulate, within its corporate limits, the slaughtering of animals for food. Under such a delegation of power the question might arise as to the authority of the judiciary to interfere with the legislative discretion thereby vested in the municipal authorities, for the purpose of checking an unwarranted or arbitrary exercise of the same.

But granting the power of courts to encompass municipal action on the subject within proper limits, the evidence in the record in this case is amply sufficient to refute the charge of unjust, arbitrary or oppressive action on the part of the City Council in the change sought to be made by means of the ordinance of September 12, 1885.

On many points of our inquiry the testimony is conflicting, but the preponderance of the voluminous evidence in the record establishes on this point the following state of facts:

Defendants established their slaughterhouse on the main street or principal thoroughfare of the neighborhood, situated in the district designated in the ordinances of September, October and November, 1881, a street which runs along the banks of the Mississippi River, and on which stand the family residences of plaintiffs and other persons living in that portion of the city.

The slaughterhouse was built in very close proximity to the residences of plaintiffs, who had selected that site for their homes, on ac-

count of the advantages of river breezes and ample supply of pure air, coupled with the orderly and quiet condition of the neighborhood.

A short distance below, also on the banks of the river, stand the United States Barracks, in which a garrison of troops, with the necessary complement of officers of the regular army is constantly quartered; and for which the main supply of water is taken from the river by means of a pump and pipe worked by steam power.

In the month of April, 1885, while the slaughterhouse was in progress of erection, the resident neighbors, several of whom are plaintiffs herein, presented a written protest to the City Council, against the establishment and maintenance of a slaughterhouse in that locality and in which they detailed the several nuisances to which they and their families would be subjected by the proposed enterprise.

Their complaint was not then heeded, and the slaughterhouse began its operations on the 11th of July, 1885.

Practical experience soon demonstrated to the Council that a slaughterhouse is *prima facie* a nuisance to those who live in close proximity thereto.

Besides the usual adjuncts of such an establishment, such as the agglomeration of a class of men not desirable as neighbors, the driving of wild steers in the street to the terror and great danger of persons passing to and fro on the street, the loud and yelling voices of cowboys, the noxious smell of blood and of offal of slaughtered animals, came the pollution of the water in the river through the action of the waste or discharge pipe used by the slaughterhouse for the discharge of blood and other refuse matter incident to such operations.

The complaints of the neighbors were thus reiterated, and became louder and more clamorous, as they were joined by the officer in command of the Barracks, who complained to the Council that the water which was pumped from the river for the use of the garrison was polluted through the operations of the slaughter-house.

A chemical analysis by an expert and competent chemist of several samples of water taken at the place where the discharge pipe empties its contents in the river, at longer distances below and immediately at the point where the suction pipe of the pump used at the barracks connects with the river, corroborated the charge made by the commanding officer of the barracks.

All these complaints, as well as the report of the chemist who had been selected by the counsel of the defendants, were referred to the proper committee of the Council, who gave a hearing to all parties concerned, and took the advice of the Sanitary Inspector of the Board of

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Health as to the nuisance condition of the business complained of. The committee on health then submitted their report to the Council; it consisted in recommending the ordinance which was adopted by the Council on September 12, 1885.

In addition to all these elements of complaint going far to show that the defendants' business was a public as well as a private nuisance, the council had also to consider the fact that the defendants had omitted to comply with a very important sanitary condition exacted by the terms of the very ordinance under the authority of which they were operating their establishment. That condition was the use of a nuisance boat "amply sufficient to hold and contain and carry off daily all offal, filth and waste" of their slaughter-house.

To dispose of such matter, the defendants hauled the same in carts, running in front of plaintiffs' residences, to a nuisance wharf belonging to the city, situated a short distance above the slaughter-house.

Under this condition of things, the members of the city council deemed it their right, and conceived it their duty, to suppress the defendants' business at the point selected by them.

With such a showing, this Court cannot and will not undertake to say that the action of the council was either unjust, unwise, arbitrary or oppressive.

It is well settled in jurisprudence, from lessons taught by nature itself, that "Slaughter-houses are regarded as *prima facie* nuisances, and their existence so near to dwellings as to impair their comfortable enjoyment is an actionable injury, and their presence in a public place or near a highway, whereby the public is annoyed, although only for a temporary period, is a public nuisance." Woods on Nuisances, p. 657.

"The business of slaughtering cattle has been held to be a nuisance where no noxious smells were liberated therefrom, when carried on near a highway so that the smell of blood frightened horses passing it. * * * Also when the business was carried on upon the banks of a stream, and the blood from the animals was discharged into the stream so as to pollute the waters thereof. Nor will the fact that the waters of the stream are already partially polluted, justify, or in any measure serve as a defense to an action for an increase of the nuisance, by the discharge of the blood and offal from a slaughter-house into the stream or by any other method." Woods on Nuisances, p. 664; Howell vs. Butchers' Union, etc., 36 Ann. 63.

With a view to subject these lessons of experience to a practical test in the incorporated cities of the State, but principally in the city of

New Orleans, the framers of our Constitution delegated the power, full and exclusive, to the constituted authorities of all incorporated municipalities to regulate the slaughtering of animals for food within their limits.

Now, in the exercise of that power, the city council ordained in September, 1885, that it shall be unlawful to establish slaughter-houses in the parish of Orleans, except in the fifth district thereof, below the Morgan Railroad depot. We fail to perceive in that action any design or intent to foster a monopoly for the slaughtering of animals in the State.

From the record it appears that in the designated limits there is ample room to establish several slaughter-houses. True, the locality is not as convenient to that particular business as the limits prescribed in the ordinances of 1881, but this is a matter which must be left to municipal discretion, in the exercise of the police power. As a consideration, it must be held to be secondary to that of the public health and public comfort.

It may be, as contended by appellants, that the change will operate favorably to the benefit of the Crescent City Slaughter-house Company, whose establishment is situated on this side of the river, immediately below the lower limits of the city of New Orleans, in the parish of St. Bernard—and that the location of that slaughter-house is equally noxious and injurious to residents in its vicinity. But the city of New Orleans has no control over that establishment, and these considerations can have no weight on the judicial investigation which now concerns us. Chances and advantages or disadvantages in trade or business cannot be regulated by judgments of courts.

4th. Defendants further charge the unconstitutionality and nullity of the ordinance of September 12, 1885, because it exacts the consent of the city council and of the majority of the neighbors, as a condition precedent to the erection of a slaughter-house in the designated limits.

This question does not properly arise in the present controversy. It could require judicial solution only in a case arising between a party who would desire to establish a slaughter-house in that locality, without complying with the imposed conditions, and the municipal authorities or any person or persons who would seek to interfere with him or his enterprise.

The question before us is not the wisdom of the selection, but the right to enforce the prohibition contained in the ordinance.

Conceding for the sake of argument that the condition imposed is unconstitutional or, as alleged, impossible of execution, it cannot invalidate or vitiate the whole ordinance.

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Without it the prohibition to slaughter animals in the parish of Orleans, except in the designated district, is complete for two purposes, namely: the prohibition on the one hand, and the permission on the other. The legal object and the void provision are not so connected together in meaning and intent that the one could not legally exist without the other.

“Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall.” Cooley’s Constitutional Limitations, 4 ed. p. 215.

This concludes our review of all the points made by defendants’ counsel, and ably supported both in oral argument and by brief.

But we must now direct our attention to bills of exception which they took from two rulings of the district judge, who rejected testimony proffered by defendants for the purpose of showing that the ordinance of September 12, 1885, was fostered, and that the present litigation was instigated by the Crescent City Slaughter-house Company, in order to retain its monopoly in the slaughtering of animals for food in the markets of New Orleans, in defiance of the Constitution.

The investigation undertaken by the defendants involved the right, which they claim, of questioning the intent and the motive of the council in passing the ordinance by which they have been injured.

The ordinance is clearly general and legislative in its character and scope: it does not purport to enter into a special contract with, or to confer any franchise upon, any individual or body, or combination of individuals. Hence, in this connection the members of the city council are entitled to the same privileges and prerogatives which belong to members of a State Legislature.

“If a court of law can, in any case, inquire into the motives of members of the Legislature, it cannot do so collaterally.” * * 6 Cranch, p. 87, Fletcher vs. Peck.

From numerous respectable judicial authorities, Judge Dillon, in his work on corporations, has formulated the following principle:

“When the officers of municipal corporations are invested with legislative powers, they are exempt from individual liability for the

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passage of an ordinance within that authority, and their motives in reference thereto will not be inquired into." Dillon, 3 ed. p. 326.

The passage of the ordinance now under discussion involved the exercise of the highest legislative power which could possibly be delegated to a municipal corporation under a republican form of government, namely: the police power.

The evidence was properly rejected.

If the defendants can prove against any member or members of the city council the charges which are intimated in their brief, their remedy is clear under constitutional provisions and existing laws.

But the issue as submitted to us in the pleadings is restricted to a question of usurpation of power, and of arbitrary and oppressive conduct, on the part of the council as a body.

Under that issue, important in itself, but restricted by the pleadings, the Court has no authority to investigate or ascertain what assistance, if any, plaintiffs herein have received from the Crescent City Company or other outside parties or influences. Our only concern is to ascertain, under the law and the evidence, whether they are entitled to the relief which they seek from the courts of their country.

The district judge has reached conclusions favorable to their demand, which he supports in an able, vigorous and well considered opinion, from which we have reaped material assistance, and we concur with him.

Judgment affirmed.

 No. 9877.

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The party who applied for a jury cannot waive the jury at the moment of trial, unless the other party consents.

The seizure and sale of one-third interest in a plantation under lease and before its expiration, does not dissolve the lease as to entire plantation.

When the term of the lease was two years, and the lessees bound themselves to leave on the leased premises, at the end of the last year of the term, a certain quantity of the products of the place, the purchaser at judicial sale of an undivided third of the plantation, made at the end of the first year of the lease, could not take possession of the entire plantation and convert to his own use the crops thereon, under the plea that, the lease being dissolved by the said sale and the crops thereon converted, not exceeding what the lessees were bound to leave there, under the contract, at the expiration of the term of lease, he had a right to take said crops. The crops belonged to the lessees, and they were entitled to recover their value.

When the contract of lease is deposited in the recorder's office for registry, and an indorsement made thereon by the recorder, showing its deposit for record, but the contract is not recorded in the book of conveyances, but in another book kept for the recording of

39	259
45	356
39	259
106	419

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leases, etc., such registry will protect the parties whether the contract was recorded in the proper book or not. Arts. C. C. 2366, 2345, 2354; *Payne vs. Pavey*, 29 Ann. 116 reaffirmed.

A PPEAL from the Twentieth District Court, Parish of Assumption. *Knobloch, J.*

W. E. Howell, for Plaintiffs and Appellees:

- (a) When real estate is owned in indivision by several persons, upon the undivided share of one of whom a judicial mortgage is of record, and the whole property is leased by the joint owners by public act duly recorded, the seizure and sale of the encumbered interest does not dissolve the lease in so far as the other unencumbered interests are concerned, and the tenant cannot be dispossessed of the unencumbered interests. The judicial mortgage and all rights under it must be restricted to the property of the debtor alone and cannot, in any possible manner, affect the property of third persons or any one holding under such third persons. R. C. C. Arts. 3278, 3279, 3282 and 3281; 12 Ann. 867; 28 Ann. 763; C. C. Arts. 2732 and 2733; *Hennen's Digest*, vol. 2, p. 1365; 8 N. S., p. 336, 11 Ann. 95.
- (b) The purchaser at such sale is entitled only to joint possession with the lessors, who hold for the other joint owners. 23 Ann. 150; 33 Ann. 298.
- (c) A purchaser of property at private sale, which property is under lease at the time, said lease being duly recorded, cannot legally take possession of the leased premises during the lease, and if he does, renders himself liable to an action in damages by the lessors. R. C. C. Arts. 2732 and 2732; 11 Ann. 95; 1 N. S. 364; 8 N. S. 563.
- (d) All crops growing or gathered upon leased property, the product of the labor of the lessees, are the property of such lessees, and if taken possession of by the purchaser of such property at judicial sale thereof, under a foreclosure of mortgage or otherwise, renders him liable to the lessees for the highest market value of such crops. 28 Ann. 763; 32 Ann. 201; *Cooley on Torts*, top page 433.
- (e) Every, at whatever of, man that causes damages to another obliges him, by whose fault it happened, to repair it. R. C. C. 2315.
- (f) All profits of which a person has been deprived by the illegal acts of another, whether prospective or otherwise, are allowed at civil law when proved. C. C. Arts. 1933 and 1934; 10 Ann. 633; 3 L. 332; *Sedgwick on the Measure of Damages*, 7th edition, pp. 108-143.
- (g) Where an action for damages is tried by a jury they are peculiarly the judges of the measure of damages, and unless their verdict is palpably wrong it will not be disturbed by the appellate court. *Hennen*, vol. 1, p. 92 (b); 3 Ann. 670.
- (h) Every assertion of title to, or act of dominion over personal property inconsistent, the rights of the owner is in law a wrongful conversion, and proof of such acts is sufficient to establish such conversion. 2 Ann. 281, 289.
- (i) Every wrongful conversion of property of another constitutes the party so converting a trespasser, and renders him liable as such, the measure of damages to be determined by the fact, whether such acts were malicious or otherwise. 9 Ann. 490.
- (j) The remedy in behalf of lessees prescribed by articles 2696, 2703 and 2704, of the R. C. C. is not exclusive, nor does it deprive the lessee of his action in certain cases against the party evicting him for the damage caused him, but the only penalty for failure to give the notice therein prescribed, is the loss of his remedy for damages against his lessor. 31 Ann. 71.
- (k) When a defendant prays for trial by jury in his answer, or subsequently, and the court so orders the trial, and the case is accordingly fixed for trial, it is too late on the morning of the trial, after the case has been called for trial, for the defendant to waive the trial

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- by jury thus ordered, and such jury trial cannot be thus waived unless the plaintiff consents, and contrary to his objections to such waiver. 2 M. 48; 10 Ann. 24.
- (f) The exception of no cause of action filed herein was properly overruled by the lower court. This is an action in damages, and arising out of a *quasi* offense committed by the defendant, and an action personal in its character, and could be brought by the plaintiffs. R. C. C. 2315; 6 R. 382; 9 Ann. 490; C. Part 32; 27 Ann. 629; 28 Ann. 761.
- (m) A party cannot ask for the dissolution of a contract and at the same time demand its specific performance, the one demand is repugnant to and inconsistent with the other. He cannot ask to dissolve a sale and at the same time demand the purchase price. 31 Ann. 73; Hennen, vol. 2, p. 1138 II, (a) Nos. 2, 12, 13, 23.
- (n) If the contract of lease is, by its nature, indivisible, then it cannot be divided for any purpose; it must be wholly enforced or wholly annulled and dissolved. 7 Ann. 612.
- (o) In all bi-lateral contracts, when reciprocal obligations are assumed, these obligations cannot be all enforced on the one side and not enforced at all against the other side. And if one of the contracting parties is released from the fulfillment of his obligations, the carrying out of which was the very consideration for the obligations engaged to be performed by the other side, the latter party is likewise released. 10 L. 23; Hennen, vol. 1, p. 803, (e) No. 6; 31 Ann. 67; 1 Ann. 422.
- (p) Profits, of which a person is illegally deprived by the act of another, are recoverable, of whatever nature or kind they may be, and any such profits proven to have been thus lost must be accorded.
- (q) Defendant's demand in reconvention was properly disallowed, and all evidence offered to prove it properly rejected, because the allegations of said demand do not upon their face set forth any cause of action against plaintiffs, and because irrelevant and inadmissible under the pleadings, and not incidental to or necessarily connected with, or growing out of plaintiffs' demand. 2 R. 216; 3 R. 387; 9 Ann. 7; 14 Ann. 859; 11 R. 347; Hennen, vol. 2, p. 1173 (b) 14 Ann. 734.
- (r) Interest at the legal rate properly runs from the date of wrongful taking, and even if it does not, the court should apply the rule of "*De minimis non curat lex*," and should not, even if the judgment is amended in this small particular, throw the cost of appeal upon the appellee. Hennen, vol. 1, p. 99; 38 Ann. 347; 7 Ann. 116, 847; 38 Ann. 347. Sedgwick leading case on the measure of damages, p. 597.
- (s) No question of partnership or partnership rights are involved in this case. The lessors were simply joint owners of the leased property.
- (t) Even should the Court hold the lease to have been dissolved, so far as the whole property was concerned, by the sale of the encumbered portion under the judicial mortgage, still the lessee cannot be held for anything in the nature of future rents, all obligations arising under and by virtue of the contract of lease are put at an end by the dissolution of the contract. 1 Ann. 421; 31 Ann. 70.
- (u) The lease in this case was properly recorded in the office of the conveyances in the parish where the leased property is situated. R. C. C. Arts. 2266, 2264, 2245; 29 Ann. 116; 33 Ann. 1250.

Walter Guion, for Defendant and Appellant:

- Int. The suit should have been dismissed on the exception of no cause of action, because plaintiffs having alleged that, as lessees, they had been evicted from the leased premises by defendant, a third party, upon a certain claim of right to such property, which, as plaintiffs alleged, "he claimed was his private property," could not hold defendant responsible for the damages claimed to have been suffered by them, and could only pursue their rights, if at all, against their lessors, Gonzales & Co., and furthermore, having alleged in their petition that they had been dispossessed of the property leased, which they had held possession of under a lease "for more than one year," plaintiffs have given to their suit the character of a possessory action which, as lessees, they have no

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- right to institute. C. C. Art. 2703 (2673); Art. 2704 (2674); Art. 2696 (2666); C. P. Art. 48; 2 La. 227; 23 Ann. 427; 31 Ann. 71; Marcadé, vol. 6, pp. 456, 457.
- 2d. That the lease relied upon by plaintiffs, as having been entered into between them and the agricultural firm of Gonzales & Co., was in no manner binding upon defendant, a third party, because the same was never recorded in the book of conveyances of the parish of Assumption, the only proper place where the registry of the same could affect or serve as a notice as to third persons. See 30 Ann. 437; 33 Ann. 1121; 9 Ann. 504; 5 Ann. 263.
- 3d. That, even granting for the sake of argument, the lease declared upon by plaintiffs was recorded in the proper place to serve as notice to third persons, of its existence and inscription, nevertheless, the same was, in its nature, essentially indivisible and incapable of existing except as a whole and in its entirety; and that the seizure and sale by Dorcino Landry, a judgment creditor of Jean Gonzales, one of the members of the firm of Gonzales & Co., the leasees of plaintiffs, of the undivided one-third of the plantation so leased under a judgment rendered and properly recorded in the Mortgage Office in the parish of Assumption, long prior to the execution of the lease to plaintiffs by Gonzales & Co., cut off and dissolved, in its entirety and as a whole, the lease under which plaintiffs claimed the possession and the right of possession to the property; and that defendant, having purchased, at the sheriff's sale made in the suit of Dorcino Landry vs. Jean Gonzales, the undivided third of said Jean Gonzales in the property, and immediately thereafter having purchased the remaining two undivided thirds of the same from the other two owners thereof, had the absolute right to enter into and take possession of the plantation as a whole, without incurring any liability whatever to plaintiffs by reason of such possession or otherwise. C. C. Art. 2823. (2794); 14 Ann. 108; 12 La. 210; 2 Ann. 478; 15 Ann. 661; 30 Ann. 1314, 404, 32 Ann. 203.
- 4th. That even should it be held that the lease relied upon by plaintiffs was duly recorded so as to affect defendant, and that it should be further held that it was not indivisible and not dissolved and cut off in its entirety, by the seizure and sale under the judgment in the suit of Dorcino Landry vs. Jean Gonzales, nevertheless, defendant, as the purchaser, at the sheriff's sale made in that suit, of the undivided one-third interest of Jean Gonzales, in the property so leased, had the undoubted and absolute right of taking and entering into possession of the undivided third of said property, free from any rights or claims of plaintiffs under that lease, and that even in this case, if defendant had taken possession of and worked the whole plantation, plaintiffs would have no right of action against him by reason thereof, unless defendant has made a profit from said plantation, and that then plaintiffs should be compelled to remunerate defendant for all proper expenditures incurred by him in carrying on the plantation, and should not be permitted to recover from defendant unless he had mismanaged the property, or had made a profit from it, or had maliciously deprived them of the use and enjoyment of the two-thirds not sold in the suit of Landry vs. Gonzales. C. C. Art. 2295, (2274); Art. 2299, (2278); 10 Ann. 257; Art. 1965, (1960); Hennen, vol. 2, p. 1020, No. 19; 4 Ann. 76; 7 Ann. 136; 12 Ann. 354; 22 Ann. 489; 30 Ann. 1099; C. C. Art. 2314 (2292.)
- 5th. That plaintiffs, for the reasons given and by further reason of the fact that defendant, instead of making any profit from the crop made in 1881, on the "Gonzales" plantation, incurred a heavy loss, notwithstanding a skillful and economical management of the property, have no right of action, nor claim against defendant, for any supposed profits resulting from the crop operations of that year. Nor is their claim for the alleged value of seed cane, corn and hay, which the said defendant took possession of with the plantation, entitled to give any greater consideration, because, under their lease with Gonzales & Co., plaintiffs received with the leased plantation a certain quantity of corn, hay and seed cane, which they bound themselves to return with the plantation at the expiration of their lease, and that the quantity which defendant took possession of with the plan-

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tation, when he entered into possession under their lease, and which quantity the evidence shows has never been otherwise, returned to their original lessors, nor any one else. 32 Ann. 203; C. C. Arts. 2710, 2680.

6th. That the lease relied upon by plaintiffs, if ever binding against defendant, was dissolved by the seizure and sale in the suit of Dorcino Landry vs. Jean Gonzales, and that defendant, as purchaser of one-third of the plantation at that sale, and of the other two-thirds thereafter, had the right to take possession of the corn, cane and hay, as part and parcel of the leased premises, and which, by the terms of the lease, plaintiffs were bound to return and abandon with the plantation at the expiration of their lease. And if, on the other hand, the lease was not dissolved in its entirety by that seizure and sale, it was certainly dissolved as to one-third of the property, and that as defendant had the undoubted right to enter into possession of one-third, at least, of the plantation, and work the same for his own account, plaintiffs cannot hold him responsible for the corn and hay so taken possession of by him with the plantation, for the same were used by defendant, and the seed cane planted by him to make the crop of 1881, for the recovery of the alleged profits of which plaintiffs have also sued defendant. The two claims are inconsistent and destructive of each other.

7th. The district judge erred in his rulings, during the trial, in the following particulars:

1. In refusing to allow defendant to waive the trial by jury previously prayed for by him, on plaintiff's counsel objecting to such waiver, though not making a specific prayer for a jury on behalf of plaintiffs. C. P. Arts. 494, 495; Hennen, vol. 1, p. 767 (b), Nos. 3, 4, 7, 9.
2. In allowing plaintiff's counsel to introduce evidence, for the purpose of establishing the value of the seed cane left on the leased property by plaintiffs, and taken possession of by defendant; and also the quantity of sugar and molasses made on the property in 1881, while in defendant's possession, and the value of same. C. C. Art. 2703, (2673); Art. 2704, (2674); Art. 2696, (2666); C. P. Art. 48, 2 La. 227; 23 Ann. 427; 31 Ann. 71; Marcadé, vol. 6, pp. 456, 457.
3. In refusing to allow defendant to establish, by the testimony of defendant himself, and by other evidence offered by him, by way of reconvention, the amount of expenses incurred by him during the year 1881, upon the "Gonzales" plantation, as alleged and set forth in his answer, and in restricting the evidence, as he did, to disproving plaintiffs' allegations for the recovery of loss of profits, and for no other purpose.
8. The district judge also erred in his charge to the jury in the following particulars, by refusing to charge the jury as follows:
 1. That a lessee of a plantation is bound by law to leave the property so leased whenever the lease is put an end to, in the same state in which he received it, and that he must return with it everything that he received with it, and everything that he agreed to deliver with it at the termination of the lease.
 2. That when a party leases a plantation with farming implements thereon, and takes with it seed cane, hay and corn belonging to the lessor, and upon the plantation at the time of taking possession with the obligation of returning the same quantity of such property at the termination of the lease, the lessee is bound to return such seed cane, corn and hay, with the leased property, whenever the lease is terminated, as one of the obligations and stipulations of his contract, and as part of the leased premises.
 3. That if the jury believe from the evidence that plaintiffs leased from Jean Gonzales & Co. their plantation, and that they received with it a certain quantity of hay and corn, to be returned with the plantation at the end of the lease, and that they further bound themselves to leave on the plantation at the termination of the lease seed cane sufficient to plant a specified quantity of land, and should further believe that defendant purchased at a sheriff's sale, made on the execution of a judgment rendered and recorded prior to the lease so entered into, the undivided third of Jean Gonzales, and

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after said sale acquired the other two-thirds of the plantation, that then they, the jury, should consider defendant entitled, by reason of his said acquisition, to everything that should be returned by plaintiffs, as lessees, with the plantation; and that if the jury should believe that defendant took possession of any corn, hay or seed cane, when he took possession of the plantation, and which had been produced by plaintiffs, that they should then consider the quantity so taken possession of by defendant and should not hold him responsible for the same unless they, the jury, found that the quantity so taken possession of by defendant exceeded the quantity which plaintiffs received with the plantation when they took possession as lessees.

9th. The judgment is erroneous in giving interest on the amount for which it is rendered, because no specific rate of interest is claimed in the petition of plaintiffs, nor any date fixed from which interest is asked to run; and, second, because the verdict of the jury fixes no rate of interest upon the amount found to be due, nor does the same provide any date from which the same should run. C. P. Art. 553; 30 Ann. 735; 20 Ann. 217. 218.

The opinion of the Court was delivered by

TODD, J. On the 6th of January, 1880, the plaintiffs leased a sugar plantation from John Gonzales & Co., an ordinary partnership, composed of John, Perico and Raphael Gonzales, joint owners of the plantation leased, each owning an undivided third of the same. The lease was for the term of two years, ending on the 31st December, 1881.

Among the stipulations of the contract was one to the effect that the lessors turned over to the lessees a lot of corn and hay then on the place, which the lessees were to return at the expiration of the term of the lease; and they were also to leave on the plantation at that time seed cane enough to plant twenty arpents of land.

The lessees took possession of the plantation, and made a crop thereon the first year named (1880). In December of that year, the one-third interest of John Gonzales in the plantation was seized and sold, under a judgment obtained against him, and recorded in 1879. This interest was purchased at the sheriff's sale by the defendant Klotz, who, on the same day, also bought, at private sale, the remaining interests in the property of the other proprietors—Perico and Raphael Gonzales. Klotz immediately went on the plantation, and took possession of the corn, hay and seed cane of the plaintiffs found there.

The plaintiffs then resorted to an injunction to restrain Klotz in his proceedings, and maintain themselves in possession during the residue of their lease, and claimed damages.

Klotz dissolved the injunction on bond, and continued in possession of the property.

Plaintiffs then filed an amended petition, in which was set out specifically the amount and character of the damages claimed.

The main items of these were:

One hundred dollars for the hay.

Two hundred dollars for corn.

Five hundred dollars for seed cane.

Twelve hundred dollars for net profits on the crop of 1881, which, under the terms of their lease, they were entitled to make on the place, but of which right they were deprived by the illegal act of the defendant in taking possession of the leased premises.

There was an exception of no cause, which was overruled, and properly so.

This was neither a petitory nor possessory action, as charged in the exception filed, but substantially an action for damages, claimed to result from the unwarranted taking and conversion of the plaintiffs' property, and the alleged violation of their legal rights. No clearer or graver cause of action could be asserted; and whatever rights the lessees might have preferred against this lessor on account of the acts of Klotz complained of, there was under the allegations of this petition a distinct liability on his part.

The case was tried by a jury—a jury being prayed for by the defendant.

When the case was called for trial, the defendant, through his counsel, offered to waive the jury, and have the cause determined by the judge. To this the plaintiffs' counsel objected, and the objection was sustained by the judge.

This ruling forms a ground of complaint, which we find embodied in a bill of exceptions taken by the defendant's counsel.

The ruling was correct; the jury had been asked for by the defendant, the case had been put down as a jury case on the jury docket, the jury were in attendance to try the case. To have it thus tried under the order rendered was a right enjoyed by both parties to the suit, regardless of the question as to which party had applied for a jury, and being thus a jury case, the jury could only have been dispensed with by the request and consent of *both* parties.

The answer of the defendant, after the general issue, resisted the plaintiffs' demands upon the ground that the defendant's purchase at sheriff's sale of the one-third interest of Jean Gonzales in the plantation, dissolved the lease as to the whole of it; and that under this purchase and the subsequent acquisition of the interests of the other proprietors as sole owner of the property, he had the right to take possession of it regardless of the lease, and a further right to appropriate the corn, hay and seed cane raised by the plaintiffs, and found on the place, since the same did not exceed the quantity of the like

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product that the plaintiffs under the terms of the contract, were to leave on the premises at the expiration of the lease.

It was further alleged that there had been no proper record of the lease, the same not having been recorded in the book of conveyances, and that therefore was without legal effect.

It was further denied that the plaintiffs had a valid lease of the plantation, because the contract was made by one of the owners of the premises without the consent or authorization of the others.

Finally, it was averred that the defendant took possession of the plantation and the property thereon claimed in the suit with the consent of the plaintiffs.

I.

The purchase at sheriff's sale of one-third of the plantation by the defendant did not dissolve the lease of the entire plantation, and render exigible, as contended by defendant, all the obligations of the lessees as fully as if the term of the lease had expired.

Granting that it dissolved the lease as to John Gonzales's one-third of the land, it had no legal effect on the rights of the lessees to or upon the remaining two-thirds, not embraced in the seizure and sale.

The defendant, as owner of the one-third of the land under the adjudication, was entitled to take possession of the one undivided third of the plantation, but no more. He could acquire no greater right or title to the plantation, under his purchase, than John Gonzales, his judgment debtor, held.

He could have possessed himself of this interest, and if he chose, have cultivated the same; but not so as to infringe upon the rights of the lessees over the remainder of the plantation. If this course did not suit him, or was deemed inconvenient or impracticable, he had the option to resort to a partition, and have his interest segregated and made definite.

He had no more right to enter on the portion, or two-third interest of the plantation, under his purchase of the one-third, than a stranger would have had, and to this extent, and as relates to such portion, unaffected by his seizure and judicial sale, as stated, his attitude and conduct cannot be viewed otherwise than that of a trespasser. *Becnel vs. Becnel*, 23 Ann. 150; *Balfour vs. Balfour*, 33 Ann. 198; C. C. 2732, 2733.

Nor does the fact that he bought at private sale the remaining interests in the plantation about the same time from the other co-proprietors, justify or relieve his conduct, for they could only convey to the defendant their interests subject to the lease. By this lease they

granted to the lessees—plaintiffs herein—the right to occupy and cultivate the plantation to the extent of their interests, for another year.

II.

The question of the dissolution of the lease by the effect of the seizure and sale of a third of the leased premises, which we have discussed, bears on the liability of the defendant for the corn, hay, etc., that he converted to his use when he entered on the plantation. His contention is, as above stated, was that the lease being dissolved by the seizure and sale referred to, and the lessees having bound themselves to leave on the plantation, at the expiration of the lease, the same quantity of corn, hay and seed cane that they found there, and as these did not exceed the quantity the lessees found there at the beginning of the lease, that he had a right to keep them, and could not be held responsible for their value.

The conclusion we have announced touching this question of the dissolution of the lease by reason of the seizure and sale referred to, leaves this contention without force. The property mentioned converted to his use by the defendant, belonged to the lessees, and their right thereto was unaffected by the seizure and sale.

In the case of *Porche vs. Bodin*, 28 Ann. 761, presenting a similar state of facts with the instant case, we find in the opinion rendered the following language:

“It is true Article 465 of R. C. C. says that standing crops are considered as immovable and as part of the land to which they are attached; and Article 466 declares that fruits of an immovable, gathered or procured, while it is under seizure, are considered as making part thereof and inure to the benefit of the person making the seizure. But the evident meaning of these articles is, *where the crops belong* to the owner of the plantation, they form part of the immovable. * * * A crop raised on leased premises forms in no sense part of the immovable. It belongs to the lessee and may be sold by him, whether it be *gathered* or *not*, and may be sold by his judgment creditors.”

See also the case of *Sandel vs. Douglass*, 27 Ann. 629.

In this case the *growing* crop of a lessee was seized, with the plantation, by a mortgage creditor of the owner, and there was no record of the lease, yet the Court held the seizing creditor liable to the lessee for the full value of the crop.

Lewis et al. vs. Klotz.

III.

It is further contended that the plaintiffs possessed no valid lease, and if they did, that it was not properly recorded and was without effect.

The contract of lease was signed by one of the owners for himself and co-proprietors. It is claimed that the one signing had no authority from the others. The evidence satisfies us that, whether he had such authority or not, his act was fully ratified.

The contract of lease was duly deposited in the recorder's office, and the required indorsement to that effect was made upon it. It was recorded in the book kept by the officer for the recording of leases. Whether it should have been recorded in the book of conveyances, it is unnecessary to consider, since the deposit in the proper office, and the proper indorsement by the officer fully protected the parties. C. C. 2266, 2254, 2245; *Payne vs. Pavy*, 29 Ann. 116.

IV.

The liability of the defendant for corn, hay and seed cane taken by him being established, it remains to determine the value of the same. The evidence on this point is conflicting. The case was tried by a jury who, we presume, were thoroughly familiar with the subject of the value of these products, and after a close scrutiny of the evidence we are not satisfied that the estimate made by them, as shown by their verdict, should be disturbed.

V.

There is a motion for an amendment of the judgment, by adding to the amount thereof the net profits that might have accrued from the cultivation of the place in 1881, which the plaintiffs were prevented from working by the act of the defendant.

Granting that the net profits on a crop not yet begun or planted could form an element of damage in a suit of this kind, still we have failed, after an attentive consideration of the evidence bearing on this point, to reach any satisfactory conclusion as to the value of such profits, or even whether there would have been any profits at all. The amendment asked must, therefore, be disallowed.

This conclusion dispenses us from the consideration of the reconventional demand urged by the defendant.

Judgment affirmed.

Gayden vs. Railroad Company.

No. 9916.

J. G. GAYDEN VS. LOUISVILLE, NASHVILLE, NEW ORLEANS AND TEXAS
RAILROAD COMPANY.

39	269
47	1899
39	269
48	458
39	269
51	1742
39	269
119	832
120	118
39	269
e123	39

A *remittitur* entered after the verdict of a jury has been rendered, in a case in which the matter in dispute, the sum demanded, exceeds \$2000, does not cut off defendant's right to appeal from a judgment rendered against him. This is so particularly when he objects to the *remittitur* being permitted, and the court allows it without prejudice to his right of appeal, and where the plaintiff himself afterwards appealed.

The failure of plaintiff to perfect his appeal does not relieve him from the imputation of admission of the appealable character of the suit.

The condition that, should a railroad not be built within a stated time, the contract giving right of way shall be null and void, is *resolutory* in character.

Until the dissolution is judicially demanded for non performance, the obligor has the right to comply with his part of the contract.

An obligee who is present during the performance of the obligation, after the expiration of the delay, who does not object, and allows the work to be completed, cannot be permitted by suit, brought more than a year afterward, to demand the value of the land taken for the building of the road, and claim damages, consequent on the use of the grant, and which were not in the contemplation of the parties, when the contract was entered into.

A PPEAL from the Sixteenth District Court, Parish of East Feliciana. *Brame*, judge *ad hoc*.

Merrick & Merrick, Calhoun Fluker and D. J. Wedge for Plaintiff and Appellee:

1. After a *remittitur* has been properly entered before judgment reducing the demand below the jurisdiction of the Supreme Court, the lower court cannot by any explanatory remarks oust the Court of Appeals of appellate jurisdiction and confer it on the Supreme Court.
2. Where a grant of right of way to a railroad company was made on condition that the grant should be null and void if the company did not complete the road in eighteen months, the lapse of time without the completion of the road leaves the condition broken. C. C. 2038; Dalloz Code Civil Annoté, p. 1024, Art. 1176, No. 1; 17 Laurent, pp. 86 and 87, No. 73.

T. J. Kernan and Farrar & Kruttschnitt for Defendant and Appellant:
ON MOTION TO DISMISS.

1. Articles 491 and 572 of the Code of Practice establishes a fundamental difference between trials before the court and trials before a jury. 5 N. S. 642; 7 M. 490; 9 E. 240; 16 Ann. 431-4.
2. A *remittitur* after verdict is equivalent to a *remittitur* after judgment, and neither can cut off the defendant's right of appeal. 16 Ann. 431-4.

ON MERITS.

1. A corporation cannot be sued outside of the parish of its domicile for damages arising from the alleged passive breach of a contract. *Montgomery vs. La. Levee Co.*, 30 Ann. 607; *Gossin vs. Williams and Morgan's L. and T. Ry. Co.*, 36 Ann. 186.
2. The grant of right of way made by the plaintiff to the defendant is a bar to this action.
3. The condition expressed in the grant, that it should be void if the road was not completed within eighteen months, was nothing but an express resolutory condition, where

Gayden vs Railroad Company.

the happening of the condition depended on the act of one of the parties, and was, therefore, not dissolved of right by the failure of the party to do, and could only be dissolved by a preliminary default followed by a suit to dissolve. C. C. Art. 2047.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff claims that this Court has no jurisdiction over this controversy, the matter in dispute not exceeding \$2,000.

The suit is for \$4,000 for the value of certain lands and for damages done to others.

After issue joined and evidence adduced, the case was submitted to a jury, who returned a verdict for \$500 for the plaintiff.

An offer was then made by plaintiff to enter a *remittitur* for all demands exceeding \$2,000. To this the defendants objected as concerned their right of appeal. The court sustained the objection, allowing the motion however, but without prejudice to the right of appeal.

There was judgment for five hundred dollars for plaintiff, from which defendants appeal.

The plaintiff also appealed, but did not perfect his appeal by giving bond.

There are several reasons for which the motion to dismiss ought not to prevail.

The motion for a *remittitur* was offered too late.

It is true that a party plaintiff has the right to discontinue his suit, but that privilege cannot be exercised under all and any circumstances. The law discriminates.

Where the suit is before the judge alone, the discontinuance can be allowed only when asked *before*, never *after* judgment. C. P. 491.

Where the suit is before a jury, it must be asked *before* the case is submitted to the jury, until the moment when the jury is about to retire. C. P. 532.

When there is a reconventional demand, the plaintiff is not permitted to discontinue, so as to affect that demand.

This doctrine has been announced in *Applegate vs. Morgan*, 5 N. S. 642, and has been applied in several instances.

See *Chedoteau vs. Dominguez*, 7 M. 490; *Warfield vs. Ludewig*, 9 R. 240.

In the case of *LeBlanc*, 16 Ann. 431, the then Court overruled the motion to dismiss.

It appears there, that, before the verdict was taken in the lower

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court, the plaintiff moved to amend his petition by remitting \$710 of his demand for \$1,000; but on objection of the defendant, the amendment was not allowed, plaintiff excepting, however.

The jury returned a verdict for \$800, and thereupon plaintiff entered a *remittitur* for all except \$299, for which judgment was rendered against the defendant, who afterwards appealed.

The Court held that the appeal was from a subsisting demand of \$1,000, and it took jurisdiction over the controversy. It first remanded the case with instructions; but, on a rehearing, gave judgment for defendants.

In the instant case, although it appears that the lower court allowed the *remittitur* to be entered, the fact is, that the *remittitur* was permitted, expressly, *without prejudice* to the defendant's right of appeal.

A *remittitur* is in the nature of a discontinuance and is governed by the same rules.

The record shows, besides, that after the defendant company had appealed, the plaintiff himself appealed.

It is true that he did not perfect his appeal; but the fact remains that he considered the case as appealable, otherwise he would not have appealed.

We therefore conclude that the *remittitur* entered in this case could not and did not prejudice the right of defendant to appeal.

The motion to dismiss is overruled.

ON EXCEPTIONS.

The plaintiff sued for \$6,000 damages, claimed on five different grounds:

- 1st. Value of right of way;
- 2d. Value of twenty acres of land rendered useless;
- 3d. Damages to plantation rendered less valuable;
- 4th. Damages by failure to complete road within eighteen months;
- 5th. Losses incurred and profits missed in certain operations.

The defendant excepted to the jurisdiction of the Court as to claims 4 and 5, which are for the passive breach of a contract and which can be enforced only at the domicile of the corporation in New Orleans.

The defendant likewise excepted to claims 1, 2 and 3, but on account of vagueness.

The Court sustained the exception to the jurisdiction, overruled the others; requiring plaintiff, however, to amend the allegation touching the second claim, which was done.

Defendant excepted again on the ground of no cause of action, and

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asked the dismissal of the suit; but the Court overruled these objections.

The only claims now in dispute are those set forth as 1, 2 and 3.

We are therefore dispensed from passing on the ruling as to the question of jurisdiction; the more so as no amendment of the judgment is asked by the appellee.

ON THE MERITS.

It appears that, on August 19, 1882, the plaintiff granted, bargained and sold to the company a right of way, 100 feet broad, 50 feet on each side of the centre of a railroad to be constructed by defendant, on such line as the company might thereafter adopt as a permanent location for its road—in consideration of the benefits and advantages to be derived from the construction of the road.

The concession was made with the understanding that, should the railroad not be built within eighteen months from date of agreement, the contract shall be *null and void*.

This suit is brought on the assumption that the condition of *building, within* eighteen months, not having been complied with, the contract is null and void and therefore that the plaintiff is entitled to the value of the lands taken and to the damage done by the company.

There is no averment that the corporation was put in default.

The evidence shows that, authorized by the grant, the company entered upon plaintiff's lands and, in March, April and May, 1883, built its road-bed, and in March of the following year laid its track through plaintiff's place; that the first train from New Orleans to Wilson ran in June, and through to Memphis between two and three months later—August or September, 1884.

It also shows that, while the work was progressing, the plaintiff was frequently present, interposing no objection; that the road was graded and the work performed with due precaution as to drainage, protection by cattle-guards and wagon crossings.

The map or plat in the record apparently shows that the route pursued was judiciously selected.

There is no charge or evidence that the defendant has misused the the right of way conceded by the plaintiff.

The claim for value and for damages might have a standing, but for the contract of August 19, 1882.

Hence the question is:

Whether that contract has or not been dissolved.

It is true that it provides that *should the railroad be not built within eighteen months from the date, then the contract shall be null and void.*

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It is also true that, although the work was *begun* some seven months after the date of the contract, the road was not terminated until March, 1884, and that it was used in June and in September following.

It does not however follow, that, on that account, the contract was *ipso facto* dissolved. Delsol, V. 3, No. 821.

The plaintiff contends that the decision of the case is to be controlled by Art. 2038 R. C. C., which provides that: "When an obligation has been contracted on condition that an *event* shall happen within a limited time, the contract is considered as broken when the time has expired without the event having taken place."

Plaintiff leaves out of view other provisions of law on the subject of resolatory conditions which bear upon this question.

The Code defines the dissolving condition as that which, when accomplished, operates the revocation of the obligation, placing matters in the same state, as though the obligation had not existed. R. C. C. 2045.

It further declares, that the obligation is implied in all commutative contracts, to take effect in case either of the parties do not comply with his engagements, in which case the contract is *not dissolved* of right. It leaves to the party complaining a right to sue for its dissolution with damages, or exact specific performance, according to circumstances.

Indeed, the law wisely so provides, for the obvious reason that, although the obligor may apparently be in default, still he may not be so in reality, and for some good reason, such as *vis major*, obstruction by the obligee, actual or constructive extension of time, etc. This is the reason for which, according to circumstances, the court may allow some further delay for compliance with the obligation. Delsol, vol. 3, p. 483, No. 821.

When the resolatory condition is an *event*, not dependent on the will of either party, the contract is *dissolved of right*; but when that event is dependent on such will, the contract is not absolutely dissolved of right, and its dissolution must be judicially sought. R. C. C. 2047.

Under the spirit and letter of the law, the resolatory condition may therefore consist in an event which does not depend, in any manner on the act of the parties, or it may have for object a fact dependent on the will of one them.

In the first case, it operates its effect of right, while in the second, the party complaining may exercise the right which results from the condition, only by having it judicially ordered as a penal clause.

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The article relied on by plaintiff refers to an *event* not dependent on the parties; the others allude to acts dependent on the will of either party. With this distinction the case is clear.

Had the plaintiff sued the defendant at the expiration of the eighteen months within which the railroad was to have been built, a different case would have been presented.

The building of that road within that time was a resolatory condition which, by non-compliance, would have had the effect of dissolving the contract, as the event was dependent on the will of the defendant; but the dissolution could not take place and be enforced, unless judicially demanded and declared.

There can be no doubt that the defendants, having failed, without excuse, to build the road within the time limited, the grantor had the right to avail himself of dereliction, and could have had the grant annulled, even in the absence of the express stipulation in the contract, which, as it reads, does not, however, magnify or secure better that right. The law implies such right even when not expressed, on the ground of equity.

By not insisting at the proper time on that right and by permitting the grantees to perform their obligation after the delay had expired, the grantor has lost the right to be heard to demand the dissolution.

Such a contract under that state of things, was not, as a matter of course, dissolved of right by the non-observance by the obligors of the obligation assumed by them. As long as they were not sued for the dissolution, the latter had a right to go on in the performance of their obligation.

The articles of our Code are literal extracts from the French Code. It is in the sense which we have expressed that the provisions in the latter have been understood and expounded. R. C. C. 1912, 2047, 2563; C. N. 1183, 1184.

We have examined the French authorities relied on by the plaintiff, but they do not apply, as they refer to the case of an *uncertain event*, not dependent on the will of either of the parties.

The record shows that it is not until some fifteen months after the road was in running order (September, 1884) that the present suit was brought (January, 1886).

Under such circumstances, it is manifest that the plaintiff has no right of action; the less so, as the value of the land taken and the damages said to have been sustained must have been considered by the plaintiff and covered by the benefits to be derived, when the parties entered into the contract of August 12, 1882.

 Heirs of Leonard vs. Baton Rouge.

The refusal of the district judge to give to the jury certain charges asked by the company, is an explanation of the verdict which was rendered in the case and which is unwarranted by the evidence and the law.

It is therefore ordered and decreed, that the verdict of the jury be set aside and that the judgment upon it be reversed; and

It is further ordered and adjudged that plaintiff's demand be rejected with judgment in favor of the defendant company, with costs in both courts.

 No. 9661.

HEIRS OF LEONARD VS. CITY OF BATON ROUGE.

In order that recovery be had under R. S. sec 318, the following conditions must concur, viz:

First. The evidence must show that the plaintiff is a riparian proprietor of the property in dispute.

Second. That there has formed an accretion or batture, in front of same, more than is necessary for public use.

Third. That defendant withholds this accretion or batture.

Batture is an elevation of the bed of a river under the surface of the water; but it is sometimes used to signify the same elevation when it has risen above the surface.

The term batture is applied, principally, to certain portions of the bed of the Mississippi river which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells.

The banks of a river are not sold; they pass as an accessory of the contiguous land when sold, and the property of the bank belongs to the adjacent proprietor.

When the sovereign grants land contiguous to the river without mentioning the bank, it passes as an accessory, and it must do so by the deeds of private citizens.

Under the laws of France and Spain, batture did not belong to the cities and towns as riparian owners, in the sense of actual and indefeasible ownership, but solely for the purposes of administration.

The possession of the *locus in quo* by a city simply for administration, and not inconsistent with the ownership in the riparian proprietor, and destined in its nature to terminate upon the happening of a certain contingency, cannot be pleaded against the latter as a basis for prescription.

Land, after being set apart for public use, and enjoyed as such, and private and individual rights acquired with reference thereto, the law considers it in the nature of an *estoppel in pais*, which precludes the original owner from denying the dedication.

A city or town is not authorized to construct permanent edifices upon the batture, to the detriment of the riparian proprietor, or to the injury or inconvenience of the public, but it may construct those which may be of public utility and advantage.

The use of the property as a landing and wharf for the reception of coal-boats and coal, is a public use, the public character of which is not destroyed by the fact that it is temporarily farmed out to particular parties.

The original proprietors are not entitled to recover the revenues paid by such parties as a consideration for the privileges, because such revenues result from the exercise of the public easement itself, and not from use independent thereof.

39	275
45	1411
39	275
47	104
39	275
49	537
49	544
39	275
104	401
104	403
39	275
e112	23
39	275
115	891

Heirs of Leonard vs. Baton Rouge.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

C. D. Favrot, K. A. Cross and James Wilkinson for Plaintiffs and Appellants:

There is a perfect and an imperfect dedication of property to public use under both the civil and common law. The former is a donation and passes the fee; the latter is a qualified dedication, and under the common law is termed an "easement," under the civil law "a servitude of public use." 30 Ann. 64; Rev. C. C. art. 482; Dillon on Mun. Corp., 3d ed., par. 633.

Any other classing of this qualified dedication creates a distinction without a difference. The rules of the Civil Code concerning servitudes are all applicable to the present cause. *Torres vs. Falgoulst*, 37 Ann. 506.

An implied qualified dedication can never result under the civil law from long continued user, where such rights or servitudes require the act of man to use them. Rev. C. C. 765, 767.

The common law differs in this respect. The leading case of *Cincinnati vs. White*, 6 Peters 481, is shown herein to be in our favor.

No one is presumed to give away his property, and he who avers a divestiture of ownership must prove it clearly. *Torres vs. Falgoulst*, 37 Ann. 506.

Where a servitude of passage has been dedicated on a map or plan for the use of the public—and the boundary of that street has not been defined, the measure of the use by and the needs of the public will regulate the extent of the dedication—and defendant, by virtue of such dedication, cannot claim property which is in blank on the plan, neither used or necessary for a street, and seek to use the same as a right of common, right of way for a railroad, and lease out the exclusive use of the balance to private parties. R. C. C. 722, 780, 733.

Where property is claimed to have been ceded or transferred by individuals in this State, the principles of the civil law and articles of the Civil Code govern the case. *Torres vs. Falgoulst*, 37 Ann. 498.

Defendant's pleas are grossly inconsistent.

No dedication of this property either absolute or qualified has been shown.

No public use thereof has been shown.

Defendant has failed to put forward the defense that Article 455 of the Revised Civil Code gave the public a legal servitude on this property.

This defense would have been a judicial admission of ownership in favor of plaintiffs, and would have entitled us on the face of the pleadings to the rents and revenues collected by the city from private parties. Rev. C. C. 455; 31 Ann. 65; Rev. C. C. 722.

Plaintiffs, as owners of this land, have the exclusive right under the circumstances to receive any rents or profits which same may have produced. *Deniston vs. Walton*, 8 Robinson; *Chase vs. Turner*, 10 La. 20; *Nicholls vs. Byrne*, 11 La. 173; *Dillon on Mun. Corporations*, par. 633; *Carrollton R. R. Co. vs. Winthrop*, 5 Ann. 36; *Heirs of Duverge vs. Salter & Marcy*, 6 Ann. 450; *Lyons vs. Hinckley*, 12 Ann. 655.

Favrot & Lamon and T. Jones Cross for Defendants and Appellees:

1. At the time of the cession of Louisiana by Spain to France, and by France to the United States, and at the time when the United States took possession of the Florida parishes, all that portion of the land covered by the highest rise of the water to its lowest ebb, in front of Baton Rouge, belonged to the town. 9th Law, Tit. 20, of Partidas 3; 23d Law, Tit. 32, of Partidas 3; Recopilation Law 1, Book 4, Tit. 13; Law Toro, 1st Tit. 7th, Book

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- 5, Recopilation Law 1, Tit. 7, Book 5; Novissima Recopilation, Book 7, Tit. 16, Law 1; N. O. vs. U. S., 10 P. 724 to 736; 3 M. 309, 303; 7 N. S. 90, *et seq.*, 634; 5 L. 166, 167, *et seq.*
2. The Supreme Court of this State must conform its decisions to those of the Supreme Court of the United States, on questions involving the alienation of the public domain and the interpretation of treaties and Acts of Congress. 3 Ann. 56; 4 Ann. 491.
3. To succeed under Section 318 of R. S. of 1870, plaintiffs must be: 1st. Riparian owners. 2d. Entitled to the right of accretion. 3d. A batture must be formed in front of their land, more than is necessary for public use. 4th. The city of Baton Rouge must withhold it from the owner of the riparian property; a portion of the batture should not be necessary for public use.
4. Plaintiffs, in order to claim the river front, must show as a condition precedent that when the property was divided into lots the alluvion was of sufficient height and magnitude to be susceptible of private ownership. 7 N. S. 625; 9 M. 656; 6 M. 19.
5. If the presumption is that the riparian owner does not in a sale convey the alluvion susceptible of private ownership (35 Ann. 210), the converse of the proposition should also be true, that when there is no batture outside susceptible of private ownership, the owner is presumed to sell everything to the water's edge.
- 6 The right of the city of Baton Rouge to the river front claimed by plaintiff cannot be divested by any act of the Legislature, except one in the exercise of the right of eminent domain and for valuable consideration. U. S. Constitution, art. 1. secs. 4 and 9.
7. The division of an empire works no forfeiture to pre-existing vested rights to property, and this maxim is equally consonant with the common sense of mankind and the maxims of eternal justice. *Tevret vs. Taylor*, 9 C. 43, 50; *Trustees of Dartmouth College vs. Woodward*, 4 W. 651, 707; *Society of the Gospel vs. New Haven*, 8 W. 480.
8. If plaintiffs ever had rights to the river front, they have divested themselves by dedication to public use and their acquiescence in its use as a *locus publicus*. In this no particular form is necessary. All that is required is the assent of the owner and the fact of its being used for the public purposes intended by the appropriation. *Cincinnati vs. Whites, lessees*, 6 P. 431; *Beatty et als. vs. Kurtz et al.*, 2 P. 566; *Town of Pawlet vs. Clerk et al.*, 9 C. 292; *Municipality vs. Cotton Press*, 18 L. 122; *Livaudais vs. Municipality*, 16 L. 509; *David vs. Municipality*, 14 Ann. 873; 3 Ann. 282; 18 Ann. 560; 22 Ann. 526.
9. After dedication is made and private and individual rights have been acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. 6 p. 438.
10. If by a plan property dedicated to public use extends to the river's edge, it is sufficient to show its destination to public use. N. O. vs. U. S., 10 P. 714.
11. When maps establish dedication and by use for a long period of time, it is conclusive. 10 P. 718.
12. Presumption of dedication exists in civil law. 10 P. 721.
13. We commend to plaintiffs the first broad and general principle of law mentioned in the "*Corpus Junii Civitatis*," to wit: *honeste vivere*, "to act honestly," from which is derived the maxim, *polliciti servare*, "when we make a promise to keep it," and the necessary corollary, *turpe est fidem fallere*, "it is shameful to disappoint expectations one has authorized."
14. The city of Baton Rouge, the defendant, has undoubted right and authority to administer and dispose of its river front. The levee forms the bank of the river. 18 L. 175, last paragraph; C. C. 448, 446; R. C. C. 455, 457. *Ergo*. If the use of the streets in Baton Rouge is public and their police regulated by the corporation, the latter has a right to raise Front street by allowing the passage of a railroad thereon. If the embankment which is built is a levee, which protects lots No. 1 to 5 from overflow, the use of

Heirs of Leonard vs. Baton Rouge.

the property in front of the levee remains public, and the city exercises rights over it consistent with law.

The opinion of the Court was delivered by

WATKINS, J. Plaintiffs, alleging themselves to be the heirs of Gilbert Leonard, deceased, instituted this suit for the recovery of a tract of land, purchased by their ancestor in 1810, of Celestine De St. Maxent, and which he caused to be laid off and divided in town lots; and averred that same constituted one of the environs of the city of Baton Rouge, and is designated upon the map of the city as Leonard town, and which extends along the Mississippi river, between the terminal points of North Boulevard and Convention streets, in that city.

They allege that Leonard town was laid off to Front street, but the control and administration of the property, on the river side of said Front street, has been *assumed* and *retained*, on the ground that it was necessary for public uses; and that, for many years, a large strip of batture, between the river landing and North Boulevard and Front streets, has not been required for any public use; but, on the contrary, the defendant has continuously, for a period of five years, rented said property to private parties, and has been deriving a revenue therefrom.

They claim \$6000 accrued revenues, and \$1000 per annum, accruing revenues. They join the lessees as defendants, and ask judgment against them *in solido*.

There is in the records an exhibit from the official map of the city, showing the extent of batture and location of the L., N. O. and T. R. R., west of square No. 1 of that part of the city of Baton Rouge, known as Leonard town, certified by the parish surveyor.

The track of this railroad traverses the vacant space between square No. 1 and the water's edge, denominated by the plaintiffs as batture, in a somewhat diagonal direction; so that, at the point of its intersection of North Boulevard street, it is one hundred and thirty-four feet from the latter and fifty feet from the former; while, at the point of its intersection with Convention street, it is only one hundred feet from the water's edge and eighty feet from the square.

The vacant space thus traversed by the railroad is on the map denominated Front street.

It is this property that plaintiffs claim to be exempt from public use.

This suit appears to have been brought under the provisions of the Revised Statutes of 1870, sec. 318, and which reads as follows, viz: "Whenever the riparian owner of any property in the incorporated

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towns or cities of this State is entitled to the right of accretion, and batture has been formed in front of his land more than is necessary for public use, which the corporation withholds from him, he shall have the right to institute suit against the corporation for so much of the batture as may not be necessary for public use; and, if it be determined by the court, that any portion of it be not necessary for public use, it shall decree that the owner is entitled to the property, and shall compel the corporation to permit him to enjoy the use and the ownership of such portion of it."

In order that plaintiffs be entitled to recover, in our opinion, the following conditions must concur:

1st. The evidence must disclose that they are the "riparian owners" of the property in dispute.

2d. That there has formed an accretion or batture in *front* of their land more than is necessary for public use.

3d. That the defendant city withholds this accretion, or batture, from them.

In answer defendant claims possession, since 1810, of all that portion of ground, above described as being traversed by the railroad track, and that the map, or plan referred to by plaintiffs, shows plainly that the land claimed by them was dedicated to public use by their ancestor, from whom they claim to derive title.

The city also urges that said dedication having been made prior to the 27th of October, 1810, when President Madison ordered Gov. Claiborne to take possession of Western Florida, wherein the town of Baton Rouge was then situated, the city is fully protected in the enjoyment of all the rights of use, and *property* therein, as same existed under the laws of Spain, to which government that territory belonged at the time, and that under said laws the river bank in front of Baton Rouge, and particularly that part of it in front of Leonard town, belonged to the defendant.

The city contends that her right to said vacant space was recognized by France in the treaty of Ildefonso, in 1800, whereby Spain conveyed the province of Louisiana to that republic; and again in the treaty between France and the United States, in 1803, whereby same was ceded to the latter; and that judgment in plaintiffs' favor would be in violation thereof.

Defendant expressly denies that there is any *increase* in alluvion, in front of that portion of the town divided into lots by Gilbert Leonard, since said division was made; and avers that the works erected by the

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Mississippi Valley Railway Company *prevent the inundation of Front street, and the lots fronting thereon, and theretofore occurring.*

The city admits that, in the exercise of her corporate powers, and to provide a revenue, lessen the burden of taxation, and to increase her facilities of trade in the article of fuel, which is one of prime necessity, she permitted a landing for coal in front of said Leonard town, where boats and barges are moored, and that for this privilege she has charged an annual rent.

She pleads in bar of plaintiffs' right of action, the prescription of ten, twenty and thirty years, and prays judgment sustaining same, and decreeing the city entitled to the *ownership*, use and possession of the property in controversy.

The word "batture" has a precise legal signification: *Vide* Bouvier's Law Dictionary, *verbo*, *batture*: "An elevation of the bed of a river, under the surface of the water; but is sometimes used to signify the same elevation when it has risen above the surface. The term "battures" is applied principally to certain portions of the bed of the Mississippi river, which are left dry when the water is low, and are covered again, either in whole, or in part, by the annual swells." 33 Ann. 548, Hollingsworth vs. Chaffe.

Abbott's Law Dictionary is the same.

In 6 O. S. 216, Morgan vs. Livingstone, the rights of riparian owners to batture formations on their river front, was thoroughly examined by Judge Martin, and from which the foregoing definitions were extracted.

The bank of a river is that space the water covers when the river is highest in any season of the year. The banks are not sold; they pass rather as an accessory of the contiguous land when sold, and the property of the banks belongs to those whose fields are contiguous. They must be the property of the riparian owners, without being included, or mentioned in their grants; for if they were only when included, there would be no use for the provision of the law.

"If," says the learned judge, "therefore, when the sovereign grants land contiguous to the river, without mentioning the bank, it passes, it must do so as an accessory. If the bank passes as an accessory in the grant of the sovereign, it must also in the deeds of private persons."

But defendant contends that the city of Baton Rouge occupies an exceptional position, and her counsel cite in their brief several paragraphs from the Partidas, to show that under the laws of Spain, prevailing at the date of the treaty of Ildefonso, when the province of

Louisiana was ceded to France, "the alluvion of said deposits on the banks of rivers" belonged to the commons of cities and towns that were incorporated.

In the opinion above quoted, (p. 236), the court said on this question: "Under the Spanish government no town or city seems to have been erected by legal authority; that of New Orleans was the *only* one that existed.

"It is true that in it the owners of the lots nearest the river have no part of the bank as accessory thereto. These lots are not charged with any of the burdens attending rural riparian estates; the levee, roads and streets were made and kept in repair at the joint expense of every lot in the city. The farthest from the water contributing as much thereto as the nearest. No riparian duties are imposed on a lot in New Orleans, either by the law, or any clause in its grant.

"Not so with regard to rural estates; the law and a clause in the original grant burden those contiguous to the river with the confection and repair of roads, ditches, bridges and levees."

In 18 La. 123, Municipality No. 2 vs. Orleans Cotton Press, this question was exhaustively considered in a very elaborate opinion. The Court said: "Cities may acquire *jure alluvionis*, but it must be as owner of the front, or as riparian proprietor; for the alluvion is but an accessory to the principal estate or land."

Again: "The mere act of incorporation of the city in 1805, changing the name of this property from *rural* to *urban*, neither made the city a front proprietor, so as to acquire *jure alluvionis*, or deprive the front lots of the right to such accretion."

Again: "The public, through the agency of the corporation, has the sole use of the levee and the bank of the river."

In 10 Ann. 55, Kennedy vs. Municipality, the Court said: "The next point made by defendants, namely, that the batture is *locus publicus*, and belongs to the city by destination, is a renewal of the pretensions set forth by the city in the case just quoted, of Municipality No. 2 vs. Orleans Cotton Press, and which were overruled after the fullest argument, and the most mature consideration." 18 La. 237.

This question was thoroughly considered in 10 Peters, 709, New Orleans vs. United States; 6 Peters, 431, the city of Cincinnati vs. the Lessee of White; and in 6 Peters, 490, Barclay vs. Howells, Lessee.

In the opinion in the first case the history of Louisiana is traced from the 26th of September, 1712, when the King of France granted a charter of right to Crozat, and whereby the laws, edicts and ordinances of the realm, and the custom of Paris, were extended thereto; and the

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lands, coasts, harbors and islands were granted to him. In that case the principles above quoted were recognized and applied.

We conclude that the claim of *ownership* set up by defendant is not well founded.

II.

This brings us to the consideration of the pleas of prescription urged in behalf of the city.

In 10 Ann. 54, *Kennedy vs. Municipality*, the Court said: "As to the claim by prescription, it results very clearly from the authorities above invoked that the possession of the *locus in quo* by the city, was a possession simply for the purpose of administration, not at all inconsistent with the right of ownership in the riparian proprietor, and destined, in its nature, to terminate upon the happening of a certain contingency. Such a possession cannot be pleaded against the riparian proprietor, as the basis of an adverse title in the city. *This suit is very different from a petitory action.*" 11 Ann. 148, *Remy vs. Municipality*; 11 Ann. 738, *Gaiennie vs. Municipality*.

The plea must be overruled.

III.

This brings us to the consideration of the question of dedication to public use of the property in question.

From the map to be found in the record it appears that the space between the lots Nos. 1, 2, 3, 4, 5, in square No. 1, in that part of the city of Baton Rouge designated thereon as Leonard town, and the river is about one hundred and eighty feet in depth. That, in this space, is laid out and in use a street called Front street, of the mien width of fifty-three and one-third feet, and between it and the river the track of the Mississippi Valley Railroad is constructed. The front of Leonard town, from Convention to North Boulevard street, is 320 feet, and the batture is used by Wood, Widney & Co., as a coal-yard and coal-chute. The railroad track is on batture. The chute rests on trestles, and is used to load coal on the cars. The locomotive and machinery to raise the coal is on a barge in the river.

The judge, in his opinion, says: "The witnesses agree that if the embankment or breakwater, made by the railroad company, was removed, the whole front of Leonard town square would be under during high water in the river. The whole of the front of the square has been filled up by the railroad company."

In 6 Peters, 502, the Court said of the city of Pittsburg: "From the plan of the town it does not appear that any artificial boundary, as the southern limit of Water street, was laid down. The name of

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the street is given, and its northern boundary, but the space to the south of it is left open to the river. All of the streets leading to the south terminate at Water street, and no indication is given on the plat * * that it did not extend to the river. * * * And it appearing that the commerce of the town required the extension of the street to the river, and there being no statement, or line marked on the plat of the town opposed to it; and, as the public, for thirty years or more, in some parts of the town, had used this street; and that property had been bought and sold in reference to it, in this form; it was held to be sufficient dedication to public use."

In the record we find an ordinance of the city of Baton Rouge, of date May 22, 1847, in which it is declared "that from and after the 1st day of September next the steamboat landing will be extended to the lower line of Convention street."

We also find another ordinance of date April 25, 1860, which declares "that the space comprised between the lower line of Convention street and the lower line of North Boulevard street, shall be exclusively reserved for *all landings not otherwise provided for.*"

After being set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an *estoppel in pais* which precludes the original owner from denying such dedication. 2 Dillon on Corporations, p. 598.

While a mere survey of land by the owner into lots defining streets, squares, etc., will not, without a sale, amount to a dedication, yet a sale of lots with reference to such plat, when bounded by streets, will amount to an immediate and irrevocable dedication of the latter, binding on both the vendor and vendee. 2 Dillon Corp., sec. 503.

In 10 Ann. 81, Saulet vs. New Orleans, the Court said: "To support a dedication to public use, it must appear that the property has been so used with the assent of the owner, or else it must appear unequivocally by some plan or writing, that the owner had made a dedication, to violate which would involve a breach of good faith."

In 24 Ann. 194, Arrowsmith vs. New Orleans, the Court said: "It is manifest from the evidence in the record that plaintiff sold the greater part of the lots in 1835, and his acts of sale refer to the plan, and have been located according to the conditions imposed by the City Council. He has acquiesced in this respect for thirty years with full knowledge of the facts and by adopting the changed location; by the act of selling lots in accordance with it, we think the purpose to dedicate to public use may be fairly inferred."

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In 6 Peters, 431, *Cincinnati vs. White*, the following principles were settled :

1. That it is not essential to a dedication that the legal title should pass.
2. Nor that there should be any grantee of the use to take the fee.
3. Nor that a deed or writing is necessary to a valid dedication.

Upon the foregoing compilation of authority, as applied to the evidence, we have no hesitancy in saying that the dedication of the space in controversy is fully made out.

It is unnecessary for the purposes of this enquiry for us to adjudge plaintiffs' title, because the public has the use irrespective of the question as to where the fee resides. 2 Dillon Corp., p. 524.

IV.

The question left for decision is whether—conceding for the argument that plaintiffs are “riparian proprietors”—has the defendant city in her possession and under her administration more of the accretion or batture than is necessary for public use.

We are of the opinion that the plaintiffs have not, in this respect, made out a case. The weight of testimony is to the effect “that there is no more batture in front of the square included between Convention street and North Boulevard now than there was many years ago.” The level of the bank was raised by the railway company. Its present improved condition is not referable to accretion.

The plaintiffs complain that the city has for several years leased this front for purposes of a coal yard, and have made of it a coaling station; and that this is not “a public use.” Their counsel cites in support of that view 5 Ann. 36; 6 Ann. 450; 12 Ann. 657; but we do not regard this case as falling within the provisions of either.

The defendant has not built, nor permitted to be constructed, upon the space in controversy, any *permanent* structure. The city claims that she only permitted and allowed certain constructions and embankments to be made from the bed or sloping bank of the river, between high and low water, in the interest of the commercial prosperity of the city, and to meet the *actual wants* of the people. It appears that if those artificial embankments had not been made, this property would not have been susceptible of occupancy. It also appears that wharfage dues are now, and have been, collected from steamboats and other crafts that land in front of this space.

This right was well recognized under the laws of France and Spain. 10 Peters, 727, *New Orleans vs. United States*.

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In her answer, the city claims, "that in the exercise of her corporate powers, and to provide a revenue for the city, lessen the burden of taxation, and increase the facilities of trade in the article of fuel—which is of prime necessity—she has permitted a landing for coal in front of Leonardtown square, where boats and barges are moored."

Such rights and privileges as the city claims were well recognized by the civilians, as well as by common law writers, and their allowance is specially sanctioned by our Code. R. C. C. 863.

The judgment of the lower court is therefore affirmed.

ON REHEARING.

FENNER, J. We granted the rehearing in this case, not because we had discovered any error in our former decision, but because the cast appellant complained that the author of the first opinion had not been a member of the Court at the time when the cause was submitted, and had not heard the oral arguments.

We have, however, attentively considered the arguments and authorities which have been advanced on the new hearing.

We remain fully convinced that the evidence in the case establishes a valid dedication to public use of the *locus* in controversy under the principles established by the following authorities: Carrollton vs. Muny, 19 La. 71; Carrollton vs. Jonas, 7 Ann. 233; Soulet vs. New Orleans, 10 Ann. 81; Arrowsmith vs. New Orleans, 24 Ann. 194; Cincinnati vs. White, 6 Peters, 431; New Orleans vs. U. S., 10 Peters, 662; 2 Dillon Mun. Corp., §§ 499, 500.

2d. Plaintiffs have failed to bring their case within the purview of sec. 318, R. S., because it is not shown that "batture has been formed in front of the land more than is necessary for public use."

The context shows that the statute refers to *batture* formed by *accretion*. In this case, it fully appears that the land in controversy has been reclaimed by artificial works erected under the authority of the city; and it is, moreover, necessary for public purposes, and is used for purposes of a public character, though through the medium of private parties, who act under the city's authority only temporarily granted.

The uses are as a landing, wharf and storing-place for coal for the purpose of facilitating the reception and distribution of fuel to the inhabitants at reasonable prices which are regulated, to a certain extent, in the ordinance.

The public character of such uses is not destroyed by the fact that they are temporarily farmed out to particular individuals. Cities ex-

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ercise, without question, the right of designating particular portions of their wharves and landings for the use of certain lines of vessels, or for the reception of certain kinds of commodities, and the power here exercised is of that general character. If the parties benefited are willing to pay for such privileges, plaintiffs have no cause to complain.

3d. The right claimed by plaintiffs to recover these revenues, has no support in the authority quoted from Dillon, who merely says: "the proprietor * * retains his exclusive right in the soil for every purpose of use or profit, *not inconsistent with the public easement.*"

This has no application to a case like the present, where the use and profit result from a direct exercise of the public easement itself by the public authority in which it is vested.

It is, therefore, ordered that our former decree remain undisturbed.

No. 9905.

A. J. FORSTALL vs. E. L. LARCHE.—R. N. LEA, INTERVENOR.

The amount in dispute is the highest sum for which the appellate court can render judgment under the allegations and prayer of the petition.

A party who makes a transfer in writing of live stock, and who does not prove that the contract, apparently a sale, was designed to be one of suretyship, and that he received no consideration, cannot recover the stock in question.

An intervenor who claims ownership of such stock, as having been given in payment to him of a judgment against the defendant, cannot recover where it appears that the debt for which the judgment had been obtained had no existence, having been previously extinguished by payment, and where the surrounding circumstances tend to show that the proceeding is the result of a combination between the defendant and the intervenor (plaintiff in the suit) to frustrate plaintiff from his rights.

A PPEAL from the Eighth District Court, Parish of East Carroll.
Deloney, J.

J. M. Kennedy for Plaintiff and Appellee.

F. F. Montgomery for Intervenor and Appellant.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The appellee moves to dismiss this appeal on the ground of want of jurisdiction in this Court over the case.

The suit is for the recovery of live stock, valued at \$1750, and for the use of them, at \$35 for each, *per annum*, from the institution of the suit to the day of delivery.

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There was judgment for the plaintiff, recognizing him as the owner of the stock, and in default of delivery for one hundred dollars for each head.

The judgment further allowed plaintiff thirty dollars *per annum* for the use of each mule and horse from the time of sequestration to final delivery—that is, for \$280 at least.

The amount allowed by the judgment, added to the value of the stock (\$1750), formed a total, at the rendition of the judgment, of \$2030. It could have allowed *more*.

Were this judgment affirmed on appeal, the plaintiff would be entitled to recover at least \$2270.

The judgment appealed from was certainly warranted by the petition, which claimed the ownership of the live stock, or their value, *and besides*, the use of the same until delivery.

We consider that the amount in dispute is the highest sum for which judgment can be rendered, under the allegations and prayer of the petition. *Crescent City Co. vs. Larrieux*, 30 Ann. 798; *Gay vs. Railway Co.*, 31 Ann. 274.

The motion to dismiss is denied.

ON THE MERITS.

The object of this suit has already been stated.

The defendant denied having ever sold the mules, etc., to the plaintiff, and says that, though the act of transfer to plaintiff appears to be a sale, it was in reality intended only to serve as security, and that he received no consideration.

An intervention was filed, claiming the ownership of the stock sequestered, and in default a privilege on the same, to secure payment of an amount alleged to be due the intervenor, as holder of rent notes, for which he had already obtained judgment.

From a judgment in favor of plaintiff and rejecting the intervention, both the defendant and the intervenor have appealed.

The plaintiff has proved, by written evidence, the sale and transfer to him, for \$1750, acknowledged to have been received and by parol, the delivery to him, through an agent, of the mules and horses in question, by the defendant; but the latter has failed to establish that the contract was not a sale but a suretyship, and that he received no consideration; a defense which is the less founded, as it is self-destructive.

The evidence establishes, with as much precision as can be expected in similar cases, that the judgment on which the intervenor relies, as

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obtained against the defendant, on rent notes acquired from the landlady, and in satisfaction or payment of which the stock in question is said to have been given, was obtained by default, the defendant making no resistance, or the shadow of a claim, which had ceased to have any existence against the defendant.

In this regard, it appears that the intervenor, in furtherance of some understanding with the defendant, acquired from the landlord the two notes in question, settling for the same in a draft on his correspondents, but that previous to this acquisition of the notes and issue of the draft, the intervenor had obtained cotton from the defendant for a value far exceeding the amount of the notes, and that said cotton had been turned over to him for the purpose of injuring the plaintiff some way or other.

The intervenor claims that the mules and horses were given to him by the defendant in payment, and that the judgment in his favor was credited with their value.

The record does not show that credit, but shows that the intervenor, plaintiff in the case, afterwards issued execution against the defendant for the whole amount, just as though the pretended giving in payment had not taken place.

We remain irresistibly impressed that the rent notes were acquired by the intervenor from the landlady with money realized by the sale of cotton transferred to him by the defendant for some evil purpose, and that the judgment on which he relies has no foundation.

We believe further, that the intervenor, who appears to have been on terms of intimacy with the defendant, was well acquainted with his business, his operations and even his designs, and was well cognizant of the fact of the transfer of the stock by defendant to the plaintiff.

We have examined the bills of exception taken by the defendant and the intervenor to various rulings of the lower court, but find that, under the circumstances, the district judge did not err in deciding as he did. In themselves, they are of no force.

We deem it unnecessary to enter into an explanation of the business relations between plaintiff and defendant, which were those of factor and planter, and remain satisfied on the questions of fact between the parties litigant, that the district court has done them justice.

Judgment affirmed.

 Succession of Triche.

No. 9879.

 SUCCESSION OF DRAUZIN TRICHE, ON OPPOSITION TO FINAL ACCOUNT
OF ADMINISTRATOR.

When in a contested provisional account, the amount and rank of various charges and privileged claims have been settled by final decrees of court, the same claims cannot be again contested when presented in a final account of distribution.

The administrator of an insolvent succession, left in possession of a fractional part of a sugar plantation with a growing crop on it, which has been sold to a person who fails to comply with his bid, and against whom he has taken proceedings for a sale *a la folle enchere*, is sustained, under the particular circumstances of this case, in making an arrangement with the purchaser of the rest of the plantation, including the stock, implements and sugar-house, by which the latter takes charge for his own account of the crop and property under the obligations to pay the taxes, keep the land, fences, ditches and improvements in order and repair, and to so plant and cultivate the land as to keep it, at all times, as nearly as possible in the condition in which it was at date of sale, and in readiness to respond to a decree for a sale *a la folle enchere*.

Under the circumstances of the case, the administrator will not be held liable for the crop or for the rents and revenues.

A PPEAL from the Twentieth District Court, Parish of Lafourche.
Beattie, J.

Clay Knobloch, for the Administrator, Appellee:

T. D. Moore and *T. A. Badeaux*, *John Ray* and *J. S. Billiu*, for Opponents and Appellants.

The opinion of the Court was delivered by

FENNER, J. Several of the matters involved in the present oppositions were presented to and determined by us, under oppositions to the provisional account of the administrator, in cause No. 8458 of our docket, reported by syllabus only, in 34 Ann. 1148. We find that the items of the present account, Nos. 1, 2, 3, 4, 5 and 6, which are now opposed, were finally settled by the decrees in that case, by which the opponents here are bound, and, as to them, the plea of *res adjudicata* was properly sustained.

II.

Mrs. Medus' opposition to the distribution of the gross proceeds of nine-tenths of Laurel Grove Plantation, as between herself and Mrs. Trosclair, has received our careful attention, but we are unable to perceive the slightest merit in it. She is simply a concurrent mortgagee with Mrs. Trosclair, and the administrator has distributed the fund to them in the exact proportion of their respective claims.

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III.

Lapène & Ferré's opposition to the eighth item of the account seems to be utterly inconsequential, even if not concluded by the plea of *res judicata*. In the provisional account the amount of Lapène's bid for the part of Orange Grove Plantation was fixed at \$10,731, and, in our decree thereon, he was ordered to pay into the administrator's hands the sum of \$8060 as having a preference on the proceeds over the mortgage notes held by him. The administrator, accepting these amounts as fixed by that decree, now reports the difference of \$2671 as the amount retained by Lapène. Lapène & Ferré, who now claim ownership of the mortgage note, then held by Lapène, claim that this is error; that the amount of Lapène's bid was not \$10,731, but only \$10,230, and, therefore, that the amount retained on account of said bid was not \$2671, but only \$2170.

Lapène (by whose acts, in the matter of these notes, we hold his firm of Lapène & Ferré fully bound), was an opponent to the provisional account, and should have had this error of figures then corrected. But, were it otherwise, inasmuch as under this final account of an insolvent succession, Lapène & Ferré, receive nothing under either hypothesis, we see no harm to them from the error, and no benefit they would derive from its correction.

IV.

The remaining and most serious grounds of opposition are the claims that the administrator should be charged in this account with the net proceeds of the crop of 1875, on the part of Orange Grove sold to Lapène, and with the rents and revenues of said portion, from 1875 to March, 1883, when Lapène was finally sent into possession.

The facts are as follows:

The succession was insolvent. A sale for cash to pay creditors was provoked, which took place on September 4th, 1875. Orange Grove was a sugar plantation, with a growing crop upon it. In compliance with Art. 132 of the Constitution of 1868, it was divided into lots for purposes of sale. Lapène became the adjudicatee of several lots, but T. J. Badeaux became the purchaser of the larger portion of the plantation, together with the sugar-house, all the mules, carts, wagons, farming implements, etc. Badeaux complied with his bid and was sent into possession. Lapène declined to comply with his bid, claiming that he was entitled to retain the whole amount thereof, on account of the mortgage notes of Lapène & Ferré held by him.

Thereupon, the administrator took a rule on Lapène to show cause

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why the lots should not be resold *à la folle enchère*, and Lapène took a contrary rule upon the administrator to show cause why the adjudication to him should not be completed, and why he should not be placed in possession.

The situation was a singular one. By Lapène's action the administrator found himself left in possession of fractional and disconnected lots of a sugar plantation, on which there was a growing crop, while the remainder of the plantation, including the sugar-house and all the stock and farming implements, had been sold and delivered to Badeaux.

The pending proceeding for a resale *à la folle enchère*, rendered the possession of the administrator exceedingly precarious, and also imposed upon him the duty of keeping the property as nearly as possible in the condition in which it was at the date of the first sale.

There was no apparent means of taking off the share of the growing crops except by use of the stock, wagons, implements, etc., and the sugar house of Badeaux; and the latter refused to make a contract for taking off and manufacturing the crop for account of the administrator, for various cogent reasons assigned by him, amongst which were the following: that the lines between the various lots had never been actually run and could not then be run without injury to the crop; that the expense of grinding Lapène's cane separately from his own would be too large; that, as he had but one cistern, the molasses could not be separated; that, in case of a freeze, he would wish to grind his own cane first and might thereby lose the other and incur liability, and the like.

In the meantime, the administrator was confronted with the problem of what he was to do with the property thereafter.

The evidence satisfies us that the land could not have been rented under such circumstances, by reason of the necessary precariousness of the possession and for want of a sugar house for taking off the crop. All the testimony as to the rental value of the land is based on the hypothesis that there was a sugar house upon it; and no witness testifies that the land alone, without stock, implements or sugar house, could have been rented, even leaving out of view the impossibility of fixing any term for a lease.

The administrator, therefore, concluded, under the circumstances, that the best thing to do was to turn the property over to Badeaux, to take charge of it, take off the crop and continue the cultivation, under the obligations of paying the taxes, keeping up and repairing the ditches, fences and improvements, and so planting and cultivating the land as to keep the property, at all times, as nearly as possible in the situation in which it was at the date of the sale.

Fusz & Backer vs. Trager & Noble.

He made an agreement to this effect with Badeaux, who has faithfully carried it out; and though the litigation was prolonged beyond all reasonable expectation, this does not appear to be attributable to the fault of the administrator, and we think the arrangement made by him was prudent and reasonable, and that the responsibility now sought to be cast upon him is not sustained in law or equity. Succession of Clairteaux, 35 Ann. 1178.

Judgment affirmed.

No. 9920.

FUSZ & BACKER VS. TRAGER & NOBLE.

A surety on a release bond in an attachment proceeding against a resident, is concluded by the judgment against the defendant, if regularly rendered.

Such surety, on a rule to hold him liable for such judgment after return of an unsatisfied execution, has no right to set up defenses which do not avail the judgment itself.

A ruling refusing a continuance to procure an absent witness to establish other defenses and striking out of the answer to the rule impertinent issues, is correct and will not be disturbed.

A PPEAL from the Ninth District Court, Parish of Concordia.
Young, J.

Elam & Luce and Steele & Garrett for Plaintiffs and Appellees.

J. L. Dagg and L. F. Mason for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The question presented in this case, involves the right of a surety on a release bond in attachment proceeding against residents to set up certain defenses.

It appears that after judgment recognizing the claim of plaintiffs and its being secured by a privilege on the property attached, the judgment becoming executory, execution was issued, but was returned *nulla bona*.

Thereupon a rule was taken on the surety on the release bond furnished by the defendants, who pleaded: that the *affidavit* was insufficient and false; that the bond was insufficient in amount; that the property seized was not the property of the defendants, but of one of them; that the bond was signed on the representation and assurance that a legal defense would be made, which was not set up and that the plaintiffs were parties to the fraud practiced.

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When the case was called, the defendant in rule moved for a continuance to procure the testimony of an absent witness, and after the plaintiffs had closed and the defendant was about to offer evidence, the plaintiffs moved to strike out of the answer to the rule all averments raising issues as to the right of attachment and the validity of same, which could only be made before judgment and cannot be urged by the surety.

The district judge refused the continuance and sustained the motion to strike out, rendering judgment against the surety, who appeals.

Counsel have argued, that the only questions presented for solution in this Court, involve only the correctness of these rulings, and that the judgment on the merits was correct; provided, the rulings complained of were so.

The rule on the surety is taken under the terms of article C. P. 259, § 3, relative to the bonding of property attached.

Under the first paragraph of that article the obligation of the surety is, that he will satisfy such judgment, to the value of the property attached, as may be rendered against the defendant in the suit pending.

The preponderance of the jurisprudence on the rights and obligations of sureties on release bonds in attachment proceedings against residents is to the effect that such sureties, when ruled to be held liable, cannot be heard to set up any defense which the defendant himself could not raise—and that where the judgment rendered on the merits condemns him, the surety is concluded by it, even if it were true, that it is not justified by the evidence; provided, it was regularly rendered, has become final and executory and remains unsatisfied and the signature of the surety to the bond is genuine.

If the attachment in this case could have been dissolved, for the reasons now advanced by the surety, they ought to have been urged by the defendants before or on the trial on the merits.

By joining him in the release bond the surety unites his destinies with him and places himself entirely in his hands and, as it were, at his mercy, as far at least as the plaintiff is concerned.

The last expression of the judicial mind on this subject is to be found in the case of McCloskey et al. vs. Wingfield et al., 32 Ann. 38, (43) in which the court (Spencer, J.,) distinctly held: that the judgment against the defendant in attachment concludes the surety whose obligation is to satisfy the judgment against the principal, the validity of which the surety cannot dispute.

The ruling of the present Court in Baker vs. Frellsen, 32 Ann. 829, can afford the appellant no comfort. It verifies what we have premised

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in this opinion, namely: that a surety is entitled to see the case tried according to law and that a judgment rendered at *chambers*, out of term and on the confession of the principal on the bond, defendant in the suit, though it would bind the principal, could not affect the surety.

We therefore conclude that, as the defenses set up by the defendant in rule, the surety, were unauthorized by law, the lower court properly refused the continuance and sustained the motion to strike out.

The plaintiffs answering, pray for damages.

We think the appeal is frivolous and that damages ought to be allowed.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed, and it is further ordered and adjudged that the plaintiffs recover from the defendant in rule, Isaac Friedler, the sum of fifty dollars, as damages for a frivolous appeal and costs in both courts.

No. 9900.

PFARR & KULLMAN ET AL. VS. STEPHEN BELMONT.

A nuncupative will under private signature need not be shown to have been *dictated* by the testator, when written out of the presence of the witnesses.

The affirmative answer of a testator to a question: Whether the paper contains his last will amounts to the presentation prescribed by law. The presentation need not be manual, or more formally made.

Witnesses who declare that they saw the testator sign the paper purporting to be his will, and that they themselves signed it; and who further declare that they recognize their signatures to the same instrument, virtually testify that they recognize the signature of the testator to it.

The law which provides for the drawing up of a *proces verbal* of probate of a will, is not mandatory, but merely directory. Apparent deficiency in its recitals cannot have the effect to vitiate the probate, but may be supplied by legal presumption or by additional proof in a suit contesting the will.

The appointment of a dative executor on the filing of a petition for the same and before any advertisement and expiration of the delay for opposition, is unwarranted. It can be made only *after* publication and in the absence of opposition.

An order of sale obtained by a dative executor thus appointed, is procured by one having no authority to ask it and must be rescinded.

A plaintiff must make his case legally certain. It is not sufficient to make it morally probable.

The Court does not pass on the capacity of plaintiffs to sue at the present stage for recovery of debts due the succession.

The contingent appointment of a dative executor, on the condition that public notices shall be given and that it be not opposed, is of no avail, where, after the advertisements have been published, though the application has not been opposed, the appointment is not confirmed by a subsequent formal decree conferring it on the petitioner.

39	294
49	240
39	294
115	103
115	104
115	106

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

G. W. Buckner, U. D. Favrot and K. A. Cross for Plaintiffs and Appellants.

T. B. Dupree and Read & Goodale for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiffs sue as legal heirs of Elizabeth Pfarr, Widow Bahr.

In that capacity they ask the nullity of what is claimed to be her last will, and, eventually, the nullity of the appointment of a dative executor.

They also urge the illegality of an order of sale to pay debts and an indebtedness of the defendant to the succession.

Concluding, they pray that he be ordered to render an account and held liable for his indebtedness and for amounts and effects not inventoried by him.

The defendant maintains the validity of the will and its probate; that of his appointment and of the order of sale, and denies any liability.

The court rejected the demand for the nullity of the will, of the probate proceedings, of the appointment of the succession representative, of the order of sale dissolving an injunction issued to arrest the sale, and non-suits the plaintiffs as to other claims.

From this judgment the plaintiffs appeal. The defendant answers, praying for damages for a frivolous appeal.

I.

The plaintiffs charge that the will, which is in the nuncupative form, under private signature, is null, because it was not *dictated* and *presented* by the testatrix as the law requires.

The evidence satisfies us that the document was written out of the presence of the witnesses, under the direction of the testatrix, by her counsel; that after the five witnesses required by law had assembled in her room, she handed the paper to one of them who inquired of her what it was, and that she answered that it was her last will; that this witness then read it to her in the presence of the other witnesses, and that, after the reading, being asked whether what had been read was her last will, she answered in the affirmative; that she then signed the will, and after her the five witnesses.

There is no evidence that the will was *dictated* by the testatrix.

None was necessary, as it was written out of the presence of the witnesses.

The ruling to which counsel for plaintiffs refer in *Bordelon vs. Baron*, 11 Ann. 678, to the contrary, requiring proof of the dictation by the testator, whether the will be made in the presence or in the absence of the witnesses, has been formally overruled in several instances. *Pendergast case*, 16 Ann. 219; *Succession of Marigny*, Ib. 267; *Wood vs. Roane*, 35 Ann. 865.

The same may be now said of the ruling in *Caleb vs. Douglas*, 16 Ann. 327, in so far as it may be considered as requiring dictation, when the will is written out of the presence of the witnesses, and as holding that the affirmative answer of a testator, to the question whether the document contains his will, does not constitute the presentation required by law.

In *Wood vs. Roane*, 35 Ann. 865, and *Bourke vs. Wilson*, 38 Ann. 328, this Court has distinctly ruled, not only that the presentation need not be manual, but that the acknowledgment of the testator that the paper contains his last will, implies the presentation provided by law, even when that acknowledgment is in response to a question.

The charge that the testatrix was mentally disabled is not established, while the reverse is shown by unquestionable testimony.

There was no justification to make the other charge that the will was obtained by undue influence.

II.

The plaintiffs further complain that the probate was *ex parte*; that the decree was made in chambers on the affidavit of witnesses; that the evidence is insufficient; that the will was not read by the judge to the witnesses; that the *proces verbal* of probate is irregular and void.

(a) The law does not require, absolutely, that the proceeding to probate a will be contradictorily carried on. The provision is merely directory. The fact is that generally the proceeding takes place *ex parte*.

The Code directs, it is true, that notice be given to the heirs present, but it does not say that, unless such notice be given, the probate shall not take place. The reason for this is quite plain. There may be urgency for the probate of the will that the executor be at once recognized and placed in possession of the estate for its protection. Besides, the heirs may not be easily reached by the process of the court.

In any event, where the proceeding is carried on *ex parte* and the will is ordered to be executed, by its very nature the decree concludes

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no one, and the will, if objectionable, can be attacked subsequently by any party interested and its nullity demanded and obtained for a proper cause.

In the present instance, it does not, however, appear that the heirs of the deceased were present and could have been notified. The law does not exact impossibilities.

(b) It is not essential that the testimony of witnesses called to prove a will be taken down separately. It is sufficient that the substance of their evidence, where it is concordant, be reduced to writing and be sworn to by them. This testimony is generally heard by the judge directly, but it sometimes happens that circumstances occur requiring that it be procured under commission as where the witnesses reside beyond the jurisdiction of the court, or are, for some other cause, unable to attend.

On the question of the sufficiency of the proof adduced, we are satisfied that the witnesses have established facts showing that the will was presented by the testatrix; that it was read by one of them to her; that it was signed by her and them; that they recognize and identify the testament, and that they recognize their signatures and that of the testatrix.

The objection cannot hold that it is not shown that the witnesses have recognized the signature of Mrs. Bahr to the document purporting to be her last will.

As well in the statement at foot of that instrument, as in the *affidavit* containing the declarations which they made shortly afterwards, on the occasion of the probate of the will, as in the testimony which they subsequently gave during the trial of this controversy, the witnesses have declared that they recognize their signatures to the document.

If they saw Mrs. Bahr sign the paper to which they have affixed their own signatures, and if they recognize their signatures to it, they evidently thereby identify the instrument as that signed by Mrs. Bahr and so recognize her signature thereto.

The charge is *not* that Mrs. Bahr did not sign, but that it is not *proved* that the witnesses recognized her signature.

Had we any doubt on this important fact, we would certainly leave a door open for new proof.

(c) In relation to the objection that it does not appear that the judge read the will to the witnesses, it suffices to say that the *proces verbal* recites that he read it in an audible voice.

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The presumption is that the judge did his duty and read the will to the witnesses and others, if any, present.

The law does not demand such reading to the witnesses as a condition *sine qua non*, for the fulfilment of that ceremony would be an impossibility in those cases, in which the testimony is procured under commission of witnesses residing beyond the jurisdiction of the court, or who are confined by infirmity to their quarters.

(d) The *proces verbal* gives the name and surnames of the witnesses who testified, two in full and two with double initials, preceding the surnames.

The same witnesses who signed the *affidavit* so termed were heard on the trial, and their identity with those who signed the will is not contested. The law was substantially complied with.

(e) It is true that the *proces verbal* might have better been drawn up, under the provisions of Art. R. C. C. 1649 and C. P. 942; but because it was inartistically prepared, it does not follow that the probate proceeding is a nullity, or that the will is affected by it.

III.

The next ground of complaint is, that the defendant was illegally appointed dative executor.

It appears that the district judge made the appointment on presentation of the petition for the same, contingent on public advertisement and of absence or dismissal of any opposition.

The law requires, as conditions precedent for the appointment of succession representatives, that due notices of the application be *first* given by advertisement in the public papers, and *next* that it be not opposed, and if opposed, that the opposition be dismissed.

In an early case which has since been followed, in which the court had appointed a dative executor, without compliance with those requirements, the then Supreme Court held the appointment to be null, saying that the notice of an application for the appointment of a dative executor must be given in all cases in the same manner as is prescribed for curators or administrators of estates. See case of Girod's Heirs, 18 L. 394; see also Succession of Henderson, 2 R. 391; Succession of Talbert, 16 Ann. 231; 5 N. S. 506; Succession of Gusman, 35 Ann. 405. Those rulings are based on the texts of the law. R. C. C. 1107, 1045, 1115; 1107 C. P. 967, 971.

In relation to the oath taken and the bond furnished by the defendant, it suffices to say that, as the order appointing him is set aside, whatever was done in furtherance of it falls with it.

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IV.

From the conclusion just reached, it follows that the petition presented for the sale to pay debts, emanating from one who had no official character to provoke the sale and the order on it, were unauthorized and must be rescinded.

V.

Conceding that the plaintiffs have a right to represent the succession without having been put in possession of its assets, and to claim payments of debts due to it, (on which we express, however, no opinion) they have not adduced sufficient proof to recover of defendant in this action.

We think the district judge properly non-suited them.

Appellees' prayer for damages is frivolous and cannot be allowed.

It is therefore adjudged and decreed that the judgment appealed from be affirmed, so far as it maintains the validity of the will of the deceased, and the sufficiency of the evidence to probate it, and *non-suits* the plaintiffs; but in other regards that it be and is reversed; and,

It is now ordered and adjudged that the order for the sale of the succession property be set aside, and the petition for same be dismissed, and that the injunction issued to prevent the sale be reinstated and perpetuated, the defendant and appellee to pay costs in both courts.

ON APPLICATION FOR REHEARING.

The application charges that the judgment rendered is erroneous in this: *that* there is evidence in the record that the petition for appointment was followed by advertisements and that it was not opposed, and *further*, that the petitioner's rights should at least be reserved.

It is true that the conditional or contingent order by which the defendant claims to have been appointed dative executor, was followed by notices in a newspaper, and that it does not appear that any opposition was made to the appointment solicited; but what is there to show that after the advertisements had been made and after the delay for opposing had elapsed without any opposition being filed, any order was rendered appointing the applicant dative executor?

The fact is that such second order which is essentially a condition precedent for the qualification of the petitioner was never rendered.

The absence of such formal order forbids the petitioner, defendant herein, from claiming to be the dative executor of the will of the

Heirs of Pike vs. Heirs of Charotte.

deceased. Succession of Picard, 33 Ann. 1137; Succession of Gusman, 35 Ann. 405-8.

It does not, however, follow that the petition for the appointment avails nothing to the applicant. That petition remains, though the order thereon, prematurely appointing the petitioner dative executor, has been annulled. It stands as a filed application, and the petitioner is entitled to further proceedings on it. The case must be viewed as one in which no appointment has as yet been made.

II.

We deem it unnecessary to answer specially the inquiry whether, had a sale taken place under the order of sale, it would not have been valid.

No sale has taken place, as the order of sale was arrested by injunction, as already said, the order falls for want of one qualified to formulate a demand for it.

Rehearing refused.

No. 9662.

HEIRS OF WILLIAM S. PIKE VS. HEIRS OF JOSEPH C. CHARLOTTE.

Against an action for the resolution of a sale, based exclusively on the failure of the vendee to pay the last five of a series of seven instalments of the purchase price, and when the first two have been extinguished by voluntary remission by the heirs of the vendor to the heirs of the vendee, prescription commences its course on the day of the debtor's default in payment of the last instalment that is covered by the suit.

Edwards vs. White, 34 Ann. 989, affirmed.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

F. L. Richardson for Plaintiffs and Appellants.

C. D. Favrot and *K. A. Cross* for Defendants and Appellees.

The opinion of the Court was delivered by

WATKINS, J. This suit is prosecuted by the widow and heirs of William S. Pike against the heirs of Joseph C. Charrotte and wife, for the resolution of a sale of one undivided half interest in the Myrtle Grove plantation, made by W. S. Pike to Joseph C. Charrotte, on the 28th of February, 1871, for the price of \$15,000, solely upon credit, payable in seven annual instalments, for which the purchaser executed his several notes and secured their payment by mortgage.

The act of sale and mortgage was duly registered in the book of conveyances and mortgages.

Suit was commenced January 11, 1884. Prior to that date plaintiffs remitted and surrendered to the tutor of the minor heirs of J. C. Charlotte and wife, the two notes first maturing on February 28, 1872 and 1873. The remainder of them were annexed to their petition, to evidence the non-payment of the purchase price, and therefor demand was made for the resolution of the sale.

The only defense is predicated upon a plea of ten years' prescription.

I.

During the pendency of the suit in the lower court, certain judicial mortgage creditors of J. C. Charlotte intervened and resisted the resolution of the sale as being to their prejudice. They aver that there has been no administration of the debtor's estate, and no judgment can be rendered against the minor heirs, who have no other representative than a tutor.

From an adverse judgment intervenors appealed to the Circuit Court, and it was affirmed.

The defendants bring their appeal here, and in argument counsel make like resistance.

It cannot be of avail to them. The decree of the Circuit Court forms *res adjudicata* as to the *only* creditors known other than plaintiffs; and defendants must rely upon their plea of prescription.

II.

There is no question of the capacity of the plaintiffs to maintain such an action, nor of the capacity of defendants to stand in judgment. All of the heirs of Pike are plaintiffs, and all of the heirs of Charlotte are defendants. 38 Ann. 583, Heirs of Castle vs. Floyd.

III.

The plea of prescription is urged upon the theory announced in the majority opinion of the Court in *George vs. Knox*, 23 Ann. 354.

But in the case of *Edwards vs. White*, 34 Ann. 990, this Court maintained as correct the views expressed in the dissenting opinion of Mr. Justice Wyly. In that case the Court say: "We must regard the present action as arising from and based exclusively on the breach of condition resulting from default in payment of the last instalment, and only prescribed by ten years from that date, which had not expired when this suit was brought."

Applying the doctrine therein announced to this case, and it necessarily results that plaintiff's action was not prescribed. The suit was

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filed and service made on the defendants within ten years after the maturity of the third note of the series, on the 28th of February, 1874.

The evidence fully establishes the remission and surrender of the two notes maturing on the 28th of February, 1872 and 1873.

IV.

Question is made in regard to the validity of the remission of the first two notes, because same was made to the tutor of the minors.

The Code recognizes *voluntary remission* as a mode of extinguishing an obligation. R. C. C. 2130.

The remission of a debt is *tacit* when the creditor voluntarily surrenders to his debtor the title which establishes the obligation. R. C. C. 2199.

"The release or remission of a debt is *presumed always* to have been accepted by the debtor, and *it cannot be revoked by the creditor.*" R. C. C. 2201.

In Halstead vs. Noble, 1 Ann. 194, the Court said: "The *gratuitous* remission of a debt is as valid as a release for a valuable consideration, and may be expressed or implied."

In Lee vs. Ferguson, 5 Ann. 532, it was said: "The acceptance of a release of a debt is by law presumed."

There was no other legal representative of the deceased than the tutor, at the time the remission and surrender of the two notes was made to him. While we do not express any opinion as to whether such a remission could have been legally made to an administrator, we consider a remission made to the tutor as valid and effective.

Judgment affirmed.

39	302
47	100
39	302
105	724
105	727
39	302
115	292
115	293

No. 9780.

C. A. A. PIRONI VS. JULIA RILEY, WIFE OF E. J. DEHART.

An action (the object of which is the nullity of certain judicial proceedings had in a succession, and the payment of a legacy), when allotted to a division of the District Court for the parish of Orleans, other than that to which the succession proceedings had been previously allotted—can be properly transferred from the former to the latter, on exceptions of defendant. The judge of the division to which the case was allotted has no authority to dismiss the suit, *simply* because it was improperly allotted to his division. Such action is not necessarily divisible, its purpose being the payment of a legacy out of the assets of a solvent succession, though the proceedings attacked show it to be insolvent.

As a rule, a universal heir or legatee, who accepts unconditionally a succession which he inherits, is bound personally for the debts thereof; but, not for the special legacies, the discharge of which is restricted to the *residue* of the estate.

Pireni vs. Riley.

The suit for the nullity is the foundation for the payment of the legacy.

The judge of the division to which such suit is transferred cannot maintain jurisdiction over the demand in nullity and relegate that for the payment of the legacy to the division whence the suit came; the less so, when the plaintiff acquiesces in the transfer and invokes the jurisdiction of the court, in the last division, for a determination of the merits.

The jurisdiction of a court, competent, *ratione materie*, represented by divisions, may be assented to, in any division before which the cause or matter may be pending. Each division exercises all the powers of the court it represents.

Nowhere does the Constitution forbid the trial, without previous allotment, of cases by the judge of a division of the Civil District Court for the parish of Orleans, where the parties do not object or assent to such trial.

An action for the nullity of succession proceedings and for the payment of a legacy involves demands intimately connected and blended. It is properly brought against the duly recognized universal legatee *alone*, when the executor is dead; where there is none; where there is no need of appointing one, and when the executor would have no interest in maintaining the proceeding attacked. The judgment to be rendered will bind all parties and constitute *res judicata*.

The executor is not a necessary defendant. The universal legatee duly recognized, being the only one concerned in upholding the proceedings levelled against, is properly made the *sole* defendant.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Charles F. Claiborne, for Plaintiff and Appellant.

G. Duplantier and W. Handlin, for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit by a special legatee against an universal legatee, for the payment of her legacy.

The suit was allotted to Division F. of the Civil District Court for the city of New Orleans. Exceptions were filed to the effect that, inasmuch as the action assailed the validity of certain proceedings in the *mortuaria*, Division E had no jurisdiction and that the case had to be allotted to the Division to which the succession proceedings had been allotted:

It appearing that the *mortuaria* had been allotted to Division C, and, considering the exceptions to be well founded, the judge of Division E referred the case to Division C, without going through the ceremony of a formal allotment. The record was accordingly transmitted.

The defendant there pleaded that the order of transfer was unconstitutional and that, under article 130 of the Constitution, the judge of Division E could only *dismiss* and not *transfer* the suit.

The judge of Division C considered that the suit involved two objects: The payment of the legacy and the nullity of the proceedings attacked.

Pironi vs. Riley.

He therefore retained jurisdiction over the suit to annul, but referred back to Division E, the action for the recovery of the legacy.

Passing upon the merits of the controversy, as presented by the pleadings, the judge further decided that, for want of proper parties he could not determine of the validity of the *mortuaria* proceedings assailed, and so dismissed the suit.

The plaintiff appeals from the adverse rulings, referring back the money demand to Division E and dismissing the suit for want of necessary parties.

I.

It is unnecessary to determine whether the case ought or not to have been allotted when brought, or if it was then properly allotted.

Neither is it useful to decide whether the case thus allotted was properly referred to Division C, to which the *mortuaria* had been allotted.

The plaintiff submitted voluntarily both to the allotment to Division E and to the reference of the case to Division C.

The objections of the defendant to a trial of the case by Division E having been sustained, he had no ground to complain when the case was referred to Division C. His object was to have the case tried and decided by the judge of another division, and that object he accomplished by the reference made of it to Division C.

He claims, however, that the judge of Division E ought not to have referred the case to Division C; that he ought to have *dismissed* the suit.

Why dismiss the suit? The Civil District Court had jurisdiction over the suit brought to recover an amount exceeding by far the lower limit of its jurisdiction. When the suit was instituted before that court, it was therefore brought before a court competent to hear and determine it.

It is true that, for the purpose of exercising its powers, that court is represented by five divisions, each presided over by one judge, and that each division can wield and apply all the powers of the court in cases before it; but not one of those divisions has a right to dismiss a suit of which the court has undoubted jurisdiction, merely because it was allotted irregularly to that division instead of going to the division to which it properly belongs.

As the *mortuaria* proceedings had previously been allotted to Division C, and as the present action was an outgrowth of those proceedings, or are necessarily connected therewith, it was eminently proper for the judge of Division E to refer it to Division C.

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The law does not require vain things. Had the suit been dismissed, that would have required of plaintiff to pay costs not legally due then, and to have brought a new suit, which would have had again to be allotted, and *non constat* that then it would have gone to Division C, to which it properly belonged. It might have gone to another division.

It would have been imposing on plaintiff an unauthorized hardship, and it was therefore the duty of the judge of Division E to have transferred the case to Division C, as he did.

What occasion has the defendant to complain of the transfer as made?

Nowhere does the Constitution say that no division of the Civil District Court for the Parish of Orleans shall hear and determine a case, not regularly allowed to it, when parties make no objection or consent.

With a view to correct previous abuses, the Constitution wisely provides for the allotment of cases before that court, and this Court, after mature consideration of the spirit and letter of the provision, has held that it is not *mandatory* but merely *directory*. Therefore, in the absence of objection for want of an allotment, the parties are viewed as assenting to the jurisdiction as though the allotment had been made and the division is authorized to exercise over the controversy all the powers of the court itself. Buisson's case, 33 Ann. 1425.

The Constitution, however, provides and has been construed as meaning differently in criminal matters. Adotto's case, 34 Ann. p. 1.

Hence we conclude that, as the plaintiff voluntarily executed the order of transfer from one division to another, rendered in exceptions of defendant, and has invoked the jurisdiction of the division to which the case had been transferred—she (plaintiff) has exercised a right of waiver if the transfer was objectionable, and that the defendant cannot complain.

The judgment to be rendered will bind alike all the parties to this suit and so constitute *res adjudicata*.

II.

The next question to be considered, is whether the judge of Division C had a right to divide the suit, to retain jurisdiction over part and to refer back the other part to Division E.

Further, whether he properly dismissed the suit for want of necessary parties.

(a) The petition is lengthy, not uselessly so however.

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The object of the suit was the recovery of a special legacy from a universal legatee, duly recognized.

To recover in such case, the law requires that the legatee be restricted in the satisfaction of the judgment which he may recover to the succession assets—and does not permit satisfaction out of the property of the heir, testamentary or legal. That heir, by accepting the succession makes himself liable, personally, only for the debts, but not for the legacies which must be discharged out of the succession property. R. C. C. 1013. In such a case, the heir may relieve himself by abandoning to the legatee what remains after payment of the debts. R. C. C. 1465, 1511, 1512, 1634, 1635.

It therefore became necessary for the plaintiff to allege that, after payment of the debts, there remained succession property, of whatever nature, out of which her legacy could be satisfied. As, from an inspection of the *mortuaria* proceedings, it would appear that the succession was absorbed by the debts, and was therefore insolvent and, as the plaintiff considered that those proceedings had been fraudulently combined by the executor and the universal legatee, for the very purpose of showing a state of insolvency and thus defeating, if possible, the payment of the legacy—she charged with precision the reasons for which those proceedings, as far as they injuriously affected her, should be annulled and revoked.

The allegations and charges made to that end were proper to put the defendant on her guard and to enable her to prepare her defense. They constitute a proper foundation for the recovery of the legacy.

They were conclusive to the end in view and did not constitute a distinct and separate suit.

The two demands, for the nullity of the succession proceedings attacked and for the payment of the legacy, were the one, the foundation of the other and therefore so intimately blended that they well could be set forth and conducted *pari passu*.

This is so true that, unless the proceedings assailed are set aside, the plaintiff cannot recover the legacy from the defendant, as it can be discharged only out of the residue of the succession. The existence of such residue, actual or constructive, is an essential condition precedent for satisfaction of the legacy.

Ruling as we do, we do not wish to be understood as saying that an heir, or a universal legatee, who accepts unconditionally the inherited estate, may or may not be held liable for the payment of a special legacy, in a proper case.

We simply hold that the plaintiff has brought but one suit, which

was in character and object, as framed, indivisible and that there is error, in the transfer to another division of the money demand.

(b) It remains now to be considered whether the case was properly dismissed for want of proper parties.

The suit is brought against the universal legatee duly recognized though not put in possession by a formal decree.

The proceedings levelled against, were conducted by the executor appointed by the will, who died long before the institution of the suit, but after he had completely administered upon the succession entrusted to him, though he was never regularly discharged from his functions by the court.

The will had given him the usufruct of the succession during life, and that usufruct, whether nominal or valuable, determined at his death.

When he departed from this world, there was nothing apparently to be further administered upon, which would have justified the appointment of a dative executor. The succession property had been sold and adjudicated to the universal legatee who had accepted the succession unconditionally.

It is a wise rule that, in suits for the nullity of judgments, all who are interested in maintaining the judgment attacked ought to be made parties; but we fail to perceive how the rule can be invoked in a case in which the only party concerned (the universal legatee) in maintaining the proceedings assailed, has been made defendant. We are powerless to discover what interest the deceased executor or his succession has in maintaining proceedings carried on by him.

It would have been an idle work to undertake to have a dative executor appointed when none was necessary, when an inventory of the succession would have disclosed no property whatever on which to administer, and when there would have been no foundation on which to base the amount of the bond to be given and required by law.

We are at a loss to discern what benefit can be derived or injury sustained by the universal legatee in finding that she is the only essential party, and that therefore no other needed be made.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed.

It is further ordered and decreed that Division C of the Civil District Court retain jurisdiction over the demand for the payment of the legacy transferred to Division E of said court; that this case be reinstated; that the exception of want of proper parties be overruled; that the defendant do now answer to the merits, and that the case be further proceeded with according to law, the defendant to pay costs of appeal.

Succession of Chalor.

No. 9907.

SUCCESSION OF TERENCE CHALOR.

When two beneficiary heirs are contestants for the administratorship of the ancestor's succession, in the choice of the administrator a large discretion is vested in the judge who makes the appointment and, unless manifestly wrong, his conclusion will not be disturbed.

Under art. 1043, he must select the "most solid."

To determine this question of "solidity," the judge should look to the business capacity, experience, property and integrity of the respective applicants.

If the succession is insolvent or its solvency questionable, to the heir who is a creditor, the preference should be given—other things being equal—to the one who is the debtor.

As a general rule, the judge should be guided to some extent in making his appointment by the preferences of the other heirs and creditors.

Where an inventory has been taken under an order of the court, and it is filed therein, there is no warrant for the clerk on an *ex parte* application of one of the heirs to order the taking of another inventory.

The inventory first taken and filed was properly recognized in the true inventory of the succession.

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

Jack & Dismukes and J. E. Breda for the Appellant.

Scarborough & Carver for the Appellee.

The opinion of the Court was delivered by

TODD, J. The only questions presented in this case relate to the administratorship of the succession and the proper inventory of the same, there having been two inventories made.

Chalor died on the 16th of July, 1886, intestate. Mrs. Grimmer, a daughter of the deceased, joined by her husband, on the 24th of same month applied to be appointed administratrix of the succession. This application was opposed by Mrs. Lattier, a widow and another daughter of the deceased.

The first inventory taken showed the value of the succession to be \$29,071.76. The one subsequently made on the application of Mrs. Grimmer amounted to \$15,726.95.

The judge *a quo*, after hearing quite a number of witnesses touching the respective qualifications and claims of the two applicants for the administratorship, and weighing the testimony, sustained the opposition of Mrs. Lattier and appointed her administratrix. He also recognized by his judgment the first inventory in date as the inventory of the succession.

We have reviewed with the closest attention the evidence in the

39	308
116	28
39	308
118	1070

Succession of Chaler.

record, and considered and weighed with care the few legal provisions of law bearing on the subject, and we cannot say that the judge erred in his conclusion.

The main provision of law governing contests for the administratorship between beneficiary heirs, as in the present case, is Article 1043, C. C., which reads as follows :

“ If there be two or more beneficiary heirs of age, and present in this State, the judge shall select one or two, whom he shall consider the most solid, for the administration of the succession.”

This article leaves the two questions, whether he shall appoint one or two of the heirs, and as to the solidity of the applicants, largely to the discretion of the judge.

The judge in determining this question of solidity should look to the business capacity, experience, property, integrity and everything else that goes to make up the personal fitness for the appointment of the respective parties.

Mrs. Lattier is the oldest child of the decedent, who lived to an advanced age, and who for the last eighteen years of his life was an invalid, confined to his house during this time. Mrs. Lattier lived with her father and administered to his wants and necessities, and in some measure assisted him in his illness, and to some extent became acquainted with the condition of his affairs. She is described by some of the witnesses as possessing fair business capacities. Besides, left a widow with an infant son, whom she reared with care and had him well educated. She had some property of her own, which she had administered successfully. She still owns property and is solvent, and claims to be a creditor of her father for \$1000, an amount coming to her from her mother's estate. She seems to be the choice for the appointment of a majority of the heirs and the creditors. Mrs. Grimmer is not shown to be superior in her qualifications for the office in any respect to Mrs. Lattier, if her equal; but it is urged that the assistance and co-operation of her husband as co-administrator would be greatly to the advantage of the succession, and fairly entitle the wife and husband to a preference over Mrs. Lattier. We are not convinced of this. The evidence satisfies us that Mr. Grimmer is a man of intelligence and some business experience, but the manner in which he is shown to have conducted his own affairs does not afford the strongest guarantee that his administration of the succession would be superior to that of Mrs. Lattier. It appears, too, that Grimmer is indebted to the succession, while we believe that Mrs. Lattier is a creditor. This circumstance, it is urged, is a matter of no significance

Heirs of Gee vs. Thompson.

whatever, since the contest is solely between the heirs, and the succession is solvent. But, from the counsel's standpoint and that of his client, the succession is not solvent, but is clearly insolvent, since the inventory made on Mrs. Grimmer's application amounts to \$15,000, while the claim of one creditor alone exceeds \$17,000.

The true inventory of the succession is the one first taken and filed. The other was made under an *ex parte* order of the clerk, and was without any warrant of law.

We think the judgment of the lower court has done full justice between the parties, and it is, therefore, affirmed.

NO. 9909.

HEIRS OF GEE VS. G. W. THOMPSON.—ON THIRD OPPOSITIONS.

The Supreme Court has no jurisdiction over a controversy for the distribution of the proceeds of a judicial sale made to satisfy a judgment creditor, where the claim of the latter does not exceed \$3000, the amount of the sale is less than that sum and the aggregate of the sums claimed by the third opponents is inferior to the proceeds of sale. Consent cannot confer jurisdiction *ratione materiae*.

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

Jack & Dismukes for Plaintiffs and Appellants.

Scarborough & Carver for Intervenors and Appellees.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The heirs of Gee move to dismiss this appeal, on the ground that the amount in dispute, or the fund to be distributed does not exceed \$2000.

As judgment creditors of Thompson for \$1800, they seized property of his, which, when sold, realized \$1925.27, out of which some \$325 were paid to laborers who had recovered judgment in another case, which is not before the Court.

Three of Thompson's creditors have filed third oppositions for payment, by preference, of sums aggregating \$1253.83.

Counsel for the third opponents who are appellants, contend that

although it be true that the cotton seized, realized the stated sum \$1925.27, still, as that circumstance only appears from accounts of sale filed *after* judgment and appeal, it ought not to be a factor in the matter, *because*, by agreement, the cotton was estimated at \$35 per bale, making \$2275, as the basis for trial and distribution.

If this were so, it would be no answer to the charge that the fund to be distributed does not exceed \$2000 and that this Court has no jurisdiction over it.

It is a well settled rule of practice that, where the matter in dispute does not appear from the pleadings or evidence to exceed \$2000, proof of some kind, even an *affidavit* may be offered, either before or after appeal, to show the fact.

There is no reason why a similar practice should not likewise prevail, to show that the property seized, though valued, during the trial, at *more* than \$2000, has subsequently, when sold, realized *less* than that amount.

The fact of the sale and of the sum realized thereby, which constitutes the fund to be distributed, may be shown by like proof and *affidavit*.

In the present instance, it appears not only by the accounts of sale, but also by *affidavit* and by what is stronger and conclusive, by the admission of the appellants themselves, that the proceeds of sale amount to some \$1600 only, which is the fund to be distributed.

The agreement, to which appellants refer, was made, in the course of the trial of another case, not before the Court now, to authorize the sheriff to settle with hands in accordance with the decree to be rendered in that case and to direct payment *pro rata* with the amount realized, whether the cotton brought more or less than \$35 a bale.

Even if made in this case, on the trial of the oppositions of the appellants, it could prove of no relief to them, so far as the jurisdiction of this Court is concerned.

Conventions of parties, whatever they be, cannot vest this Court with jurisdiction over a controversy, when, under the facts, the Constitution says it shall have none *ratione materiae*.

As from no standpoint, can this Court render a judgment affecting a fund exceeding \$2000, it is manifest that it has no jurisdiction over the controversy.

Appeal dismissed.

Watkins, J. recused.

No. 9903.

THEODORE WUNSTEL, TUTOR, ET AL. VS. JOSEPH AND CHRISTOPHER
LANDRY ET AL.

An action by one heir against his co-heirs of a common ancestor, to declare the simulation of a transfer made by the ancestor to two of said heirs of immovable property, to bring said immovable into the succession of said ancestor, and for a decree of partition thereof amongst all the heirs, partakes of the nature of a proceeding *in rem* in such manner as to authorize the bringing in of a non-resident heir by appointment of a service on a curator *ad hoc*.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Talbot, J.

Alex. Hebert and Chas. P. Moore for Plaintiffs and Appellants.

David N. Barrow and Samuel Matthews for Defendants and Appellees

The opinion of the Court was delivered by

FENNER, J. This is an action brought by one heir against her co-heirs of common ancestors, praying the following relief, viz :

1. To declare the simulation of a sale of certain immovable property made by the common ancestors to two of the heirs and to have said property decreed to belong to the successions of said ancestors.

2. To have the two heirs, who were the alleged simulated vendees, pay into the mass of said successions the amount of the revenues collected by them during their possessions.

3. For a decree of partition of the aforesaid property and funds amongst all the heirs.

One of the heirs, Christopher Stephen Orcutt, being a resident of the State of Illinois, a curator *ad hoc* was appointed to represent him, who filed a peremptory exception to the effect that said absentee could not validly be brought into court as a party to such an action by service on a curator *ad hoc*.

From a judgment sustaining the exception and dismissing the suit as to said absentee, the present appeal is taken.

We think there was error in this judgment.

The invalidity of substituted service through a curator *ad hoc* as a means of bringing an absentee into court when not attended by direct process against his property in the State, is restricted to merely personal actions, and does not extend to proceedings "partaking of the character of proceedings *in rem*."

By this is meant, not a proceeding which is strictly and technically a proceeding *in rem*, but one partaking of that character.

Marshall vs. Holmes et al.

The Supreme Court of the United States, in the leading case on this question, has drawn the distinction very clearly, thus: "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned." *Pennoyer vs. Neff*, 95 U. S. 734; *Ice Co. vs. Loughlin*, 35 Ann. 1184.

In a more recent case we have held that a suit for dissolution of a sale of an immovable and for possession thereof partakes of the nature of a proceeding *in rem* in this sense, and that non-resident defendants may be cited through a curator *ad hoc*. *McKenzie vs. Bacon*, 38 Ann. 764.

It is very clear from our preliminary statement of the issues, that this case falls within the principles above stated, except possibly as to the demand for revenues, as to which we need express no opinion, because the absentee herein is not one of the heirs against whom the revenues are claimed, and has no interest therein except as a beneficiary.

It is therefore ordered, adjudged and decreed that the judgment appealed from sustaining the exception of the curator *ad hoc* be avoided and reversed; and it is now ordered and decreed that said exception be overruled, and that the case be remanded to be proceeded with according to law.

No. 9929.

MRS. SARAH E. MARSHALL VS. H. B. HOLMES, SHERIFF, ET AL.

39	313
e114	651
39	313
115	489

A party cast in an action of nullity of twenty-four judgments, in none of which the amount in dispute exceeds \$3000, brought in one petition, cannot sustain an appeal in the Supreme Court, although the amount involved in all the judgments together does exceed \$3000.

A cause not appealable in amount to the Supreme Court for the review of the judgment originally rendered therein cannot be made appealable there to review the judgment rendered in an action of nullity in the same cause.

A PPEAL from the Eighth District Court, parish of Madison,
Deloney, J.

Marshall vs. Holmes et al.

Walton Farrar, Wade B. Young and J. G. Hawkes for Plaintiff and Appellant.

Stone & Murphy for Defendants and Appellees.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff, owner of a plantation, was made a co-defendant with twenty-four of her tenants, in twenty-four different suits instituted by D. Mayer, for the recovery of various sums of money due him by the tenants respectively, on account of advances made to them in working animals, and general plantation supplies, and for the enforcement against Mrs. Marshall of an alleged obligation on her part to deliver to Mayer a sufficient quantity of cotton to satisfy the amount due by each of her aforesaid tenants.

In one of the suits, entitled *D. Mayer vs. William Talliaferro*, the following agreement was entered into by counsel of both parties :

"In this case it is agreed between plaintiff and defendant, through their counsel, that this shall be test case of all the cases numbered from 595 to 618, inclusive of both, and the final decision of this case shall be decisive of all the issues involved in said cases of like character as those in the case being tried, and at the April term of the District Court judgment by said court shall be rendered upon the issues as decided and passed upon in this case in the appellate court."

From a judgment against her in the District Court, Mrs. Marshall took an appeal to the Court of Appeals, where the judgment was amended in some particulars, and otherwise affirmed.

Whereupon the District Court entered a judgment in conformity with the conclusions of the Court of Appeals in each of the twenty-three other suits embraced in the agreement of counsel hereinbefore referred to. Mrs. Marshall then had recourse to the present suit, by means of which she seeks to enjoin the execution, and to obtain a decree declaring the nullity of the twenty-four judgments rendered as above set forth.

She prosecutes this appeal before us from a judgment of the District Court rejecting her demand and dismissing her action with damages of twenty per cent on the amount of each of the judgments aforesaid.

The point made by appellees' counsel to the effect that this Court has no jurisdiction *ratione materiæ* is well taken, and hence it must be sustained.

The highest amount involved in any one of the twenty-four suits is

Marshall vs. Holmes et al.

\$361 20. Hence it is clear that not one of the judgments could by itself have been appealed to this Court.

This is conceded, in fact, by appellant herself by taking her first appeal from the judgment in the Talliaferro case, which she brought to the Court of Appeals, although, under the agreement of her counsel, the final judgment rendered there was practically a decision of the twenty-three other cases.

Can she now vest jurisdiction in this Court, in an action of nullity by cumulating twenty-four judgments in one petition ?

The question is answered in the negative by the very nature of things as well as by our jurisprudence.

A similar attempt was made in the case of Provost and wife vs. Creig et al., 5 N. S. p. 87.

It was disposed of in the following manner :

"It appears that each of these judgments was given for an amount less than that of which this Court can take cognizance. The attempt therefore made by this mode of proceeding to obtain a review of these judgments, and to have their nullity established, is an attempt to have that done indirectly which the law will not permit to be done directly. We are of opinion that we cannot in this way take cognizance of cases of which the Constitution and the law have denied us jurisdiction."

The same doctrine was enforced in the case of the United States vs. Cochran et al., 5 Rob. 120, in which the Court said : "This Court, on more than one occasion, have decided that an appeal will not lie from a judgment rendered on *one* petition enjoining executions on several judgments, each for less than three hundred dollars, rendered in separate suits, although the judgments added together amount to more than three hundred dollars." See also Armitage vs. Barrow, 10 Ann. 78, and Stevenson vs. Weber, 29 Ann. 106.

Common sense and logic alike point to the rule that a cause not appealable in amount to this Court for the review of the judgment rendered therein, cannot be made appealable here to review the judgment rendered in action of nullity in the same cause.

In the case of Denegre vs. Moran, 36 Ann. 423, the rule was formulated in the following language : "The Supreme Court has no jurisdiction over a suit in nullity to annul a judgment rendered in a case in which the amount in dispute is less than \$1000. It is immaterial what the grounds of nullity be."

The action of this court in entertaining the present appeal would practically be the assumption of appellate jurisdiction of a cause which, under the Constitution, belongs to another appellate court, and

Spencer et al. vs. Lewis et al.

would involve the court in an attempt to review a final judgment rendered by the proper Circuit Court of Appeals.

Under the conclusions herein announced the appellant is not deprived of her constitutional right of appeal; she is merely required to retrace her steps from the incompetent to the proper tribunal.

It is therefore ordered that this appeal be hence dismissed at appellant's costs.

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110 884
111 805

No. 9902.

S. F. SPENCER, ADM., ET AL. VS. A. C. LEWIS, ADM., ET AL.

Since the amendment to article 2229 C. C., forced heirs are not restricted in their right to annul simulated contracts of those from whom they inherit by parol evidence, to their legitime. The right of action in such case is now unlimited.

Such an action is not barred by the prescription of one, five or even ten years.

Where a party dies holding property under a simulated title, and devises his estate to a universal legatee, such universal legatee succeeds to the testator's rights with their defects and is charged with his author's defects, infirmities and bad faith.

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

Sam'l A. Hall for Plaintiffs and Appellees.

J. H. Pierson for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. Plaintiffs, as the legal representatives of W. B. Stewart, sue to recover the lands described in the petition, and to have declared simulated a conveyance of these lands from Stewart to Isaac A. Caldwell, and to avoid the testamentary devises of the lands by Caldwell to his wife and by her to one J. C. Hunter, whose succession is one of the defendants represented by an administrator.

There was judgment in favor of the plaintiffs and defendant appealed.

The defenses urged to the action, besides the general issue, are :

1st. An exception of no cause of action; next, the prescription of one, five and ten years.

The cause of action is so distinct and clear that it is really unnecessary to discuss the exception. Counsel in filing it could only have had in mind the question of the inability forced heirs to recover, in the ab-

sence of a counter letter, property conveyed by their ancestor through a simulated sale, or rather to establish such simulation by parol evidence, beyond their legitime. Such contention is, of course, without force since the amendment of article 2239, C. C., was passed. That amendment is in the following words:

"But forced heirs shall have the same right to annul absolutely and by parol evidence the simulated contracts of those from whom they inherit, and shall not be restricted to the legitime."

The evidence leaves no doubt respecting the simulation charged.

Stewart, after the sale, remained in possession of the property, and received its revenues and sold portions of it with the knowledge of Caldwell. It was a sale *omnium bonorum* and both Caldwell and his wife, to whom it was conveyed by will, always recognized Stewart's ownership of the property.

The simulation seems really not to be seriously controverted.

The prescription of one year does not apply to an action of this character. It is one in declaration of simulation. This prescription only relates to the action of nullity directed against a real but fraudulent contract.

Just as little applicable is the prescription of five years.

There has been no argument, oral or printed, in behalf of the defendants to enlighten us on this subject. This plea of the prescription of five years, suggest the idea that counsel might have regarded this action as one attacking the wills of the Caldwells, by which this property purports to have been transmitted. It is not an action to cancel a will, nor can the prescription be invoked to cure an absolute nullity in the titles of the testators to the property. 13 Ann. 574; 25 Ann. 98.

Nor will the prescription of ten years avail the defendants. This plea is filed in behalf of the universal legatee under the will of Mrs. Caldwell.

It is fully settled that a universal legatee succeeds to the testator's rights with their defects, *succedit in vitia et virtutes*, and is charged with his author's defects, infirmities and bad faith. Griffin vs. Blanc, 12 Ann. 5; Gaines vs. City, 6 Wall. 642; 12 R. 553; C. C. 3498.

This disposes of all the issues in the case. They were properly decided in favor of the plaintiffs.

Judgment affirmed.

State vs. Thomas.

No. 9863.

THE STATE OF LOUISIANA VS. SAM THOMAS.

In case of loss of the original information in a criminal cause, a duly certified copy thereof, taken from the record book, may be substituted therefor, upon which copy the trial may proceed. Act 17 of 1878.

A PPEAL from Twentieth District Court, parish of Lafourche.
Knoblock, J.

M. J. Cunningham, Attorney General, and *E. A. O'Sullivan*, District Attorney, for the State, Appellee.

John S. Billie, for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Act No. 17 of 1878 provides as follows:

"That section 474 R. S. be amended and re-enacted, so as to read as follows: * * * * * It shall be the duty of the clerk of court within ten days after the adjournment of any term or session of court, at or during which any bill of indictment, information or bail bond, have been filed, to record in a carefully bound book kept for that purpose, all such bills of indictment, information and bail bonds, and in case of the loss, destruction or abstraction from such court, of the original of any such recorded bill of indictment, information or bail bond, it shall be the duty of the judge of the District Court, on proof of such loss, destruction or abstraction, to order that a certified copy from such record of said original be substituted for the original, and that the trial and further proceedings in such case be had as on the originals of such lost, destroyed or abstracted indictment, information or bail bond."

The original information in this case having been lost, and proof of said loss made, the Court ordered a certified copy of the record of said original to be substituted, and the further proceedings to be had thereon. The defendant excepted to going to trial on such copy, and, after conviction, filed a motion in arrest on the same ground.

Both were overruled by the judge *a quo*, and with manifest propriety.

The counsel for accused has not favored us with any argument in this Court in support of his appeal.

Judgment affirmed.

 State vs. Hebert.

No. 9865.

THE STATE OF LOUISIANA VS. ROBERT HÉBERT.

An application for a new trial, for the purpose of proving the insanity of the accused, must be supported by evidence tending to substantiate the mental aberration of the accused, else the trial judge may decline to grant it.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

M. J. Ounningham, Attorney General, and *L. D. Beale*, District Attorney, for the State, Appellee.

E. W. Robertson and *H. F. Brunet* for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The accused was indicted for the larceny of a cow, and from a verdict of guilty and sentence by the court to imprisonment at hard labor, has appealed.

He rests his claim to relief on three bills of exception.

I.

Counsel for the accused file a motion for a new trial on the sole ground "that since the trial of this cause, defendant has discovered evidence which he could not obtain before. That his counsel has been informed and believes that, from circumstances related, the accused has been bereft to a great extent of the exercise of his mental faculties; that counsel is prepared to prove this and other facts by competent witnesses; that the conduct of defendant has been so strange and unreasonable as to induce them to believe that his intellect is seriously affected, and that he is not responsible legally for his conduct, etc."

He requested the court to dispense the accused from making affidavit, which was permitted by the judge, and for the following reasons refused to grant the application, viz: "I consider the application as if sworn to; asked counsel if he desired to introduce evidence on the motion, which he *did not do*; and after argument for plaintiff I overruled the motion."

The conclusion and ruling of the trial judge was manifestly correct.

II.

The accused objected to the introduction on the part of the State of any evidence *tending to rebut* certain testimony elicited on cross-exam-

39	319
45	1144

39	319
108	457

39	319
1120	304

State vs. Smith.

ination of his witnesses. The evidence has not been annexed to the bill, and cannot, of course, be considered. But, if we are to consider the abstract question of law, we hold it untenable.

III.

The accused reserved another bill of exceptions, without any evidence annexed, and of which the trial judge says in his assignment of reasons, viz: "The evidence offered by the State was in rebuttal of the statement made by Gamble, a witness called by defendant."

The objection is not serious, and is completely covered by preceding paragraph.

IV.

A motion in arrest of judgment was filed *ex industria*, assigning "errors apparent on the face of the record," but which are not designated, and are *not* apparent.

Judgment affirmed.

No. 9834.

THE STATE OF LOUISIANA vs. B. F. SMITH.

This Court has no jurisdiction of a criminal case wherein a fine of three hundred dollars has not been actually imposed; and when the crime charged is not punishable with imprisonment at hard labor in the penitentiary. *State vs. J. Mack Smith*, recently decided, is affirmed.

APPEAL from the Fourth District Court, Parish of Jackson.
Bridges, J.

M. J. Cunningham, Attorney General, for the State, Appellant.

E. E. Kidd, for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. The State appeals from a judgment quashing an indictment against the accused for retailing liquor without a license, contrary to the provisions of R. S. Sec. 910, on the exception of the accused to the effect that same was repealed by Act 83 of 1886.

The penalty provided for such an offense is a fine of not less than

Insurance Company vs. Lozano.

one, nor more than five hundred dollars, and, in default of payment, imprisonment of not less than fifteen days, nor more than four months.

No fine has been actually imposed; and the accused could not, under the law, be sentenced to imprisonment at hard labor. Hence, this Court has no jurisdiction of the appeal, and appellee's motion to dismiss the appeal is sustained. State vs. J. Mack Smith, just decided and unreported, is affirmed.

Appeal dismissed.

30	321
117	899
117	900
39	331
120	1067

No. 9919.

MECHANICS AND TRADERS' INSURANCE COMPANY VS. LOUIS LOZANO.

The pledgee of a note, secured by mortgage, has the right to *take measures*, that is: to sue for payment in his own name, or for the use of the pledgor, to satisfy the debt to secure which the pledge was made, subject to the obligation of accounting to his debtor.

The appeal taken by a defendant from a decree of executory process, which allows as attorneys' fees a larger percentage than that agreed to in the act of mortgage, is not frivolous and damages cannot be allowed.

Executory process can issue on the pledged note, although the plaintiff annexes unauthentic evidence of the debt due him and secured by the pledge.

On an application for a rehearing the court can, without granting the prayer and hear the case anew, make verbal corrections which do not change materially the effect of the decree previously rendered.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Talbot, J.

Jonas & Nixon for Plaintiff and Appellee.

David N. Barrow for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from an order of seizure and sale.

He charges that the claim of plaintiffs is not established by authentic evidence and that the decree allows ten per cent as attorney's fees, one-half more than could be allowed.

The plaintiffs claim damages for a frivolous appeal.

The plaintiffs have submitted to the lower court, in support of their prayer for executory process, a matured note of defendant in the stereotyped form to his own order and by him endorsed, and a duly certi-

Insurance Company vs. Lozano.

fied copy of an act, whereby the defendant secured the payment by mortgage on the property described in the act, and agreed to pay attorneys' fees fixed at *five* per cent on the amount due, in case of suit to enforce payment.

This showing was amply sufficient to justify the *fiat* of the district court.

The contention is, however, that the plaintiffs sue on six notes of defendant, to the order of and endorsed by another party, which stipulate attorneys' fees at *ten* per cent, and that there is no authentic evidence that these notes were drawn by the defendant, that they were endorsed by the party to whom made payable and that they are secured by mortgage on the property described in the petition.

The plaintiffs claim that the three thousand dollar note, already mentioned and which is secured by mortgage, was pledged to them by a debtor of theirs.

They do not sue as owners of that note, but simply as pledgees thereof. By so doing they have exercised a recognized right.

It was unnecessary for them to have made any averment as to the pledge, or as to their title to the note of \$3000. They had authority to sue directly as the pledgor himself might have done, or they might have sued in their own names for his use as is frequently done.

The Code is explicit on this subject. It provides that if the credit which has been given in pledge, becomes due before it is redeemed by the person pawning it, the creditor shall be justified in receiving the amount and *in taking measures* to recover it, subject to the obligation of accounting to the pledgor. R. C. C. 3170, (3137).

In several instances the right of the creditor to sue has been expressly admitted. *Bank of Lafayette vs. Bruff*, 33 Ann. 626; *Blouin vs. Liquidators*, 30 Ann. 714; *Ducane vs. McKenna*, 28 Ann. 419; *Succession of Dolhonde*, 21 Ann. 3; also 7 Ann. 225; 8 N. S. 370.

Taken as a whole their petition may be considered as drawn in the latter form.

The allegations touching the debt due plaintiffs by defendant and evidenced by the six notes which are not authentic and the annexing of those notes to the petition, were surplusage and cannot affect the rights of the plaintiffs.

They do not propose to ask that the property be sold to pay the \$3000, but only to pay them \$2451 and interest which is due them as holders of the six notes; any surplus to remain to the credit of their debtor.

State vs. Dominique.

The district judge, however, erred in allowing ten per cent for attorney's fees when the act of mortgage only allows *five*.

The defendant to that extent had a right to complain, and his appeal cannot be treated as frivolous.

It is therefore ordered and adjudged that the decree appealed from be amended, so as to reduce the percentage allowed for attorney's fees from *ten* to *five* per cent on the amount sued for, and that thus amended said decree be affirmed, appellees to pay costs of appeal.

ON APPLICATION FOR REHEARING.

Appellees and appellant pray for a rehearing.

The appellees call the attention of the court to the fact that the district judge did not allow *ten* per cent as attorney's fees on the amount, sued for, but *five* only, under the stipulation in the act of mortgage.

In this they are well founded. Justice to the district judge demands that the correction be made. The *ten* per cent mentioned in the prayer of the petition and which we had taken to be the allowance for services for recovering the amount sued for, are those provided for in the authentic notes.

The correction is in the verbiage only, as the allowance of *five* per cent for attorney's fees, which the plaintiffs claim and which was allowed them, was sanctioned by this Court on the decree and the practical result in the recovery is the same.

The appellant has urged no defense which he had not previously submitted. His application is a mere rehearsal of the past and has already received attention and been pronounced without merit.

We do not think, however, that the case is one in which damages for a frivolous appeal can be granted.

The correction asked may be made without granting a rehearing, by simply eliminating from the opinion and the decree what was therein said touching the allowance of the percentage as attorney's fees by the district judge.

Rehearing refused.

No. 9886.

THE STATE OF LOUISIANA vs. EMILE DOMINIQUE, ALIAS FRENCHY.

The absence of the accused, in a case of larceny, from the courtroom at the hearing, of a motion of the State's attorney for the amendment of his information, with a view to an alteration of the name or surname of the owner of the stolen property, will not vitiate

39	323
50	448
50	1349
39	323
52	500

State vs. Dominique.

the proceedings. His presence in court is required only at the trial of his guilt or innocence, and not during all other preliminary or secondary proceedings, involving matters connected with the form or conduct of his trial.

An amendment of an indictment or information in a case of larceny, changing the name of the alleged owner of the stolen property, may be allowed after arraignment, and the accused cannot complain, after conviction, that he was not arraigned under the indictment or information as amended.

A PPEAL from the Nineteenth District Court, parish of St. Mary.
Allen, J.

M. J. Cunningham, Attorney General, and *W. K. Wilson*, District Attorney, for the State, Appellee.

W. J. Suthon and *P. J. Sigur*, for Defendant and Appellant.

The opinion of the Court was delivered by

POCHE, J. In a prosecution for larceny, the District Attorney, with leave of the Court, amended his information touching the given name of the owner of the stolen property. The name of the owner as originally alleged, was "Isaiah T. Sharp," and it was amended so as to read "Jeremiah F. Sharp, Jr."

The amendment was made in open court after arraignment and before trial, in the absence of the accused, but in the presence of his counsel. To this mode of proceeding the defendant charges two errors:

1. That his absence from the court vitiated the proceeding.
2. That after the amendment he could not be legally tried without arraignment under the information as amended.

1st. The recent and somewhat numerous decisions of this Court, determining what proceedings in a criminal cause may be had during the absence of the accused, must have escaped the attention of counsel for defendant herein.

The rule has been formulated thus:

"The absence of the accused during the trial of motions not making part of the actual trial of his guilt or innocence, but having reference to the form or conduct of the trial, will not vitiate the proceedings." *State vs. Fahey*, 35 Ann. 9; *State vs. Clarke*, 32 Ann. 560; *State vs. Harris*, 34 Ann. 121; *State vs. Gonsoulin*, 38 Ann. 459.

Hence that contention can hardly be considered as serious.

2d. The amendment made in this case is clearly covered by the provisions of Section 1047 of the Revised Statutes. Such an amendment has been allowed after the trial had begun. *State vs. Holmes*, 23 Ann. 604.

Calhoun vs. McKnight.

In a trial of larceny the gist of the offense is the unlawful taking and appropriating by the accused of the property of another; the name of the owner being a matter of secondary importance or consideration. *State vs. Everage*, 33 Ann. 120. Hence, in the recent case of the *State vs. J. and H. Hanks*, not yet reported, this Court sustained the ruling of the district judge, who had allowed, in a case of horse stealing, an amendment, after the trial had begun, of the name of the alleged owner of the stolen horse, from "Sevigne Duhon" to that of the tutor's daughter, "Cecile Duhon, wife of William Harson."

Hence, it follows that the trial judge in the case did not trespass beyond his legal discretion in ordering the trial to proceed without a second and useless arraignment of the accused.

Judgment affirmed.

No. 9914.

W. S. CALHOUN VS. H. MCKNIGHT ET AL.

In a rule taken by an heir to be put in possession of an estate, and for other purposes, any irregularity in such proceeding, though urged in oral and written argument, will not be considered in the absence of pleadings raising such issues, save in exceptional cases.

An heir is not entitled to be put into possession of certain funds in the hands of an administrator, when it appears that this fund is in litigation between the succession and another claimant. The heir cannot receive it until the litigation is terminated, though otherwise he might be entitled to it.

A PPEAL from the Twelfth District Court, Parish of Grant.
Overton, J.

Thorpe & Peterman for Plaintiff and Appellee.

White & Thornton for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. On the 31st of October, 1884, the plaintiff presented a petition to the district court of Grant parish, alleging that he and Mrs. Lane were sole legal heirs of Meredith Calhoun, deceased, whose succession was opened in said parish and was then under administration. He further alleged that he accepted said succession purely and simply, and prayed that his co-heir, Mrs. Lane, and McKnight, the administrator, be cited, that the latter be ordered to render his account and that he, the petitioner, be recognized as an heir accepting the succes-

Calhoun vs. McKnight.

sion absolutely and unconditionally, and be put in possession of the estate.

There was judgment rendered on default in the plaintiff's favor, granting the prayer of his petition, save with respect to the demand to be put in possession of the property of the succession, in which point the judgment was silent.

This judgment was rendered on the 25th of November, 1884.

McKnight, administrator, subsequently filed an account of his administration as ordered in the judgment, and a short time thereafter died, and Mrs. Elizabeth McKnight, his surviving widow, was appointed administratrix of his succession.

On the 9th of September, 1886, W. S. Calhoun, plaintiff, filed a rule, alleging that he had been recognized as an heir of Meredith Calhoun, accepting his succession purely and simply as shown by the judgment of November, 1884; that the administrator had died before putting him in possession of the property, and prayed that Mrs. McKnight, administratrix of Howard McKnight, be required to show cause why she should not deliver to the petitioner all the property movable and immovable, rights and credits of the succession of Meredith Calhoun, which remained in the hands of Howard McKnight, administrator, at his death, and of which Mrs. McKnight, his administratrix, was then in possession; Mrs. Lane was also made party to the rule.

There was judgment making the rule absolute and requiring Mrs. McKnight, administratrix, to turn over to the plaintiff all the property in her possession belonging to the succession of Meredith Calhoun.

This is the judgment before us for review under an appeal therefrom taken by Mrs. McKnight and Mrs. Lane.

The defendant's main contention before this Court is:

First, that the proceeding by rule was illegal and unwarranted; that the judgment first rendered virtually denied the right of the plaintiff to be put in possession of the estate, by reason of its silence in this demand, which formed part of the petition; and that a rule could not be engrafted on this judgment to enforce a demand which the judgment itself had refused.

Further, the incapacity of Mrs. McKnight, administratrix, to stand in judgment or to represent the succession of Meredith Calhoun is urged.

These are nice questions which admit of ample discussion, but we are powerless to consider them, since they were not raised by the pleadings, but appear for the first time in the brief of the counsel before this Court.

Manning vs. Board of Liquidation.

The defenses set up in the answers are without force with one exception. That exception is: It is alleged, quoting, that there is a suit pending between this opponent (Mr. Lane) and H. McKnight, administrator—the said McKnight being appellant from a judgment decreeing him to pay petitioner (Mrs. Lane) about \$750 collected from rents of opponent's (Mrs. Lane), and this Court cannot order said funds to be paid to the said Calhoun."

The evidence in the record in support of this averment and defense is as follows, (quoting): "It is admitted that the appeal in the suit of M. M. A. Lane vs. H. McKnight, administrator, is now pending before the Court of Appeals from a judgment rendered by the district court against H. McKnight, administrator, for rents alleged by Mrs. Lane to have been collected from her lessees. It is admitted that on the homologation of McKnight's account of September 18, 1884, the amount of these rents was left in his hands to await the issue of that suit."

Under the judgment appealed from in the instant case, this identical fund with all other funds and assets of the succession of Meredith Calhoun, are ordered to be paid over to W. S. Calhoun, plaintiff herein, notwithstanding Mrs. Lane had obtained judgment for the same in the district court and the appeal therefrom pending in the Court of Appeals as shown.

It was wrong to disturb the disposition of this fund made by the judgment homologating the account and the further proceedings mentioned, and the judgment in this respect must be corrected and amended.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be amended by adding and interpolating after the words "due course of administration," found in said judgment the following: "and save and except the amount decreed Mrs. Lane by the judgment rendered in the district court in her favor in the suit of M. M. A. Lane vs. H. McKnight, administrator, and now on appeal in the Circuit Court;" and as thus amended the judgment is affirmed, the costs of appeal to be paid by the plaintiff and appellee.

No. 9928.

JOHN B. MANNING VS. BOARD OF LIQUIDATION.

The *bona fide* holder of bonds issued under Acts 69 of 1870 and 35 of 1865, are entitled to have them funded, under Act 3 of 1874.

The legality of the first is not attacked by Act 5 of 1875 which reflected on the second.

The validity of the last has been recognized judicially, twice, by the Supreme Court.

If it be true, that more bonds have been *funded* than were *issued*, the plaintiff cannot be made the victim of that circumstance.

State ex rel. Lamarque vs. Recorder.

APPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

Kennard, Howe & Prentiss for Plaintiff and Appellee.

M. J. Cunningham, Attorney General, for the State, Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff sues to have certain bonds held by him, issued under Acts 69 of 1870 and 35 of 1865, funded under Act 3 of 1874.

The defense is that the bonds are not valid and that more bonds than were issued of the same class have been funded.

The genuineness of the bonds held by plaintiff is not questioned and it is not shown that they are illegal.

Act 5 of 1875, which questioned the validity of certain bonds, did not attack that of the bonds issued under Act 69 of 1870, while it reflected on those issued under Act 35 of 1865, known as Levee 8 per cent bonds of 1865.

In the case of Attorney General vs. Clinton 28 Ann. 219 and in State ex rel. Matthews vs. Board, decided in Monroe in 1877 (No. 697, and not reported) the validity of the last bonds was judicially recognized.

If it be true that more bonds have been funded than were issued, this fact cannot affect the plaintiff, who is a *bona fide* holder, as is declared by this Court in the case of Buckingham, a similar plaintiff, this day decided.

No. 9930.

THE STATE EX REL. F. LAMARQUE VS. L. A. BURTHER, RECORDER.

A defendant, prosecuted for the violation of a municipal ordinance subjecting him to a fine, and in default of payment to imprisonment—who, on arraignment, pleads *guilty*, and on judgment voluntarily pays the fine, is not entitled to an appeal

Where a discrepancy exists between the return of a judge and the statement of a relator, credence will be given in preference to the return.

The refusal to allow an appeal is justified under the circumstances, and no mandamus will issue to compel the granting of any.

APPLICATION for Mandamus.

Belden & Armbruster for the Relator.

The opinion of the Court was delivered by

State vs. Paul.

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the granting of a suspensive appeal.

The relator charges that he was arrested for violation of an ordinance of this city, bearing No. 4798, A. S., prohibiting private markets within a certain radius from a public market; that he pleaded that the ordinance had been repealed by the present city charter; that he was nevertheless fined \$25 and sentenced to imprisonment during thirty days in case of non-payment; that he has applied for a suspensive appeal, which was refused him.

He prayed for an alternative *mandamus* and a restraining order, which were both allowed.

The recorder returns that the defendant on arraignment pleaded "guilty," and upon judgment being rendered, as stated, that he promptly *paid* the fine imposed.

Since the case was submitted, the relator has filed an *affidavit*, traversing the recorder's return, to the effect that he did not plead guilty, but that the recorder so inferred or deduced from his confession or admission of having committed the act charged as done in violation of the municipal ordinance.

This *affidavit* ought not to have been filed. It came too late. Conceding to it, however, whatever effect it might be otherwise entitled to, we have no hesitation to say that it is a settled rule in such cases of contradictory statements to give credence rather to the return of the magistrate.

But even then, the relator does not pretend to deny the material fact that he has promptly paid the fine imposed by the recorder, or explain the circumstances under which he did so.

The payment made without qualification must be viewed as made voluntarily. C. P. 567.

Under such circumstances the relator must be denied the right of appeal.

It is therefore decreed that the restraining order herein made be rescinded, and that the application for a *mandamus* be refused with costs.

No. 9854.

THE STATE OF LOUISIANA VS. SAMPSON PAUL.

In the trial of a criminal case, neither party should be allowed to introduce new or additional testimony after the evidence has been closed, after the argument has been made, after the judge has given his general charge to the jury, and when he is about to give a special charge requested by counsel for the accused, on a point which the district attor-

39	329
51	105
39	329
113	750
113	752

State vs. Paul.

ney had omitted to support by evidence, and for the introduction of which he seeks to reopen the case.

There must be an end to the examination of witnesses in all trials.

A PPEAL from the Twelfth District Court, Parish of Grant.
Blackman, J.

M. J. Cunningham, Attorney General, and *John C. Wickliffe*, District Attorney, for the State, Appellee.

M. F. Machen and *H. L. Daigre* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. The complaint in this case is that the trial judge allowed the district attorney to reopen the case in order to prove the time of the commission of the offense charged, after the evidence had been closed, after the argument of counsel to the jury had been made, and after the general charge of the judge to the jury had been given.

While we concede to its fullest extent the discretion which is vested in the judge in conducting the trial in criminal cases, we are constrained to hold that the ruling in this case is error.

It appears from the record that the case was reopened after the argument, after the general charge, after a special charge at the instance of the State's counsel had been given to the jury, and when that attorney was reminded of his omission to prove time through the request made by defendant's counsel for a special charge on the necessity of proof of the time at which the offense charged to the accused had been committed.

If it is within the legal discretion of the judge to reopen the case at that stage of the trial, it is difficult to conceive at what point that same discretion could not be invoked to justify the introduction of new or additional evidence.

Under such a practice, when could any trial be considered to be at an end? And yet it stands to reason as well as in law that there must be an end to the examination of witnesses in all trials.

One of the latest expressions on the subject emanating from this Court is to the effect that: "The rules of practice have wisely provided that when the evidence has been closed, the examination of witnesses is at an end. A different rule would have protracted trials beyond reason, and would have practically resulted in a denial of justice." *State vs. Chandler*, 36 Ann. 177.

We are aware that jurisprudence has recognized some exceptions to the general rule, and that the exercise of a sound discretion by the trial judge to the extent of admitting evidence immediately after the

State vs. Jefferson.

case had been closed has been justified on appeal in this State as well as in other appellate courts. *State vs. Coleman*, 27 Ann. 691; *State vs. Colbert*, 29 Ann. 715; *State vs. Rose*, 33 Ann. 932; Wharton's Criminal Law, §§ 3009, 3342. But instances of the kind cannot and should not be numerous.

In the case of *Colbert*, 29 Ann. 715, the Court very guardedly restricted the exercise of the right to reopen the case after the evidence had been closed, to that stage of the trial *before the argument began*, these words being italicized in the opinion, thus clearly indicating a different ruling if the attempt to reopen the case had been made at a more advanced stage of the trial, particularly as was the case here, when the case had been practically ended.

In our investigation of jurisprudence we have found no case, and we have been referred to no ruling which can be invoked as a precedent for the latitude which was allowed to the prosecution in the instant case. And we are not inclined to establish such a precedent, which would, in our opinion, be subversive of all the safe rules which should prevail in the trial of criminal causes.

Next to the certainty of punishment, the enforcement of wise and impartial rules in trials of all cases, will be found to be the most effective means for the repression of crime.

Our conclusion is that the accused in this case has not had a fair and impartial trial.

It is therefore ordered that the verdict of the jury be set aside; that the sentence of the court be annulled and avoided, and that the case be remanded to the district court for further proceedings according to law.

No. 9885.

THE STATE OF LOUISIANA VS. DAVID JEFFERSON.

39 311
48 1020

A written acknowledgment that A has picked *so many* pounds of cotton, purporting to be signed by the proper party, amounts to a note or order for the payment of money. Under a charge of *forgery*, it can serve as a basis for an indictment.

Whether such instrument was or not used for the purpose of drawing money, is a matter of fact within the province of the jury.

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Blackman, J.

State vs. Jefferson.

M. J. Cunningham, Attorney General, and *John C. Wickliffe*, District Attorney, for the State, Appellant.

Cullom & Son for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The State appeals from a judgment sustaining a demurrer to the indictment against the defendant, charging him with forgery.

The grounds set forth to quash the indictment are :

1. That the charges laid in the indictment are too vague, uncertain and indefinite to warrant the prosecution.
2. That the instruments, papers or orders charged to have been forged, uttered and published, have not the requisites of orders, as shown on their face, and could not serve to defraud anyone.
3. That said instruments are of no effect, and are such that forgery cannot be predicated on them.
4. That said instruments are in reality what the indictment describes and alleges them to be, and are not susceptible of the charge of forgery.

I.

The defendant has not shown in what respects the indictment are open to the charges of vagueness, uncertainty and indefiniteness, either in his plea or in his argument, and the Court cannot be expected to raise points and issues for his benefit, which he has not made.

II

The indictment charges that the defendant, with intent to defraud a named person, has forged and uttered certain orders of the following tenor: "Willy Johns has picked 215 pounds of cotton, *Henry Weastly*," and "David Jefferson has picked 852 pounds of cotton. *Henry Wooten*."

The law does not require, in cases of forgery, that the instrument charged to have been forged, shall on its face purport to be an order for the payment of money or delivery of goods.

It is sufficient that the instrument be one, by the use of which, money or goods can be obtained.

It has been held that the following instrument; "Due J. F., one dollar on settlement this day" is the forgery of a note for the payment of money. *People vs. Finch*, 5 Johns (N. Y.) 236.

It enters in the order of probabilities that the instruments charged to have been forged and uttered, were issued by some one in authority

Interdiction of Parker.

to acknowledge work done by a laborer, in a manner intended to serve as the basis for the computation of what he may have earned; that an acknowledgment of that description is equivalent to an order on a disbursing agent, which, on presentation, entitles the party named, or the bearer, to payment of the realized amount, viz: So much per pound of cotton; and that the delivery of such written acknowledgment amounts to a receipt showing payment.

Whether the instruments charged in this case as having been forged and uttered are such, is a question of fact for the jury to determine.

They came within the charge, if the evidence establish that, on presentation of genuine similar instruments money can be obtained.

III AND IV.

The third and fourth grounds are a repetition of the second one in a different form, but are substantially the same.

It is, therefore, ordered and decreed that the judgment appealed from be reversed; that the demurrer be overruled, and that the case be remanded for further proceedings according to law, with costs.

No. 9890.

IN THE MATTER OF THE INTERDICTION OF JOHN M. G. PARKER.

Under the effect of C. C. 415, the rules laid down in articles 363 and 364, relative to tutors and guardians of minors residing out of the State, apply equally to guardians of insane or interdicted persons residing out of the State.

Such guardians, when duly appointed and qualified according to the laws of the State where the insane person resides, are entitled to recognition as such by our courts, to be vested with the power and authority defined in said articles. But to support a decree to that effect, it is essential that they should not only have been appointed, but that they should have qualified in conformity with the laws of the State where they have been appointed.

A PPEAL from the Civil District Court for the parish of Orleans.
Monroe, J.

Sambola & Ducros and Rouse & Grant for the Appellant.

1. The powers of executors, administrators or guardians cannot be exercised beyond the limits of the State where they are appointed. *Burbank vs. Payne*, 17 Ann. 16; *Mason vs. Executors of Nutt*, 19 Ann. 41; *Vaughn et al. vs. Northrup et al.*, 15 Pet. 1; *Morrell et al. vs. Dickey*, 1 Johns. Chy. R. 153; *Story on Conflict of Laws*, § 504, 504a. In the absence of statutory authority, our courts are without jurisdiction to recognize them.
2. If the law were otherwise, our courts could not recognize them until they produced evidence not only of their appointment, but of their qualification, according to the law of the State where appointed.

Interdiction of Parker.

3. Our courts cannot give effect to the judgments or decrees of the court of another State which they would not have in the State where rendered. After appeal claimed, from a decree of a probate court in Massachusetts and notice given, the decree is vacated. Public State. of Mass., chap. 156, sec. 12; and it is an error to give effect to such decree in this State. *Briggs et al. vs. Spencer*, 3 Rob. 269; *Pillet vs. Edgar et al.*, 4 Rob. 374.
4. A judgment of interdiction, where the person interdicted has not been cited or otherwise personally notified, is a nullity. *Segar vs. Pellerin*, 16 La. 63; 1 N. S. 351; 23 Ann. 26.

Kennard, Howe & Prentiss for the Appellee.

The opinion of the Court was delivered by

FENNER, J. Edward M. Tucke and Percy Parker filed a petition in the court below, alleging that the probate court in and for the county of Middlesex and State of Massachusetts, being the court of John M. G. Parker's domicile and having sole jurisdiction in the premises, had rendered a decree adjudging the said Parker to be an insane person incapable of taking care of himself and appointing the petitioners as guardians of his person and estate: that, as such guardians, they are entitled, under the laws of Louisiana and the Constitution of the United States, to exercise within the territory of Louisiana the same rights as in the State of Massachusetts; and, annexing to their petition a duly authenticated copy of the record and decree in the Massachusetts court, they prayed for an order recognizing them as guardians of John M. G. Parker with the powers and duties attaching thereto.

The judge *a quo* thereupon entered the following decree:

"Considering the allegations and prayer of the within petition and document annexed, let Edward M. Tucke and Percy Parker, of Lowell, Massachusetts, be recognized by this court as the guardians of the person and estate of John M. G. Parker, interdict, under and by virtue of a decree rendered by the Probate Court of Middlesex county, State of Massachusetts, on the 21st day of September, 1886; provided, however, that the order shall not be so construed as to authorize said guardians to take possession of or remove from this jurisdiction any property of said interdict until such advertisement shall have been made, and such proof offered as shall satisfy this court that all debts due by said Parker in this State have been paid." R. p. 4.

John M. G. Parker, who, it appears, is now in Louisiana, appeals from this judgment, and makes the following assignment of errors apparent on the face of the record:

1. That said judgment appealed from herein was rendered upon the *ex parte* application of said petitioners, without this appellant having been cited or otherwise notified of said application, or of the pendency of said proceedings in said Civil District Court.

Interdiction of Parker.

2. That it appears from the record of the proceedings annexed to said petitioner's application to be recognized as guardians of appellant's person and estate in Louisiana, that notice of an appeal had been given, which had the effect of suspending, vacating and superseding said judgment of said probate court, under which they claimed to be acting.

3. That it appears from the said record that the judgment of said probate court, under which said petitioners claimed to be acting, made their appointment as such guardians conditional upon their giving bonds according to the law of said State of Massachusetts, for the due performance of their trust, and it does not appear that they have given any such bonds.

4. That said Civil District Court was without any jurisdiction or authority of law to make said order and decree appealed from herein.

Art. 415 of the Civil Code provides that "the person interdicted is, in every respect, like the minor who is under a tutor, both as respects his person and estate, and the rules respecting the tutorship of the minor, etc., apply with respect to the curatorship of the person interdicted."

Under the effect of this article, we have no doubt that the rules laid down in Articles 363 and 364, relative to the tutor and guardians of minors residing out of the State, apply equally to the guardians of insane or interdicted persons residing out of the State.

We, therefore, conclude that the guardians of such non-resident insane persons, on complying with the requirements of said articles, are entitled to be recognized as such in the courts of this State, and to be vested with the power and authority defined therein.

Hence, we hold that the Civil District Court had jurisdiction over the subject matter of the petition, and that, from the very nature of things, such proceeding was necessarily *ex parte*.

Therefore, the first and fourth assignments of error have no merit.

It only remains to determine whether jurisdiction has been properly exercised, and whether the decree is supported by the evidence upon which it is based.

The article 363 provides: "Any person who has been, or shall be appointed tutor or guardian of any minor residing out of the State of Louisiana, but within the United States, and *who has qualified* as such, in conformity with the laws of the State or county where the appointment was made, shall be entitled to sue for and recover any property, rights or credits belonging to the minor in this State, upon his producing *satisfactory evidence* of his appointment as aforesaid, without

 Lynch vs. Febiger.

being under the necessity of qualifying as tutor of the minor, according to the laws of Louisiana." To sustain the decree, satisfactory evidence was essential to show that the petitioners had been appointed as guardians, and that they had qualified as such.

The record produced shows a decree of the Massachusetts Court appointing the petitioners as guardians of John M. G. Parker, who is therein adjudged to be an insane person; but it also appears that the decree in terms made the appointment dependent on their "first giving bond according to law for the due performance of said trust," fixed at one hundred thousand dollars.

The record exhibits no evidence whatever that they have furnished such bond, or have ever qualified. Hence the third assignment of error is well taken.

It further appears that a notice of appeal from the decree of the Massachusetts Court was entered, and appellant cites the laws of Massachusetts to show that such notice of appeal had the effect of staying all proceedings under the decree until the determination of the appeal by the appellate court.

To this appellees respond that the law of Massachusetts required to be proved and was not proved in the court below, and further deny that the statute has the effect claimed for it.

We do not find it necessary to determine that question now, because under the third assignment we shall reverse the judgment and remand the case, and appellant will then have the opportunity of urging such objections to the validity, finality and effect of the judgment under the law of Massachusetts as he may see fit.

Of course, the Massachusetts judgment will be entitled to the same faith, effect and credit in Louisiana as it has in Massachusetts.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that the case be remanded for further proceedings according to the views herein expressed.

 No. 9774.

FRANK A. LYNCH vs. JOHN C. FEBIGER, JR.

A dealer in paints of a particular quality who sells the same with the formal condition that they shall be used as they come from the manufacturers and be properly put on, and who subsequently discovers that one to whom he has sold such paints has put in the same foreign ingredients—oil and turpentine—is not, as a rule, liable in damages for refusing to sell further to such purchaser and for stating that he had not kept his agreement.

Particularly is such the law, when the statements are made without malice, under the firm belief that they are true and for self-protection, to the party himself, or to parties interested entitled to an information.

A PPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Henry Dufillo for Plaintiff and Appellee:

Every publication of language concerning a man or his affairs, which, as a necessary or natural and proximate consequence occasions pecuniary loss to him, is *prima facie* a slander. Townshend on Slander and Libel, § 70, p. 115.

Slander is defaming a man in his reputation by speaking words which affect his life, office or trade. *Ibid*, p. 59, foot note 3.

Words uttered must be construed in the sense which bearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed in the matter alluded to, might form a different judgment on the subject. Moak's Underhill on Torts, pp. 122, 123.

Language is not to be construed in a milder sense (*mitiori sensu*), because it is capable of a forced construction by being interpreted in an innocent sense. Bigelow on Torts, (Student's Edition), p. 39; see also 2 L. 577; 2 N. S. 257, and other authorities quoted in brief.

When language is slanderous *per se*, damages may be recovered without special injury or damage being proved. Townshend on Slander and Libel, p. 542; 38 Ann. (vol. 38), No. 2, p. 161, and the authorities in that decision quoted.

Injury to one's feelings is a legitimate ground of action for reasonable indemnity. 38 Ann. (vol. 38) No. 2, p. 161.

Communications made by one person to another, having for object the protection of the private interest of either or both of the parties, must, in order to be privileged, have been made with a firm belief in their truth; otherwise malice is to be presumed. To determine whether such communications were made under a firm belief in their truth, it is necessary to consider the circumstances attending the publication, and the means of information possessed by the publisher for knowing whether or not the communication or publication was true. That mischief which a man does he is supposed to mean, and he is not permitted to put in issue a meaning abstracted from the fact. Townshend on Slander and Libel, pp. 135, 600; Moak's Underhill on Torts, p. 129; Folkard's Starkie on Slander and Libel, p. 343.

The answer of defendant equivocates. It includes every possible defense, except apology to the party aggrieved. It cannot avail him, 38 Ann. (vol. 38), No. 2, p. 161.

There is no such thing in law as a half-way justification. Townshend on Slander and Libel, § 212 and note, 2d ed.

Joseph P. Hornor and *Francis B. Lee* for Defendant and Appellant:

1. The truth of the words uttered, or publication made, is an absolute defense to a civil action of libel or slander. Const. 1879, Art. 168; Perret vs. Times, 25 Ann. 176; 14 Ann. 406; 15 Ann. 393; Hawkins vs. Picayune, 20 Ann. 137; Staub vs. Van Benthuyssen, 36 Ann. 460.

2. Statements made by one person about another to a third, though untrue, are privileged when they are made without malice, under a firm belief in their truth, and for the purpose of protecting his own pecuniary interests or those of persons equally interested in the subject matter of the communications, or in reply to questions upon the said subject matter put to him by persons interested in it and entitled to an answer. Townshend on Libel and Slander, secs. 209, 240, 241; Odgers on Libel and Slander, pp. 203, 209, 234; Haney vs. Trost, 34 Ann. 1147.

Lynch vs. Febiger.

The opinion of the Court was delivered by

BERMÚDEZ, C. J. This is an action in damages for slander, fixed at \$25,000.

In two petitions, an original and a supplementary, elaborately prepared, the plaintiff complains that the defendant has slandered him in his business, as a house painter, misrepresenting him as having adulterated paints purchased from defendant.

Elaborate exceptions and an amplified answer were filed, in which the defendant avers that he, as agent, had sold paints known as "*Masury's liquid colors*," under the express condition, previously entered into, that he would use these just as they come from the manufacturers whom he represented, and would put them on properly; that he subsequently discovered that plaintiff had violated the agreement by allowing something to be put into the colors, and that he would not sell plaintiff any more of said paints.

The case was submitted to a jury, who returned a verdict of \$500, on which was rendered the judgment appealed from, and of which no amendment is asked.

Twenty-two witnesses have testified.

The contract or understanding was proved, and it was expressly admitted that the plaintiff had put oil and turpentine in Masury's liquid colors.

The proof is also that the defendant made the statements to the plaintiff himself, as well as to parties interested, who had a right to be informed, and whom defendant had a right to approach.

Conceding *arguendo*, however, that the defendant has not proved the contract and its violation, a question rising superior to those raised in this suit would be: Could not the defendant, without giving any reasons or tendering any excuse, have refused, with impunity, selling paints any further to plaintiff?

It occurs to us that defendant cannot be assimilated to public servants, common carriers, and to others in similar positions, who are bound to do certain things, and who may make themselves liable in cases of dereliction of duty and injury to others.

Considering further that it is established that the defendant used the word *adulterated* when he accused plaintiff with putting in the paint other ingredients, we do not think that it is shown that he did so with a full knowledge of the whole purpose of the word, which sometimes means to corrupt by some foreign mixture. We prefer, under the cir-

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cumstances, in the absence of any malice shown, to consider that he used the word in the other sense which it has, to alter by intermixing what was less valuable, such as oil and turpentine.

Even were it otherwise, under the evidence, we are not prepared to say that the addition of those two ingredients did not really constitute an adulteration, which actually corrupted or vitiated the liquid colors, so as to deprive them, when properly used, as received from the manufacturers, of their usual brilliancy and durability.

The testimony, *pro and con*, establishes satisfactorily the defense.

In refusing the motion for a new trial, the District Judge said that he considered the verdict erroneous, and gave reasons in support, as follows :

1st. There was no proof of any defamatory utterances by defendant other than the statements as admitted in the answer.

2d. It is more than doubtful whether those statements taken in the light of the entire admissions are at all defamatory.

3d. The truth of those statements were not only proved beyond a doubt, but it was admitted in argument that the turpentine had been put into the paints by plaintiff's orders.

4th. The existence, prior to the date of the alleged slanders, of the contract set up by the defendant was established.

5th. The further defense of the qualified privilege set up in the answer was established in each particular case in which it was pleaded, and it was so pleaded as to each of the statements admitted and proved to have been made.

6th. There was no proof of injury to plaintiff's reputation.

7th. There was no malice by the defendant. His acts and statements proceeded from the desire to protect his interests, not to wantonly injure or annoy plaintiff.

While we consider that the district judge ought to have granted a new trial, still as the defendant does not complain, we feel justified in passing upon the merits.

With the district judge we think the verdict is erroneous and that the case is with the defendant.

It is therefore ordered that the verdict of the jury be set aside and that the judgment appealed from be reversed, and it is now decreed that there be judgment in favor of the defendant, with costs in both courts.

State vs. Jordan.

No. 9853.

THE STATE OF LOUISIANA VS. SPENCER JORDAN.

Burglary is a statutory offense. An information charging that the breaking and entering into was done wilfully, maliciously and *feloniously*, is not defective for not setting forth that the act was done *burglariously*.

A PPEAL from the Twelfth District Court, Parish of Grant.
Blackman, J.

M. J. Cunningham, Attorney General, and *John C. Wickliffe*, District Attorney, for the State, Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The accused moved to quash the information for burglary and larceny filed against him, on the grounds: That it does not charge the essential words to constitute an information for burglary, to wit: *feloniously* and *burglariously* broke and entered the dwelling house in the night time.

The motion was sustained and the information quashed. The State appeals.

The information does not purport to charge burglary into a *dwelling-house*. It charges that the defendant did wilfully, maliciously and *feloniously*, and in the night time, break and enter the *corn crib* of March Scott, * * and having so broken and entered, did then and there, wilfully, maliciously and *feloniously*, one barrel of corn worth one dollar and the property of said March Scott, steal and carry away.

The State says that the information was filed under the provisions of sec. 852, R. S.

That section does not require that the accused be charged with having *burglariously* broken into and entered, etc.

In *State vs. Nelson*, 30 Ann. 1253, the previous court held that the crime of burglary known to our law, is statutory; that the statute defines it, and that we must, therefore, look to the statute to ascertain the essential averments of the indictment.

"It is urged, said the Court, that it is not sufficient to charge that the act was "*feloniously*" done; that the charge should also be that it was *burglariously* done. * * It is sufficient to charge in the language of the statute that the offense had been committed *feloniously*. *Whar. Cr. L. 399; 29 Ann. 602.*

It is therefore ordered and decreed, that the judgment appealed from be reversed; that the motion to quash be overruled and that the case be remanded for further proceedings according to law.

No. 9937.

THE STATE EX REL F. LAMARQUE VS. L. A. BURTHE, RECORDER.

The Supreme Court can exercise its jurisdiction in so far only as it shall have knowledge of the matters argued and contested below.

A *mandamus* will not lie to a recorder for refusing to allow an appeal from a judgment inflicting a fine for the violation of a municipal ordinance, when the constitutionality or legality of the ordinance authorizing the fine was not contested and put at issue before the judgment.

Mandamus does not lie to compel the granting of an appeal in a case which, on the face of the papers, is unappealable.

A PPLICATION for Mandamus.

Belden and *Armbruster*, for the Relator.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The Relator applies for a *mandamus* to compel the recorder to grant him a suspensive appeal from a judgment inflicting a fine on him for the violation of a municipal ordinance, charged with illegality as having been previously repealed.

The recorder, in an elaborate return, denies that the constitutionality or legality of the ordinance was, in any manner, put at issue before him.

The relator has adduced no proof to show the reverse.

This Court surely could, in the exercise of its appellate jurisdiction, review a judgment, for any amount, rendered in furtherance of a municipal ordinance assailed as unconstitutional or illegal, where such judgment has passed on such issue; but in the absence of such plea, it would be powerless to adjudicate upon the correctness of such judgment.

The Constitution vests it with appellate jurisdiction in cases in which the constitutionality or legality of any fine imposed by a municipal corporation is in *contestation*. Art. 81.

"The Supreme Court can only exercise its jurisdiction in so far as it shall have knowledge of the matters argued or *contested* below." C. P. 895.

As the legality of the fine was not *contested* below, it could not be *contested* on appeal.

The recorder has, therefore, properly refused the appeal.

It is, therefore, ordered that the application for a *mandamus* be refused, with costs.

State ex rel. Johnson vs. New Orleans.

No. 9720.

THE STATE OF LOUISIANA EX REL. BRADISH JOHNSON VS. CITY OF
NEW ORLEANS.

In a proceeding by mandamus for the cancellation of an inscription of the drainage tax mortgage, on the ground that the tax is not exigible against relator's property, either for want of consideration or for non-performance of the drainage contract, or on account of previous payment, the controversy does not involve the legality or constitutionality of the tax.

In such case the test of the jurisdiction of the Supreme Court is the amount of the tax in discussion, and the appeal cannot be sustained if said amount does not exceed two thousand dollars.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

T. Gilmore & Sons for the Relator, Appellant.

W. H. Rogers, City Attorney, and *Wynne Rogers* for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. Relator seeks a judgment for the cancellation of the inscription in the mortgage office of drainage taxes in favor of the city of New Orleans against property which he owns in said city.

He predicates the relief which he prays for on the following averments substantially:

1. That said tax rests on no consideration in so far as it is intended to affect the property which he describes in his petition.
2. That said property had already been drained, and the tax for the same had been paid to the New Orleans Draining Company.
3. That the drainage work undertaken by the city of New Orleans, under color of the acts of the General Assembly of 1858, 1859 and 1871, has not been carried on, but, on the contrary, has been abandoned.

The city made no defense, and the district court dismissed the action as in case of non-suit, for the reason that relator had failed to prove the facts necessary to his success.

The amount of the tax complained of is \$1,368.35, and therefore we have no jurisdiction of the case.

As it clearly appears from the allegations which make up the groundwork of the mandamus prayed for, this controversy involves purely and simply questions of fact.

Hence the legality or constitutionality of the tax in suit is not in contestation.

Buckingham vs. Board of Liquidation.

Relator does not complain, allege or intimate that the drainage tax is either illegal or unconstitutional, but his contention is that under the circumstances which characterize the condition of his property in reference to drainage, the tax inscribed against it cannot be exacted, either because it is not due, or because it had already been paid, or because the drainage work, which is the only consideration therefor, has not been carried on, but is abandoned.

These three questions of fact, depending for solution exclusively on evidence, cannot be construed as a contestation involving the legality or unconstitutionality of the tax under discussion.

And that feature of the controversy is the sole condition of our jurisdiction when the amount of the tax does not exceed two thousand dollars. *Gillis & Kennett vs. Assessor*, 33 Ann. 285; *New Orleans vs. Blanks*, 35 Ann. 1201; *Cobb vs. Tax Collector*, 36 Ann. 801; *Breaux vs. Recorder of Mortgages*, 36 Ann. 742.

It is therefore ordered that this appeal be hence dismissed.

No. 9927.

S. M. BUCKINGHAM VS. THE BOARD OF LIQUIDATION.

The *bona fide* holder of State bonds, the genuineness and legality of which is not at issue, issued under Act 69 of 1870, E. S., is entitled to have them funded under Act 3 of 1874, although the books of the Auditor show that more bonds have been funded than were issued.

The plaintiff cannot be made to suffer from the error or fraud committed.

A PPEAL from the Seventeenth District Court, parish of East Baton Rouge. *Burgess, J.*

Kennard, Howe and Prentiss, for Plaintiff and Appellee.

M. J. Cunningham, Attorney General, for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from a judgment which directs the funding of certain bonds held by plaintiff, issued under Act 69 of 1870, E. S.

The Board of Liquidation contends that, acting under Act 3 of 1874, which provides for the funding of State bonds, it has no right to fund bonds of any particular issue, to a larger amount than appears to have been entered.

The legality or genuineness of the bonds held by plaintiff is not at issue.

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It appears from the books of the State Auditor that \$2,950,000 of the floating debt bonds were issued under the act of 1870, and that \$2,962,000 of those bonds have already been funded under the act of 1874, \$12,000 more than issued.

No doubt the entries on the Auditor's books are *prima facie* correct, but what does this presumption amount to when they are self-destructive? Their own recitals establish either that more than the stated number and amount of bonds have been issued, or that among the bonds funded there are some which are spurious.

If the bonds *funded* are all genuine, then the number and amount of bonds *issued* exceed by \$12,000 the bonds funded.

If, on the other hand, the bonds *funded* are in part spurious, for an amount exceeding \$12,000, then the number and amount of the bonds issued include more than \$12,000 of forged bonds.

The plaintiff is a *bona fide* holder of genuine legal bonds, not cancelled, as is done with funded bonds.

It is evident that some error or fraud has been committed somewhere; but, whether the one or the other, the plaintiff cannot be made to suffer. The State must seek relief otherwise than by shutting him out.

Judgment affirmed.

No. 9788.

ANGELO SOCOLA VS. CHESS-CARLEY COMPANY.

A dealer in petroleum fluids, who fills an order for a barrel of "Puroline" by delivering a barrel of "Gasoline" of 74° gravity, and brands the package as "Puroline," is not guilty of deception, as the difference in the dangerous character and in the use of the two fluids is hardly measurable or perceptible; and the package containing the stamp "explosive and dangerous," placed thereon by the inspector under the provisions of Act No. 37 of 1877, regulating the mode of inspecting coal and petroleum oils or fluids.

In a case of a fire originating from the package of such goods, from which oil is drawn in the night by persons who enter the room with a burning lantern, the dealer will not be held responsible for the damages resulting from such fire.

Positive testimony on a given point always predominates over negative testimony on the same point.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

E. H. McCaleb and T. J. Semmes & Legendre for Plaintiff and Appellant:

1. The vendor of illuminating oils is liable to the vendee in damages for the destruction of property by fire caused by the volatilization and ignition of a barrel of gasoline sold as "puroline." R. C. C. Art. 2445; Addison on Torts, pp. 850 and 851; 18 Ann. 332; Thomp-

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- son on Negligence, vol. 1, pp. 232 and 236. The vendor who is a dealer in dangerous agencies liable, though ignorant of the vices of the thing sold. Pothier, *Contrat de Vente*, Part II, Chap. 1, Nos. 203, 213, 214; 2 Ann. R. Q. R., div. 102. The buyer may recover damages for injuries which result from selling property with a false warranty. *Sutherland on Damages*, vol. 2, p. 435; *Laurent*, Tome 24, Nos. 294 and 295; 2 M. & W., 519; 4 M. & W. 337; *Bonnin et Julien c. Gabriel*, Dalloz, 1873, p. 55; L. R. 5 Ex. 1; 2 Selden 397; 11 Allen 578. A dealer in oil is responsible for injuries caused by an explosion. 104 Mass. 64.
2. The article ordered, "puroline," and the article delivered, gasoline, of a high specific gravity and very dangerous, are materially different, and the defendants are estopped from asserting their identity, because (1) of the statements contained in the charter of the "Insurance Oil Tank Co.," of which they are the controlling stockholders; (2) by representing and selling puroline as a patented article; (3) by their circulars; and (4) by their price-cards, in which they are called by different names and sold at different prices. In dangerous agencies mere resemblance is not sufficient—absolute identity is requisite when the article sold is likely to do harm to life or property. 27 A. 713; *Lewin's Cro. Cas.* 169. Stockholders are bound by the acts and representations of the corporation or its agents. 17 Wall. 623; § 17, *Freeman on Judgments*; 13 Ann. 259; 28 Ann. 204; 18 How. 331; § 139, *Boone on Corporations*; *Bigelow on Estoppel*, chap. XIX, p. 473; H. D. p. 512, No. 6.
 3. The defendant had no right to counterfeit the trade-mark "Puroline," belonging to the Insurance Oil Tank Company, upon the barrel of gasoline shipped to plaintiff, and which caused the damage complained of. The unauthorized use of this trade-mark was a fraud upon the purchaser. 33 Ann. 953; 24 Ann. 99; *Sutherland on Damages*, vol. 3, p. 639. An implied warranty is imposed on the vendor who sells an article with a trade-mark. *Benjamin on Sales*, p. 495; *Pardeasus*, vol. 1, p. 196, No. 110; *ib.* 189, No. 163. A purchaser can maintain an action for deceit against his vendor for selling him an article under a false trade-mark. *Croke's Jacobus*; *Upton on Trade-marks*, pp. 10 and 11; *Browne on Trade-marks*, par. 63, 64, pp. 40, 41 and 42.
 4. The barrel delivered by defendant was not branded "*Dangerous and Explosive*," as required by the laws of this State (Act 37, Ex. Ses. 1877, p. 60), and was shipped on a passenger vessel, in violation of the penal statutes of the United States. *Rev. Stats. of the U. S.*, secs. 4474, 4476. These statutes are State inspection laws, passed under the police power. 9 Wall. 141; 97 U. S. 304.
 5. Defendants having suppressed and withheld the testimony of their clerk, who received the order for, and the drayman who hauled, the barrel of fluid in question, every presumption must be taken against them. 2 Ann. 288; 6 Ann. 166; 35 Ann. 694.
 6. The defendant cannot set up plaintiffs alleged contributory negligence as an excuse, because (1) they committed unlawful acts in failing to have the barrel marked as required by the State statute, and in shipping it in violation of the act of Congress, and (2) because they threw plaintiff off his guard. Par. 22 and 23, *Beach on Contributory Negligence*, pp. 69, 70 and 71 et seq.; *Thompson on Neg.*, vol. 1, p. 344; 9 Md. 108; 37 Ann. 31.

White & Saunders for Defendant and Appellee:

The 13th paragraph of Art. 356 defines the term "fault." Now this term "fault" is used in quite a number of Articles of the Code, as a general term denoting both intentional and unintentional violation of another's right. For example, Art. 2721 declares that the lessee is liable for injuries to the thing leased, sustained "through his fault." In Arts. 2071-2-3, relative to alternative obligations, "fault" is again used to denote either intentional or unintentional wrong doing. So, in Art. 1858, which declares that contracts are interpreted against him through whose "negligence or fault" the obscurity arose. In this article the term is manifestly used as more especially denoting intentional wrong

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- doing. And again it is used in this sense in Art. 2370, which provides that the husband is not liable where the dowry was not lost through his "fault or neglect."
- But the article in which the term is used in immediate connection with the subject we are now considering, is Art. 2315. This article declares that: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it."
- The article just cited is a literal translation of Art. 1382 of the Code Napoleon. The commentators are all agreed that the term "faute" in this article means both intended and unintended infringement of the rights of others. For example, Mourlon, commenting on Art. 1382, says: "La faute est un délit lorsque l'argent du dommage l'a causé avec intention; un quasi-délit dans le cas contraire." (Vol. 2, p. 892.)
- So Marcadé, vol. 5, p. 265: "La loi s'occupe simultanément des délits et des quasi-délits dans les Arts 1382 et 1383, puisqu'elle y consacre l'obligation résultant de tout acte préjudiciable et fautif sans distinguer si cet acte a été ou n'a pas été accompagné de l'intention de nuire."
- And Laurent, vol. 20, p. 406: "La loi prend le mot 'faute' dans sa plus large acception; il comprend toutes les causes d'imputabilité, depuis le dol jusqu'à la plus légère imprudence; donc les délits aussi bien que les quasi-délits."
- In other words, the term "fault" in our Code is "*nomen generalissimum*," and designates intentional wrongs as well as those which happen through negligence or inadvertence. "Fault" is thus the generic term; negligence a specific term. "Fault" denotes all wrongs, both intentional and unintentional; "negligence" denotes only unintentional wrongs.
- When, therefore, our Code defines "fault," and distinguishes its several divisions, it is illogical to claim that the definition and division given are intended to apply also "negligence."
- But it may be urged though "fault" is sometimes used as a generic term, yet in the definition of it given in our Code it is taken in a narrower sense, as the equivalent of negligence.
- There does not seem to be any ground for this assumption, but if it were conceded, the only result would be to make the definition unmeaning. For, if we assume that by "fault" is intended "negligence" in this definition and substitute the latter term for the former, the definition would then read thus: "The gross negligence is that which proceeds from inexcusable negligence or ignorance."
- More briefly: "Gross negligence is inexcusable."
- So is ordinary or slight negligence. The doer of an injury is liable whether his negligence was gross or ordinary. Gross negligence and slight negligence would thus be confounded and identified by the very definition which is supposed to distinguish them.
- The assumption that "*culpa*" is used and defined in the Roman law as a technical term, signifying simply what "negligence" signifies in our law is, in our judgment, equally unfounded. The term "*culpa*" is used in the Roman law with a signification as broad as that which "*faute*" has in the French law, or which "fault" or "wrong" has in our law. For example: It was a rule of the Roman law that responsibility did not attach for failure to prevent an injury which it was out of the power of him who foresaw it to prevent—"Culpa caret, qui scit, sed prohibere non potest," l. 50 de *directis regulis*. He is without fault, etc. And where *vis major* is declared to release from responsibility, the language is "*Ejus vero nulla culpa est, cui parere necesse sit*." (L. 169 Id.) That is, though the act was intended, it was without fault. So, a surgeon who deliberately abandons a patient, after amputating a limb, and when he must know that such abandonment will endanger the patient's life, is declared to be *culpæ reus* (Inst. Lib. IV. T. 3. 86), that is, guilty of a legal fault which, by hypothesis, is intentional, not inadvertent.
- The "*culpa*" to which the Aquilian law related was, of course, usually that form of "fault" which results from negligence. But, as we have just seen, the term was, by no means,

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invariably used in this restricted sense. The definitions cited from the 16th title of the 30th Book of the Pandects, are unsatisfactory and of little value, as they are simply a few pointed expressions taken from the context which showed the particular phase of "culpa" which the author was discussing. It seems, probable, however, as Pothier intimates in his edition of the Pandects, that these definitions relate to negligent breaches of duty in connection with the several contracts of bailment. The comparison of great negligence with intentional wrong-doing, has a significance and propriety in these particular relations which are altogether wanting in the case of "culpa" unconnected with contract.

We see, then, that "culpa," in the Roman law, is either "fault," and thus a term of much wider significance than "negligence;" or else it is that phase of negligence which is shown in connection with the contracts of bailment, and so, in this restricted sense, as much too narrow, as in its more general sense it is too wide. In either sense it is not negligence unconnected with contract, and therefore is not the matter we are now discussing. We may remark here, that the mediæval and modern attempts to classify and divide negligence have appeared in professed treatises on bailments, and the cases stated to establish and illustrate the divisions are drawn from those contracts. The efforts to extend this classification and division to negligence, unconnected with contract, has given rise to infinite confusion.

As the Roman law and code definition throw no light on the subject, we must consult the anglo-American text writers and decisions, with whose principles and terminology our jurisprudence on the subject of negligence is much more closely connected than it is with the Roman law. For it should be observed that the term "gross negligence or carelessness" appears not in the Code, but in a very modern statute—one passed in 1877. The term is a recognized technical term, of every day occurrence in general American jurisprudence, and its meaning has been extensively discussed by courts and authors during the past half century. The literature on the subject is found in all the works on torts, negligence and damages, which make a part of the working library of every lawyer in the State. It is far more likely, then, that the term was used in the sense familiar to the Legislature which enacted the law, than in a sense which learned research might disputably and doubtfully give it in the Roman law.

2d. The sense of gross negligence or carelessness in anglo-American jurisprudence.

Modern judges and text writers have, with great unanimity, repudiated the attempt to engraft on the general law of negligence unconnected with contract the distinctions elaborated by mediæval choicists as to negligence in connection with the several contracts of bailment.

Says Sutherland, J. in *Wells vs. R. R. Co.*, 24 N. Y. 186: "It has been doubted of late whether the formal division or classification of negligence in the abstract into gross, ordinary and slight, recognized in the books, has been useful; indeed, whether it has not tended to produce confusion. This classification of negligence which grew out of the classification of bailments, and which has been considered more particularly applicable to questions of negligence between bailor and bailee, is founded upon but one circumstance, that is, the circumstance of the benefit to the bailor, or to the bailee, or of mutual benefit. This circumstance, either of mutual benefit, or of benefit to one or other of the parties only, being a circumstance common to all bailments, was made the foundation or principle of the classification; but it is evident, from the very nature of the subject, that it is and must be a mere abstract, philosophical classification, of little or no use in practice. Courts deal with cases."

In another case (*Perkins vs. Railroad Co.* p. 206), in the same volume, the organ of the Court says: "I think, with Lord Denman, who, in *Hinton vs. Dibbin* (2 Q. B. 661), said: 'It may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists.' Judge Curtis (in 16 How. 474) also says:

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'It may be doubted whether the terms slight, ordinary and gross negligence can be usefully applied in practice.'

'The difficulty of defining gross negligence, and the intrinsic uncertainty pertaining to the question, as one of law, and the utter impracticability of establishing any precise rule on the subject, renders it unsafe to base any legal decisions on distinctions of the degrees of negligence.'

The Supreme Court of Massachusetts has announced the same view in *Gill vs. Middleton*, 105 Mass. 478, where they say: "The law furnishes no definition of gross negligence, as distinguished from want of reasonable and ordinary care, which can be of any practical utility. * * * The degrees of negligence, so often spoken of in the text books, do not admit of such precision and exactness of definition as to be of any practical advantage in the administration of justice, without a detail of the facts which they are intended to designate."

The Supreme Court of the United States has also reached the conclusion that the distinction between gross and ordinary negligence is impossible of definition or practical application.

In *Steamboat vs. King*, 16 How. 474, the Court say: "It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. * * * If the law furnishes no definitions of the terms 'gross negligence,' or 'ordinary negligence,' which can be applied in practice, but leaves it to the jury to determine in each case what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned."

Subsequently, in *R. B. Co. vs. Arms*, 81 U. S. 494, they quote, with approval, the case last cited. They say that they have there "expressed their disapprobation of these attempts to fix the degrees of negligence by legal definitions." Further on, after quoting, with approval, the English cases, they say, "* * * but, after all, it (gross negligence) means the absence of the care that was necessary under the circumstances."

The English cases are equally clear. In *Wilson vs. Brett*, 11 M. & W., 113, it is said that "gross negligence is ordinary negligence, with a vituperative epithet." And in *Gill vs. General, etc., Co.* (L. R. C. P. 1), the Court, after repudiating the distinction between gross and ordinary negligence, remark: "Gross is a word of description, and not of definition, and it would be only introducing a source of confusion to use the expression, 'gross negligence,' instead of the equivalent, 'a want of due care and skill.'"

Finally, Chancellor Kent long ago declared that 'gross neglect is the want of that care which every man of common sense, under the circumstances, takes of his own property. (2 Com. 560.) This definition, it will be observed, confounds gross and ordinary negligence, as understood by plaintiff's counsel. A recent English writer (Smith on Negligence, p. 21) remarks: 'The words 'ordinary' and 'reasonable' are, no doubt, vague; but the subject is only further obscured by the introduction of the words, 'gross' and 'slight,' because nobody can really say what they mean, though anybody may easily give to them some peculiar or exaggerated meaning.'

The opinion of the Court was delivered by

POCHÉ, J. This is a suit for damages in the sum of \$17,275, in which plaintiff appeals from a judgment rejecting his demand.

The principal facts are as follows :

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A rice mill, situated in the parish of Plaquemines, about 45 miles below this city, and owned by plaintiff, was totally destroyed by fire on the night of September 11, 1885.

The fire originated in a warehouse adjoining the mill, in which was stored a barrel of petroleum oil or fluid, used for illuminating purposes when the mill was run at night. While two of the mill employees were engaged, a short time after midnight, in drawing some oil from the barrel, in order to replenish the lamps of the mill, an apparently spontaneous combustion occurred in the room, which ignited the barrel. The fire then spread from the warehouse to the mill, which was in a short time destroyed with all its appurtenances.

The barrel of oil or fluid had been purchased by plaintiff from the defendant company, by which it had been shipped by boat to the mill on the 7th of September, according to plaintiff's directions.

In his pleadings, plaintiff holds the defendant company responsible for the destruction of his mill, for the following reasons, substantially:

1st. That his order of September the 7th was for a barrel of "puroline," a burning fluid extensively used in illuminating sugar-houses and rice mills with safety, and that instead thereof, the defendant shipped to his mill a barrel of "gasoline," an exceedingly dangerous fluid.

2d. That with a fraudulent design the defendant caused the barrel of "gasoline" thus shipped to his mill, to be branded as "puroline," and purposely omitted to mark said barrel of oil, as "dangerous and explosive," as required by law.

3d. That through the deception thus practiced on him by the defendant, plaintiff used said "gasoline" in his mill contrary to a prohibition against the use of the same, in the fire insurance policy which he held, in consequence of which he was defeated in an action which he instituted in the Circuit Court of the United States, Eastern District of Louisiana, for the recovery of the amount of said policy.

4th. That the fire resulted from defendant's fraudulent substitution of "gasoline" for "puroline," and not through the carelessness or negligence of plaintiff or of his employees.

Hence he claims damages for the value of his mill and appurtenances which he fixes at \$11,275, and for the profits, which he lost by the fire during that season, in the sum of \$6000.

The defense is a general denial, followed by the special averments that the article which was delivered to plaintiff was a fluid of the nature and quality which he had ordered; that the barrel was marked "explosive and dangerous;" that the damages sustained by plaintiff

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were brought about by his gross carelessness and negligence, in making use of said fluid in an improper manner.

The pivotal point in the controversy is the alleged deception practiced on the plaintiff by the defendant, in the substitution of "gasoline" for "puroline," and designedly omitting to brand the barrel with the words "explosive and dangerous."

Its proper discussion involves an investigation of the difference which may exist between the dangerous and explosive character of the two fluids.

In this connection the voluminous record in the case discloses to our minds the following facts:

"Puroline" and "gasoline" as sold and used for illuminating purposes are both petroleum products, and both are gas generating fluids. From the testimony of chemists, and of other experts, and of dealers in such articles, it appears to our entire satisfaction, that the difference of danger between "puroline" and "gasoline" of 74° gravity, is so slight and insignificant that it is hardly measurable, or, even perceptible.

It also appears that in the trade, orders for "puroline" are frequently and almost usually filled by delivering 74° "gasoline." And circulars issued and distributed all over the State by different dealers in these articles, contain the statement that 74° "gasoline" is of the same gravity as "puroline." In both, the danger is not from explosion while burning in lamps, but from handling in the proximity of a light, on account of the gas which they generate and liberate from packages which are not air-tight, and which gas is inflammable.

Under the provisions of Act 37, approved April 2, 1877, entitled an act "To provide for gauging and inspecting coal oils and illuminating oils or fluids, derived wholly or in part from coal or petroleum, to regulate the sale or disposition of the same," etc. An inspector is appointed in the city of New Orleans to carry out the purposes of the act.

Among other duties which are imposed on him by the act, the inspector is required after inspection, to brand the barrel or other vessel containing any such products of coal or petroleum, whose flashing point shall be less than 125°, with the words "explosive and dangerous," to be stamped with stencil or otherwise in a conspicuous place.

Now the present inspector, who has been in office since 1880, testifies that in his inspection he ranks "puroline" and "gasoline" alike as to the flashing point, and that he invariably brands them both as "explosive and dangerous," and from the testimony of his predecessor's deputy, it appears that the same rule was followed in his time.

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It is in proof that plaintiff, who resides in this city, had entrusted the management of his mill to an agent who was to participate with him in the profits of the enterprise, and that the barrel of oil had been ordered at his request, which was based on his experience in the use of that kind of illuminating fluid. Plaintiff himself was not familiar with it, and was throughout these transactions guided by the judgment of his agent, to whom the bills for all supplies sent to the mill were forwarded, and they were paid only on his approval.

Now, it appears that on the 13th of August previous, a similar order had been filled by the defendant, who had shipped thereunder precisely the same article, which was delivered on the 7th of September, stamped in the same manner, and that the bill which the company presented described the goods delivered as "*gasoline, 74°.*" The bill was forwarded to the agent, the fluid was used by him, and no complaint was made by him or by plaintiff.

The agent had died before the trial of this case, and the Court is thus deprived of the benefit of his testimony on a subject peculiarly within his knowledge.

We conclude that the mere substitution of "*gasoline, 74°.*" for "*puroline,*" under circumstances showing that the difference is only in the name of the goods, was not deception or fraud on the part of defendant.

But plaintiff's main contention on this point is that the barrel under discussion was not branded in the manner required by law, with the words "*explosive and dangerous,*" and that the omission in that particular was part of the scheme of deception practiced on him by the defendant.

He rests that part of his case on the testimony of five witnesses, all employees in and about his mill, who testify that they saw the barrel in question after it had been landed from the boat, and that it did not contain the words "*explosive and dangerous.*"

These witnesses were skilled laborers at rice-milling; neither of them was entrusted with the care or control of the lamps or of the oil used therein; that duty was incumbent on another employee, whose testimony was not taken. They did not, and they do not even pretend that they did, examine the barrel in a particular manner, or with a definite object in view, and their testimony was given in April, 1886, more than six months after the fire, which had also destroyed the very barrel which was the subject matter of their testimony.

From impressions produced from the stencil plates used by the defendant and by the inspector, it appears that the company stamps one

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end of the barrels as follows: "Insurance Oil Tank Co., New Orleans, La., Trade-mark Puroline, 95 and 97 Gravier street, N. O. I. O. T. Co;" and that the inspector brands on the other end the following words: "Eugene Legardeur, Gauger and Inspector coal oils (50) gallons, flashing point, 0 degrees; New Orleans, May, 1886. Explosive and dangerous."

In both inscriptions the words are grouped together in a circular form, the circle in the inspector's brand being not quite completed, so as to leave room for the address of the purchaser or consignee.

Now, the witnesses who have testified on this point, when asked to specify the particular inscriptions which they had noticed on the barrel in question, all stated with striking unanimity that they had seen the following words: "Chess-Carley Company, Puroline, 50 Galls."

It thus appears that they saw words which are not at all in either stencil plate, which is branded puroline, and that they saw the word "gallons" on that end of the barrel which never contains that word according to the stencil plates. These circumstances illustrate the natural unreliability of human memory, as well as the innate weakness of negative testimony. The same uncertainty is further illustrated by the testimony of one of those witnesses, who had gone from this city to the mill on September 9, on a steamboat, and who could not remember the name of the boat on which he had made the journey, but who remembered specially the letters which were inscribed on the end of the barrel.

In contrast with this testimony which leaves the judicial mind in a state of painful uncertainty and doubt, we have that of the inspector and his deputy, and of several clerks, warehousemen and other employees of the defendant, who state positively that no barrel oil or fluid leaves the warehouse without inspection, and without the proper brand. One of the clerks remembers the brand and the address of plaintiff on the barrel, which corresponds in date with the order of September 7, and with the entry in the shipping or delivery book.

Positive testimony on a given point always predominates over negative testimony on the same point. *Story vs. Insurance Co.*, 37 Ann. 255; *Guesnard vs. Bird*, 33 Ann. 796.

We conclude that the barrel of oil shipped to plaintiff by the defendant on September 7, 1885, did contain in a conspicuous place the words "explosive and dangerous," and that the company is not amenable in this suit to the penal clause in the act of 1877, which reads as follows: "Any person, firm, company or corporation, violating any of the provisions of this section, shall be liable to a penalty not exceeding

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the sum of two hundred dollars for each and every offense. It is further provided that, in the event of any injury or damage to person or property resulting from or caused by such oil or fluid not so stamped, the party thus suffering shall have a right of action in damages against the person, firm, company or corporation selling, giving or delivering such oil or fluid, for the full amount of such injury or damage, together with all costs of court. * * * Provided further, that such injury or damage shall not have been the result of gross negligence or carelessness."

We now reach the point at which we must consider what cause in our opinion led to the destruction of the mill.

As already shown in this opinion, the consumers of the oil or fluid which had been shipped to plaintiff on the 7th of September, 1885, were warned of its dangerous character under the authority of the State itself, by means of the stamp which she required from all dealers in that kind of illuminating oil.

It is also in proof that with every package containing such fluid, even when stamped with the trade-mark "Puroline," the dealers sent to their customers printed circulars containing directions for the proper use of the fluid.

These circulars contained cautions of which the following is a sample :

"Puroline is absolutely non-explosive, but like alcohol is inflammable; therefore, the reservoir should not be filled when the gas is burning or near a flame. *Lamps should always be filled in day time.*"

It also appears that from the volatile character of the fluid, the principal danger was from the generating and liberating of gas, if the package was not air-tight. Hence in the warehouse great caution is exercised in that direction, in trying to make barrels as safe as possible by fresh paint outside and by means of glue inside.

All these circumstances and elements of danger were known to the agent, who, in consequence had placed the whole control and management of the lamps and fluids under the exclusive charge of one man, and had issued orders forbidding the handling of fluids in order to replenish the lamps, at night, or soon after 5 o'clock p. m.

But it happened that the man in charge of that department was sick at the time that the barrel was delivered at the landing during the night of September 7, and that the barrel was not stored for two days during which time it laid exposed to a September sun in Louisiana. It ceases to be a subject of wonder to account for the gas which was subsequently liberated from that barrel.

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Now, it appears that in spite of all these elements of danger, of all these warnings and conditions, and in utter disregard and violation of the rules of the mill, two employees went into the room where that barrel was stored at midnight, with a burning lantern, in order to draw therefrom the fluid needed to replenish some of the lamps used in the mill. The result was the fire which destroyed the mill and subjected its owner to a heavy loss.

For the purpose of our decree it is not necessary that we should charge the loss to the gross carelessness or negligence of plaintiff, or of his employees, but we are thoroughly convinced that plaintiff has utterly failed to fasten responsibility therefor on the defendant company.

In view of plaintiff's averment that, owing to the use of "gasoline" as an illuminating fluid in his mill, under the deception practiced on him or his agent by the defendant, he had been defeated in his suit for the recovery of the insurance thereon, we have given full and more than ordinary consideration to every feature of his case, and to every circumstance which might tend to relieve him from the hardship of an entire loss, notwithstanding his prudent caution on the subject of insurance. But we are powerless to afford him any relief on the score of his lost policy. We have no concern with the judgment rendered in that controversy by a court of competent jurisdiction and of his own choice.

We have even no means of ascertaining the precise ground on which the insurance company was relieved of the burden of its contract.

But, in so far as our record goes, we are inclined to think that the assertion that the judgment of the Circuit Court vested solely on the broken condition which prohibited the use of "gasoline" in the mill, is not borne out.

The condition in the policy reads: "The generating or evaporating within the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, is prohibited."

Now, the Circuit Court may have had evidence satisfactory to show that under the prohibition there was no practical difference between "puroline" of 68° and "gasoline" of 74°.

We noted also that in its answer the insurance company had set up the additional defense that plaintiff had run his mill at night without previously obtaining the company's written consent. In its reasons

World's Exposition vs. Railroad Company.

for judgment the Circuit Court "finds the issues of fact in favor of the defendant," and it is not a violent presumption to believe that the judge had considered both grounds of defense as good.

It is thus clear to our minds that that judgment and our decree are not absolutely irreconcilable, and both may stand in law and justice, on their respective grounds.

Judgment affirmed.

No. 9931.

THE WORLD'S INDUSTRIAL AND COTTON CENTENNIAL EXPOSITION VS.
THE CRESCENT CITY RAILROAD COMPANY.

When a party appeals, but fails to bring up his appeal in time, and it is filed after the return day and dismissed, he cannot, under another order, bring up a second appeal. The appeal will be considered as abandoned.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Gus A. Breaur and E. M. Hudson for Plaintiff and Appellant.

John M. Bonner for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. This is the second appeal in this case.

In the first appeal the transcript was not filed in time, and the appeal, on motion, was dismissed. Subsequently, the appellant filed a petition for an appeal and obtained another order, and under that order brings up the present appeal.

There is a motion to dismiss the appeal, substantially on the ground that the first appeal having been dismissed because not filed in time, the appeal must be considered as abandoned, and that this second appeal should not be entertained.

The motion must prevail. We see nothing whatever to distinguish this case from those of *Pierce vs. Cushing*, 33 Ann. 810, and *Sterling vs. Sterling*, 35 Ann. 840, where, after a thorough review of our jurisprudence on this point, we reached a conclusion similar to the one now announced. *Ducournau case*, 3 Ann. 245; *Ducournau vs. Levinstone*, 4 Ann. 30; *Brickell vs. Conner*, 10 Ann. 235; *Redmond vs. Mann*, 29 Ann. 149.

Appeal dismissed.

 State vs. Travis et als.

No. 9861.

THE STATE OF LOUISIANA VS. QUINCY TRAVIS ET ALS., PRINCIPALS,
AND W. E. PRATT ET ALS., ACCESSORIES BEFORE THE FACT.

Where a number of persons are on trial charged in one indictment with arson—the burning of a court-house—some as principals and the others as accessories before the fact, evidence is admissible as against two of the parties to prove that, when the building was burned, there were two indictments on file therein against them for other crimes, in order to show a motive for the commission of the arson and as a circumstance going to establish their guilt; and this fact can be proved without first showing a conspiracy between the parties. The question of conspiracy is not involved.

Where there had been a conversation between a witness and one of the accused in a matter bearing on the charge being tried, it is permissible to give the entire conversation, and the witness is not to be restricted to what the accused said to him.

Where, after the State had closed, a motion is made to discharge one of the accused for the purpose of making him a witness for the others, on the ground that no evidence had been adduced against him the determination of the motion rests largely within the discretion of the trial judge, and where it is refused for the reasons stated by the judge that there *was* inculpatory evidence against him, the ruling will not be disturbed, unless it is made clear that it was unfounded and arbitrary.

Where an indictment contains a charge against certain of the defendants as principals and another charge against others as accessories, it is sufficient that it close with the usual words “contrary to the form of the statutes, etc.,” and this language need not be repeated after each count.

A PPEAL from the Fourth District Court, Parish of Winn.
Bridger, J.

M. J. Cunningham, Attorney General, and *Geo. Wear*, District Attorney, for the State, Appellee.

B. P. Edwards and *Patterson & Dormon* for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. Quincy Travis and Richard Travis, as principals, and W. E. Pratt as accessory before the fact, were convicted of arson—the burning of the court-house of Winn parish—and appeal from a sentence imposed of seven years imprisonment at hard labor.

I.

Our attention is first called to several bills of exceptions, taken to the rulings of the trial judge.

The first bill shows:

That against Butler and Pratt, it was offered to show “that there were indictments pending and on file in the court-house at the time it was burned—offered for the purpose of proving a motive for the arson charged and a circumstance tending to show their guilt.”

It was objected to on the ground that there had been no conspiracy proved, and that motive could not be proved until a conspiracy had been established.

The objection was overruled and the proof admitted.

The ruling was proper. There was no force or even pertinency in the objection.

The burning of the court-house had been proved; and the judge states that it had been shown that the burning was the act of an incendiary or incendiaries.

The proof was offered solely against the two accused, who were under indictment for another offense, the indictments alleged to be on file in the court-house when burned.

There was no question of conspiracy in the matter. Had proof been offered of some statement made or some act done by one of the accused out of the presence of the other, intended or calculated to implicate the latter in the crime charged, then it would be proper and legitimate to invoke the principle that proof of such statement or act could not be shown to affect the accused not present until a conspiracy between the two had been shown at least by *prima facie* proof.

Here the fact sought to be proved did not involve the act or the statement of either of the accused.

They were charged with the burning, or the procuring the burning of the court-house, and it was important and entirely proper to show that there were documents in the building burned that involved and necessitated their prosecution for crime and therefore they were specially interested in destroying them and, in other words, that there was a powerful motive for the perpetration of the act charged against them; and that proof of such motive would, in itself, be a circumstance tending to establish their guilt. As stated there was no error in the ruling.

2. The second bill of exceptions shows that a witness on the stand was proceeding to relate a conversation between himself and Pratt, one of the accused, who, after testifying to a statement or proposition made to him by the accused, was on the point of giving the accused's reply thereto, when such reply was objected to as irrelevant.

We think, under the facts detailed by the judge, that it was proper to give the entire conversation.

There is no rule of law that excludes the reply of a witness to a question, proposition or remark of an accused. If such reply or the fact or statement embraced in it is silently or expressly acquiesced in,

State vs. Travis et als.

it may be just as legitimately used against the accused and affect him, as if the words were spoken by himself.

The testimony was properly admitted.

3. On the cross-examination of one of the State witnesses, he was asked about the arrest of a Mrs. Weaks, not a party to this prosecution, and how she was treated. It was objected to, and the court refused to permit the questions to be answered. His ruling was correct, since the proffered evidence was clearly irrelevant and was offered solely in the interest of Kelly, one of the accused on trial, who was acquitted.

II.

There was a motion for a new trial filed and overruled. The grounds of the motion were :

1. That the verdict was contrary to the law and the evidence.

As we have often said before, we are powerless to review the ruling on this point. The trial judge asserts in the reasons for his ruling that this was not true; that the guilt of the parties was established beyond all doubt. We cannot gainsay it; in fact, can say nothing about the facts or the proof.

2. The second ground is to the effect: that, after the State's evidence was closed, there was a motion to discharge Stringer, one of the parties tried, for the reason that there was no evidence inculcating him; his discharge at this stage of the trial being desired in order to procure the testimony of Stringer's wife in behalf of the other accused.

The judge refused the motion to discharge, for the reason stated by him that it was not true that there was no evidence against him (Stringer). That there was evidence against him and to such an extent, that no case was presented for a special verdict in his favor. The judge's finding on this point is final. Wharton Cr. Law, 3d ed. p. 1036; 27 Ann. 395.

3. That, by the acquittal of Stringer, Mrs. Stringer has become a competent witness, and that on another trial the accused could prove by her an alibi. The accused swore to this, but they were not supported by the affidavit of Mrs. Stringer or any other corroboration as required. State vs. Edward, 34 Ann. 1012. Besides, Stringer himself had sworn to the same effect, and that of his wife would have been merely cumulative. 6 Ann. 652; 7 Ann. 284.

The new trial was properly refused.

III.

There was a motion in arrest of judgment, substantially on the ground that the information contained one charge against some of the accused as principals in the crime, and another charge against the others as accessories before the fact, and that the charge against each should have concluded with the words "contrary to the form of the statutes and against the peace and dignity of the State." Such language is found at the close of the indictment, and that suffices. Archbold, Cr. Prac., 8th ed., p. 71.

We can find no ground of relief for the accused in the entire proceedings.

Judgment affirmed.

No. 9910.

J. W. JACOBS VS. YALE & BOWLING.

Where an appellee files an answer to the appeal, wherein he seeks to increase the judgment in his favor, he waives his motion to dismiss the appeal for formal irregularities.

One who sells an immovable to another, with full warranty, and afterward has conveyed to him an outstanding interest in the property, thereby cures the defect in his original title, which ensures to the benefit of his vendee.

If such outstanding interest is conveyed to the wife of the vendor, in community with him, it is the same as if conveyed to himself. Neither the wife or any vendee of his acquires any title to this outstanding interest in the property.

A PPEAL from the Eleventh District Court, parish of Natchitoches.
Pierson, J.

Egan & Pierson, for Plaintiffs and Appellants.

W. J. McDonald and *E. E. Buckner*, for Defendants and Appellees.

The opinion of the Court was delivered by

TODD, J. There are two appeals in this case, one from an order dissolving an injunction on bond, and another from a judgment on the merits.

Except on the ground of want of jurisdiction *ratione materiæ*, embraced in one of the motions which we must notice on our own motion, we cannot consider these motions, since they were waived by the appellee's answer to the appeal, wherein they asked that the judgment be affirmed, and for \$300 damages for a frivolous appeal.

We could not grant these damages, or even affirm the judgment unless we take cognizance of the appeal. We could not affirm the

39	359
52	1262
39	359
121	415

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judgment appealed from, and could not award the damages claimed except by a decree of this Court, and we could render no decree or judgment unless we recognized and maintained the appeal, and ignored the motion to dismiss.

The prayer of the petition is for the rescission of a sale, the recovery of \$1675 paid on the price, and of \$2040, the value of the improvements made by the vendee on the land sold, which shows plainly that this Court has jurisdiction of the cause.

The motion to dismiss appeal is therefore denied.

ON THE MERITS.

Yale & Bowling, the defendant, to enforce a special mortgage securing the unpaid residue of the price of a tract of land, sold by them to the plaintiff, obtained an order for the seizure and sale of the property. The plaintiff enjoined the execution of this order, on the ground that Yale & Bowling, his vendors, were not the owners of one undivided half of the land sold, and that he (plaintiff) was about being evicted therefrom, through a suit then pending in another court, to that end. He asked that the sale be rescinded, and that Yale & Bowling be compelled to return him the part of the price he had already paid, and compensate him for the value of his improvements on the land.

The defense substantially is :

That the plaintiff is under no real danger of eviction, that the suit referred to, purporting to be instituted to evict him, is a fictitious proceeding, gotten up by the plaintiff and his father-in-law, confederating with him for the purpose of defeating the collection of the debt, and defrauding them out of the same.

The facts bearing on this controversy are substantially these :

The land mentioned was conveyed in December, 1871, by one John Barron to his brother, L. G. Barron, Sr. This sale was made after the death of the wife of John Barron, and the property had been acquired during the marriage of said Barron and wife, and belonged to the community resulting from their marriage. On the 8th of February, 1882, the property was mortgaged by L. G. Barron, Sr., to Yale & Bowling for \$7000, and on the 29th of March following, was sold by Barron to Jacobs, the plaintiff, on terms of credit, the instalments of the price being evidenced by notes of the buyer.

On the 17th of April following, Jacobs reconveyed the property to Barron, and, on the same day, Barron transferred it to Yale & Bowling, in settlement of his indebtedness to them, and they then con-

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veyed it to Jacobs for \$3100, divided into two instalments of \$1550 each. It is for the last instalment that the order of seizure and sale issued.

Jerome and L. G. Barron, Jr., purport to have conveyed to Mrs. L. J. Thompson, the wife of L. G. Barron, Sr., on the 4th of May, 1883, the undivided half of this land, claimed to have been inherited from their mother, Mary Barron, for the stipulated price of \$800. The deed was passed in Texas, where the vendors lived at the time, and was procured by L. G. Barron, Sr., his wife, the deceased vendee, not being present.

In regard to this conveyance of the half interest, it is shown by the testimony of L. G. Barron, Jr., one of the alleged vendors, that no money was paid, that no consideration passed, but that, using his language, "He gave his uncle (L. G. Barron, Sr.), the deed, to cure the defect in the title which his father, John Barron, had made to him, L. G. Barron, Sr."

If it had been a real sale it would not have conveyed the property to Mrs. Barron, but to the community of which, Barron, the husband, was the head and master. And inasmuch as Barron had once sold this land to Jacobs and subsequently to Yale & Bowling, with full warranty, this conveyance which cured the defect in his original title from John Barron, enured to the benefit of his subsequent vendees; and therefore leaves the complaint of Jacobs in the present suit, in which he resists the demand of the defendants, Yale & Bowling, without any foundation whatever.

This undivided half interest purporting to have been conveyed to Mrs. Barron was subsequently conveyed to one E. H. Carter, of Texas; and this Carter is the nominal plaintiff in the petitory action alleged to be pending in the United States Court of Shreveport, La., and through which Jacobs fears eviction from the premises.

It is evident from the character of the conveyance to Mrs. Barron, that she had no title to the land, and could convey none to Carter. But Carter's testimony was taken and is in the record, from which it appears that he knows nothing about this alleged purchase by him. He states in substance that he personally never bought the land, had never seen it, and knew nothing of its value; that if there was a conveyance of the land to him, it must have been made with his agent at Shreveport; but if it was made, he, Carter, had never been apprised of it.

We are satisfied from these facts, and from other evidence in the record strongly corroborative, that this sale of an outstanding title in

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the land, and a suit for its recovery, and the threatened eviction of Jacobs from it, is a fraudulent scheme gotten up by Barron, the father-in-law of Jacobs, to enable him to resist the payment of the price he obligated himself to pay Yale & Bowling for the property. We believe that Barron is the real person in interest, and Jacobs but a party interposed.

There is no reality or merit whatever in the defenses set up by Jacobs against the demand of Yale & Bowling, and the process taken out by them to enforce it. Such seems to have been the conclusion of the district judge and we are satisfied that he was right.

The judgment of the lower court is therefore affirmed with costs.

No. 9918.

SUCCESSION OF CHAS. M. PILCHER.—ON APPLICATION TO HOMOLOGATE ACCOUNT AND TABLEAU OF DISTRIBUTION.

ON MOTION TO DISMISS.

Notwithstanding the clerk's certificate is not technically sufficient, and the transcript contains neither a statement of facts, note of the evidence, bill of exceptions nor assignment of errors—the appellant having been absent from and taken no part in the trial, though constructively, a party to the proceedings—the appeal may be likened to one brought up by a third person, resting his claim to relief upon questions of law alone. The irregularities in the mode of bringing up such appeal may be disregarded by the court when the questions relied upon as determining the right sufficiently appear from the transcript.

ON THE MERITS.

In the absence of proof to the contrary, it will be assumed that every fact essential to the validity of the judgment, was proven in the court below.

A partnership once formed and put into action, becomes, in contemplation of law, a moral being, distinct from the persons who compose it.

It is a civil person, which has peculiar rights and attributes. The partners are not the owners of partnership property.

It belongs to the ideal being, which has the control and administration thereof, to enable it to fulfill its legal duties and obligations. The partners own the *residuum*.

Partnership property—whether ordinary or commercial—is liable to creditors of the partnership in preference to those of the individual partners.

Notwithstanding the interest of the deceased member of an ordinary partnership is subjected to administration as his other property, funds realized from the sale thereof cannot be withdrawn from partnership creditors and applied to minors' claim to \$1000.

APPEAL from the Eighth District Court, parish of East Carroll.
Delony, J.

W. G. Wyly, for the Appellant.

J. M. Kennedy, for the Administrator, Appellee.

39 362
52 1365
39 362
107 320
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110 700
39 362
117 790

Succession of Pilcher.

The opinion of the Court was delivered by WATKINS, J.

ON MOTION TO DISMISS.

1st. That the clerk's certificate is insufficient because it does not recite that the transcript contains "all the evidence adduced on the trial."

2d. The transcript is incomplete because it contains no note of evidence, no statement of the facts proven on the trial, and no bill of exceptions, nor assignment of errors filed in this Court.

An examination of the record discloses that the appellant was only, constructively, a party to the record by newspaper publication of notice, and that he did not actually participate in the trial of the account and tableau of distribution.

Hence his appeal is to be viewed rather in the light of one taken by a third party resting his pretensions to relief upon the face of the papers, the correctness of which he concedes *in point of fact*, but the *legality* of which he puts at issue.

"Although a case, the transcript of which comes up without the evidence or any statement of facts, cannot be examined on the merits the court will *consider and decide the questions of law* presented by bills of exception." 7 La. 173; 12 La. 415; 12 Ann. 332.

Under this view of the case, we have chosen to disregard the technical insufficiency of the certificate suggested—a fault not attributable to the appellant—and proceed to the examination of the case.

Motion to dismiss overruled.

ON THE MERITS.

The *principal* contention of the appellant is that the \$1000 allowed the minor child of the deceased, who was at his death, in August, 1885, left in necessitous circumstances, is largely, if not entirely, taken from the proceeds of the sale of the interest of the deceased in the planting partnership of Embry & Pilcher, of which he was a creditor for a large sum, with privilege and right of pledge upon the assets thereof.

It is shown, as well as conceded, that in any event the succession of the deceased is insolvent for a large amount.

His argument, predicated upon these facts, is that the judgment of homologation is erroneous in allowing the \$1000, thus withdrawn from a fund that should be *exclusively* applied to the debts of the *partnership*, and only the surplus applied to debts of the *deceased*. He insists that from the total proceeds of Pilcher's half of the partnership crop and movables, \$7,287.11, he should be paid by *preference* over all other

Succession of Pilcher.

creditors his *rent claim, mule hire and plantation supplies, \$6,222.53*, bearing the lessor's privilege and supply lien.

Deducting his privileged claims "from the total process of Pilcher's half of the crop and movables, there remains a balance of \$1,064.58," which appellant insists the court should have applied to the settlement of Pilcher's half of the *ordinary* debts due by the planting partnership of Embry & Pilcher.

The appellant further complains that *no* tutor had been appointed to represent the minor, and that the act of the administrator in making the allowance in favor of the unrepresented minor was a purely *gratuitous* one, and was only resorted to in order to diminish the amount he would recover. In support of this theory he cites R. C. C. 3252, which is to the general effect that "the widow or *legal representative* of the children shall be *entitled to demand and receive* from the succession of the deceased husband or father * * \$1000, etc.

I.

Considering the latter proposition first, it is sufficient to say that we undertook the examination of this case upon the theory that the appeal *only presented questions of law*, and that the *facts* set out in the account and tableau contested appeared to be conceded.

We must presume in such case that the judge *a quo* had before him sufficient evidence to justify the judgment rendered. This has become a familiar rule of construction. 26 Ann. 734, 148; 24 Ann. 20; 23 Ann. 504; 22 Ann. 118.

In the absence of proof to the contrary, we cannot assume that any fact essential to the validity of the judgment was wanting on the trial in the lower court.

In *Nugent vs. Stark*, 34 Ann. 631, this Court said: "It is no fault of the appellee that the record does not contain the evidence which the judge says was heard."

"She was not bound to have it taken in writing. The appellant, under the law and the jurisprudence, should have secured a statement of facts before appealing."

II.

In support of his theory that *partnership funds* cannot be applied to the claim of the necessitous minor, and the commissions of the administrator, because they are, by law, consecrated to the payment of the debts of the partnership, which is insolvent, he cites *Succession of Stauffer*, 21 Ann. 520.

In that case the claim for \$1000, set up in favor of the necessitous widow and minor, was denied under very like circumstances to those

 Succession of Pilcher.

presented here. Its allowance was opposed by the creditors of the partnership of Stauffer & Co., of which the deceased had been a member; and the opposition was sustained on the ground that the property of the partnership does not belong to either of the partners separately, but remains common stock, and a pledge for the payment of the debts of the firm, in preference to any claim against the individual partners.

In *Smith vs. McMicken*, 3 Ann. 322, the Court said: "The partnership once formed, and put into action, becomes, in contemplation of law, a moral being, distinct from the persons who compose it. It is a civil person, which has its peculiar rights and attributes. * * * * Hence, therefore, the partners are not the owners of the partnership property. The ideal being thus recognized by a fiction of law is the owner; it has the right to control and administer the property, to enable it to fulfill its legal duties and obligations; and the respective parties, who associated themselves for the purposes of participating in the profits which may accrue, are not owners of the property itself, but of the residuum which may be left from the entire partnership property, after the obligation of the partnership are discharged." 33 Ann. 1128, *City vs. Gauthreaux*.

In the *Succession of Cason*, 33 Ann. 790, this Court, having under consideration the claim of the widow of the deceased for a similar allowance of \$1000, maintained the principle announced in *Succession of Stauffer*, citing it.

It is true that the Court, in that case, allowed the claim against mortgage creditors of the community; but the decree rested upon the theory that "the community of property created by marriage, is not a partnership." R. C. C. 2807.

It does not matter that effects under consideration were those of an ordinary partnership, and that the one-half interest therein of the deceased, passed under administration for settlement. R. C. C. 1144, 872.

R. C. C. 2823 provides: "The partnership of property is liable to the creditors of the partnership in preference to those of the individual partner; but the share of any partner may, in due course of law, be seized and sold to satisfy his individual creditors, subject to the debts of the partnership."

This article would seem to be in conflict with the provisions of R. C. C. 3276, which is as follows, viz:

"The charges, against a succession, such as funeral charges, law charges, lawyer's fees for settling the succession, the thousand dollars secured in certain cases to the widow, and minor heirs of the deceased and all claims against the succession, originating after the death of the

Dawson et al. vs. Thorpe.

person whose succession is under administration, are to be paid before the *debts contracted by the deceased person*," etc.

The seeming conflict between the two articles grows out of the idea that partnership debts are the debts of the deceased.

The partnership is a "moral being, distinct from the persons who compose it," *not alone* as regards the *ownership* of the partnership property, but as regards the creation of, and liability for the partnership debts.

Hence money cannot be withdrawn from the funds of an ordinary partnership for the purpose of satisfying the claims of the necessitous minor.

The administrator of the succession of Pilcher was entitled to the *custody* of them for the sole purpose of disbursing them according to law.

It is therefore ordered, adjudged and decreed that the account filed by the administrator be amended, and the claim and demand of \$1000 in behalf of the minor be rejected and disallowed; and it is further ordered, adjudged and decreed that the account in all other respects be approved and homologated at appellee's cost.

Judgment amended.

Mr. Justice Todd dissents and reserves the right to file his opinion hereafter.

No. 9898.

MARY P. DAWSON ET AL. VS. SPENCER R. THORPE.—THOMAS HICKMAN ET AL., WARRANTORS.

The eviction of a purchaser under a voidable tax sale, who, at the time of the purchase, held a mortgage on the property, renews the mortgage and relieves it from all effects of the extinguishment resulting from the mortgage creditor's having acquired the ownership of the thing mortgaged.

But this renewal is ineffective if the creditor has, in the meantime, permitted the principal debt to secure which the mortgage was given, to become prescribed.

The purchase by the mortgage creditor, while extinguishing the mortgage, did not destroy the debt or affect the creditor's right and power to enforce payment of it and to prevent its prescription. Having suffered the debt to become extinguished, his mortgage is necessarily destroyed, and he has no more right to enforce it when the debt has been extinguished by prescription than if it had been extinguished by payment.

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

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123 798

Dawson et al. vs. Thorpe.

Scarborough & Carver and White & Saunders for Plaintiffs and Appellants.

Juck & Dismukes and K. A. Cross for Defendant and Appellee.

C. Chaplin for the Warrantors.

The opinion of the Court was delivered by

FENNER, J. Under the view we take of the law applicable thereto, we are relieved from the necessity of stating all the facts and issues involved in this complicated case, and confine ourselves to the following facts which are undisputed:

1st. On October 13, 1866, Mrs. Blanchard executed a conventional mortgage upon the property now in controversy in favor of Mrs. Clark for a debt of \$8031 with interest, then acknowledged to be due but rendered exigible only on October 15, 1867.

2d. On May 31, 1872, Mrs. Clark sold to Dr. Thomas H. Patterson her above-mentioned debt and mortgage.

3d. On July 6, 1872, Dr. Thos. H. Patterson bought, at a tax sale, the property on which his mortgage rested and entered into possession thereof as owner.

4th. In 1878, the heirs of Mrs. Blanchard brought a suit against the heirs of Dr. Patterson, who had succeeded him in the title and possession of the property, to annul the tax sale under which he held and to recover the property.

5th. The abovementioned litigation resulted in a final decree rendered by this Court in November, 1883, (35 Ann. 1086) by the effect of which the tax title was annulled, and the heirs of Mrs. Blanchard recovered the property subject, however, to the condition of reimbursing to defendants the sum of \$9894.88 with interest from date of judgment in district court, being excess of reimbursement allowed defendants for taxes and improvements over the rents and revenues.

6th. On the 18th of October, 1883, the heirs of Blanchard sold the property to the defendant, S. R. Thorpe, for the price of \$21,000 and out of the cash payment the amount of the judgment in favor of Patterson's heirs, exceeding \$10,000, was paid to and accepted by them.

7th. On the day preceding the final consummation of this sale, viz: On October 17, 1883, the heirs of Patterson had caused to be reinscribed against the property the old Clark mortgage of 1866, heretofore mentioned, which had been first inscribed in 1867, and had never before been reinscribed.

Dawson et al. vs. Thorpe.

In September, 1885, the present suit was brought, which is an hypothecary action instituted by the heirs of Patterson against defendant, as third possessor, to enforce the aforesaid conventional mortgage.

Numerous defenses are set up, among which the one which was sustained by the judge *a quo* was the prescription of ten years, pleaded in extinguishment of the principal obligation secured by the mortgage.

There is no dispute that the debt became due in 1867, and that nearly eighteen years had expired before any demand of payment was made, or any step taken of any kind to interrupt prescription.

The only reliance of plaintiffs to defeat this plea of prescription rests on the application of the principle announced in Art. 3409 of the Civil Code: "The servitudes and incorporeal rights which the third possessor held on the property before his possession of it, are renewed after his relinquishment, or after the sale under execution made upon him. His own creditors, after those who held their titles under the preceding proprietors, exercise their rights of mortgage in their order on the property relinquished or sold at auction."

In a learned and equitable opinion, this Court has extended this principle so as to cover the case of an evicted purchaser. *N. O. Ins. Assn. vs. Labranche*, 31 Ann. 839; *Spencer vs. Goodman*, 33 Ann. 398.

But, what is the principle? Under the language of the Code, the revival only extends to "the servitudes and incorporeal rights which the third possessor held on the property;" and the application of it in the *Labranche* case is correctly announced in the syllabus, as follows: "Pre-emption of a mortgage cannot take place pending the possession of the mortgaged property by the mortgage creditor, who holds under a voidable tax sale; and should such sale be annulled, the mortgage will revive with the rank which it held at the date of the sale."

And what are the reasons on which the principle rests? They are well expressed in the *Labranche* case, as follows: "The principle that no one can mortgage unto himself his own property is axiomatic, *res sua nemini servit*; and to say that one must reinscribe against himself would be compelling the doing of that which the law says cannot be done."

The Civil Code prescribes several methods by which mortgages are extinguished, amongst which one is: "by the creditor acquiring the ownership of the thing mortgaged;" and another is, "by the extinction of the debt for which the mortgage was given."

It is obvious that the principle under discussion applies exclusively to the first method of extinction, and relieves from its consequences

alone. In other words, the law declares that, by the effect of the mortgagee's acquisition of the property, the mortgage was extinguished; that, therefore, while holding the title, it was an impossible and vain thing for him to reinscribe a mortgage against his own property; and hence, that when the former owner and mortgage debtor annuls and destroys his title, justice requires that the supposed extinguishment of the mortgage by the title should cease with the destruction of the title, and the effects of such extinguishment in the failure to reinscribe should also cease.

The principle, in this point of view, is supported by the three equitable maxims, "*lex neminem cogit ad impossibilia aut vana*," "*contra non valentem, etc.*," and the "*restitutio ad integrum*."

But it is perfectly clear that the acquisition of the property by Patterson under the tax sale had not the slightest effect upon the debt due by Mrs. Blanchard to him. Had the price paid by him for the property gone to the satisfaction of that debt, to that extent the principle of *restitutio ad integrum* would have received its effect in the requirement that the heirs of Mrs. Blanchard would have had to repay the same as a condition precedent to the recovery of the property.

But there was no such application of the price. The debt due to Patterson was entirely unaffected by the sale. Nothing prevented his suing the heirs of Blanchard and recovering judgment against them, and from satisfying the same out of any property liable therefor. That debt might have been paid, remitted, novated or extinguished by any of the modes of extinguishing obligations, and amongst others it was subjected to extinguishment by prescription.

It has been so extinguished, and, under the express language of paragraph 4, art. 3411 C. C., this extinguished the mortgage.

The revival of the mortgage under art. 3409 is no more effectual when the debt secured by the mortgage has been prescribed, than it would be if the debt had been paid. The one mode of extinction of the debt is just as effectual as the other.

This extinction of the debt destroyed the mortgage not only under the terms of Art. 3411 already referred to, but under the emphatic language of Art. 3285, which declares:

"Consequently, it is essentially necessary to the existence of a mortgage, that there shall be a principal debt to serve as a foundation for it. Hence it happens that, in all cases, where the principal debt is extinguished, the mortgage disappears with it."

How are we to disregard these mandatory provisions of the law ?

Counsel for plaintiffs contend that the decision in *City Bank vs. Houston*, 2 Ann. 114, establishes an exception to the above rules of the Code and shows that a mortgage may exist without any principal debt to support it.

Our study of that decision leads us to the conclusion that the court held that the debt was not extinguished, and that the bankrupt court had no power to extinguish it, in so far as it was secured by the mortgage. The court likened the prohibition in the Bankrupt act against destroying mortgages, etc., to the provision exempting fiduciary debts from the operation of the act; and held that the mortgage debt, to the extent of the security, was similarly exempt from the operation of the act.

But were this otherwise, that case would be clearly distinguishable from the instant one on other principles.

It is further claimed that the rule *contra non valentem* should defeat the prescription in this case, because if Patterson had sought to interrupt prescription by suit, he would have been compelled to pretermitt his mortgage claim, and would thereby have abandoned and destroyed it. We cannot assent to the proposition.

It may be true, as a general rule, that by suing and obtaining a judgment for a debt, without asserting the mortgage by which it is secured, the creditor might be presumed to have abandoned the latter; but this presumption would by no means apply in a case when, at the time of the suit, the creditor held ownership of the mortgaged property. If the debt had been kept alive, the revival of the mortgage on eviction would have attached to the debt in whatever shape it might exist, under the very principles of the Labranche case.

We have reflected on this case in every light and can find no ground on which plaintiff's mortgage can escape the extinguishment resulting from the extinction of the principal debt.

If the renewal of their mortgage free from the effects of the extinguishment resulting from the mortgagee's ownership, when the latter is destroyed, becomes ineffective, it results from their failure to keep their debt alive, which the ownership of Patterson did not prevent them from doing, and from the effect of which the eviction cannot believ them.

Judgment affirmed.

Watkins, J. recused himself.

Succession of Vance.

No. 9817.

SUCCESSION OF ELIZA VANCE.

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c112 697

ON PETITION OF CITY OF NEW ORLEANS.

Bequests for pious uses are highly favored by law.

An unincorporated institution, organized, administered and maintained by a municipal corporation, and known as "*The Insane Asylum*," may be the object of a charitable bequest.

A legacy to such an establishment is intended for the relief of the indigent insane of the city, and vests, at the testator's death, in the municipal corporation for the use and benefit of the unfortunate cared for by it.

An unconditional legacy, once vested, cannot be divested. After it has passed, it cannot revert.

The municipal corporation may subsequently discontinue such institution as a *locus*. It may confine and keep such persons in another local and special institution.

By such discontinuance the legacy does not lapse and revert.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

W. H. Rogers, City Attorney, for the City of New Orleans, Appellant.

Leovy & Leovy, E. B. Kruttschnitt and J. P. Blair, for the Executor and other Defendants, Appellees.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit by the city of New Orleans for the recovery of a legacy made for the benefit of the indigent insane in her charge.

The defense is, that there is no such bequest in the will; that, while there was a gift to a certain named institution, "*The Insane Asylum*," yet, before acceptance, or demand for the legacy, this institution passed out of existence, leaving no representative; that, having voluntarily abolished the asylum, the city has deprived herself of the only character in which she had any right to receive the legacy, and has rendered impossible the performance of the conditions attached thereto.

From a judgment dismissing her petition, the city prosecutes this appeal.

From the admissions of counsel, the following are the important facts from which the controversy arises:

Mrs. Vance left a will, by which she bequeathed \$300 to each of four charitable institutions, all of the city of New Orleans, one of which was "*the Insane Asylum*," and directed that any residue of her estate, after payment of the legacies, be divided, share and share alike, between five grandchildren and the four institutions alluded to.

At the date of Mrs. Vance's death, there was in the city of New

Succession of Vance.

Orleans an institution known as the *Insane Asylum*, which was unincorporated and under municipal control.

Before the legacy was accepted by the asylum, that institution was discontinued and its inmates transferred to the State Insane Asylum, at Jackson, in this State.

Subsequently, relying on an ordinance of the city of New Orleans purporting to have transferred to the State Asylum all the rights of the city, as particular and residuary legatee, the State Asylum claimed the legacies.

It is also admitted that in such Insane Asylum were housed the indigent insane of New Orleans, and that after discontinuing caring for them in that place, the city has provided for their detention in the *Louisiana Retreat*, a special institution which receives persons afflicted with mental affections; and that the city pays for the same.

The legacy claimed exceeds \$2000.

Other admissions were made, which it is unnecessary to particularize.

It forms part of the judicial history of this succession that the right urged by the State Asylum to the legacy in question was not recognized—the court holding that the fund bequeathed to the Insane Asylum of New Orleans could not be diverted by the city to another institution under the administration of a State Board.

Apprehending, after the decision was rendered, that the executor of Mrs. Vance would distribute the amount of the legacy among the grandchildren of the deceased and the three other institutions, as residuary legatees, the city sued out an injunction and claimed the legacy.

In order to arrive at a correct conclusion on the subject, the following questions must be considered:

1st. What was the intention of the testatrix?

2d. Has the legacy to the Insane Asylum passed at her death to that institution?

3d. If it has, can it be claimed to have reverted?

4th. Even if it could, has the event arisen upon which the return could take place?

I.

Our Code has long ago recognized and laid down the wise rules which prevail in all civilized countries and which have been steadily followed, as much as practicable, namely: that in the interpretation of wills the intention of the testator must be principally endeavored to be ascertained, and that a disposition must be understood in the sense in which it can have effect, rather than in that in which it can have none. R. C. C. 1712, 1713.

Succession of Vance.

Guided by the light of these texts of law, as well as by numerous precedents and the views of commentators on similar provisions in other systems, we once endeavored to find and we then formulated what we conceived to be the intention of the testatrix, namely: when the interpretation of her will was first before us on the claim of the State Asylum.

We then said, after rejecting the pretensions of the State Asylum, as transferee:

"It may be that the legacy and the residuary bequest have not absolutely lapsed. The ordinance of the city council assigning them to the opponent is null; but it is not necessarily a renunciation of them. Whether the council can or will accept and administer the fund for the benefit of those for whom the testatrix intended it, is a matter not of present concern to us.

"If the indigent insane of the city are the sole recipients of it, there seems to be no satisfactory reason why the legacy and bequest shall not be maintained.

"The *locus* where these unfortunates are detained is not a material consideration.

"The object of the testatrix was to relieve their destitution and assuage the rigor of their lamentable condition. The city council is the administrator of the fund she has donated for that purpose."

We were then and we are now satisfied, that the intention of the testatrix was to cooperate in the relief of the indigent insane, for whom the city was bound to make provision.

In her mind, it must have been a matter of no significance whatever, whether those persons were attended to in this or that building, in this or that locality, by these or those municipal or other employees, or servants, or nurses. Her object was to relieve suffering humanity in that class of human beings, and to that charitable purpose she devoted part of her worldly goods.

II.

The fact is patent that, at the death of Mrs. Vance, persons of that denomination were being taken care of by the city, and were housed in a particular place, specially set apart for their custody and maintenance, under municipal supervision.

It is admitted that this asylum was not incorporated and was under the city's control. Indeed, as it was not a corporation or independent being, it had to be so. It had in itself no life, no legal existence. It had, therefore, no inherent rights and could be subjected to no legal

Succession of Vance.

obligation, but it could well be an object of charity; though it could neither accept or reject a gift.

Established, provided for and administered by the city, out of her own revenues, served by subordinates appointed and removable at pleasure by the city, that institution formed part of the municipal machinery, as much as the jail, the court house, and was nothing but a municipal or corporate functionary. In other words, it was the city herself.

While writing on public institutions, Laurent says:

“Quand le Code parle d'établissements publics il place toujours en première ligne, les hospices. C'est une institution nécessaire, puisqu'il y aura toujours des misères humaines aux quelles il faut porter remède. Cependant personne ne dira qu'elle forme une personne naturelle.

“Les administrations municipales nomment une commission qui dirige les divers établissements de charité et gère les biens qui leur sont affectés.

“C'est la société qui exerce la charité par l'intermédiaire des hospices.” Vol. 1, No. 295, p. 378.

III.

The executor puts himself out of court by the very attitude which he assumes when he charges that the legacy has returned to the succession, by reason of the discontinuance of the asylum. He thereby impliedly admits that the legacy has passed from the succession to the legatee, but insists that it has returned.

This cannot be under our system of law, which forbids giving and not giving. Had the testatrix thus stipulated, however, that condition, being prohibited, would have been illegal, and as such dealt with or reputed as not written.

If the legacy has passed, as it surely has, then the succession has been divested absolutely and the legatee has acquired.

An unconditional legatee cannot, after vesting, be divested under any contingency.

It is, therefore, clear that, although the insane asylum was not incorporated, the legacy could take effect, and that it has passed from the succession of the deceased to the city of New Orleans for the use and benefit of her indigent insane.

IV.

If it be true, then, that the legacy, at the death of Mrs. Vance, passed and vested. and if it could be said that it was made contin-

Succession of Vance.

gent on a condition sanctioned by law, could it be urged that it had *lapsed*, because of the discontinuance of the asylum?

It is perfectly true that legatees and heirs benefit by the *failure* of legacies which they were bound to discharge. R. C. C. 1704, 1709; but it is no less so that those legatees and heirs are thus benefited only where the legacy has been rejected and was made to one incapable of receiving it. R. C. C. 1703, 1709.

In the instant case, however, the insane asylum could be an object of charity, the legacy was not rejected, but accepted, and suit was brought to recover it; the testatrix has not expressed any contingency for the caducity of the legacy, and the municipal corporation which administered the institution is still in existence, ministering unto the necessities of her indigent insane.

The Supreme Court of this State has, in a remarkable litigation, well said that legacies of this class are known to the civil law from the formation of Christianity, as legacies for pious uses, and are an element in the polity of municipal administrations in all countries which have preserved the features and jurisprudence of Roman civilization. They are highly favored by law on account of their motives for sacred usages and their advantage to the public weal and the great consideration which the law attaches to these legacies controls tribunals in their interpretation of them, and has secured for their support a doctrine of approximation which is coeval with their existence. McDonogh's will case, 8 Ann. 246.

It is under the authority of the article which is now No. 1549 of the Revised Code, which declares that donations made for the benefit of a hospital, or the poor of a community, or of establishments of public utility, shall be accepted by the administrators of the same, that the Supreme Court has allowed a bequest to the orphans of a municipality to be recovered by the city of New Orleans. Succession of Mary, 2 R. 438. It is under the same authority that, in another celebrated controversy, the city was recognized the right to receive the residue of a large estate, which the testator had directed to be applied to the erection, maintenance and support of a suitable asylum in the city, to be used solely for Protestant widows and orphans, to be called *Fink's Asylum*. 12 Ann. 301. See, also, 8 Ann. 171; 17 La. 46; J. P. V. 1886, p. 967.

Withal, those propositions of law are admitted, but it is argued that the city has no right except as administrator of the asylum, and then only *sub modo*, under condition of applying the gift to the use and benefit of this particular institution. It is further urged that, as the

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city has, by her voluntary act, abolished the asylum before acceptance of the legacy, she has thereby lost the character of administrator and rendered impossible the performance of the conditions attached to the gift, the city is without any title to the legacy she is seeking to recover.

We do not view the matter in that light.

As was well said by this Court, when it passed on the pretensions of the State Insane Asylum, under the transfer of rights attempted to be made, the *locus* where the indigent insane of the city are detained, is not a material consideration. The object of the testatrix was to relieve their destitution and mitigate their lamentable condition. The city council is the administrator of the fund which she donated for that purpose.

It is admitted that the city of New Orleans no longer does what she formerly has done and was doing when Mrs. Vance died, viz: confine and keep her indigent insane in a specially assigned building and place, but this circumstance does not militate adversely to her present claim.

The discontinuance may be justified for reasons which have not been proved, but which can be easily realized. She may have done so either because the building was too small, needed repairs or improvements of which she could not defray the expense, or because it was located in an improper spot, or because the inmates were not sufficiently well cared for, or because the depleted municipal treasury would not afford adequate means to relieve existing evils, or because she found it more advantageous, pecuniarily, morally and physically, to have her indigent insane committed and maintained in a special institution within her limits, easy to supervise, which receives a like class of unfortunates.

Non constat that the city will not some time resume the direct control over her indigent insane, which she exercised over them when Mrs. Vance died.

The fact is patent that since the city has discontinued keeping her insane in a building under the management of her subordinates, she has made arrangements with the Louisiana Retreat for the admission and care of her insane, and that this substitution, which has for its special object to take charge of such persons, receives and provides for them, for a money consideration which the city actually pays.

There exists no parity between this case and that of the succession of Nicholson, 37 Ann. 346. There this Court held that incorporated institutions claiming directly a charitable bequest must show that it

Burns vs. Thompson.

comes within the *terms* and *conditions* of the will. Here the question is not one of identity; it is simply one of existence or not, one which is practically: whether a municipal corporation has a right to claim a legacy made to an institution at a time under its direct management and which has been discontinued as a distinct organization after the death of the testator.

There is no dispute that if the Insane Asylum which was in being at that date, existed to-day in the same conditions, the city would have a right to recover.

But we have said that the place, mode or manner in which the insane of the city are maintained is insignificant, the intention or object of the testatrix being the relief of those persons of whom the city takes charge and for whom she provides.

We therefore conclude that the legacy made by the deceased for such relief having once vested, cannot be and has not been divested; and that consequently the city is entitled to recover it, the same to be used exclusively in furtherance of the benevolence of the testatrix.

Melius valeat quam pereat.

It is therefore ordered and decreed, that the judgment appealed from be reversed, and it is now ordered and decreed that the city of New Orleans recover of the succession of Mrs. Eliza Vance the particular and residuary legacies, with legal interest from judicial demand, the sums bequeathed when received to be exclusively applied by the city for the relief of her indigent insane, in furtherance of the will of the testatrix.

It is further ordered and decreed that the injunction originally issued but subsequently dissolved, be reinstated and perpetuated, the succession to pay costs in both courts.

No. 9906.

SALLIE E. BURNS VS. GEORGE W. THOMPSON.—HEIRS OF GEE, INTERVENORS.

Lands purchased in the name of the wife, and paid partly with her paraphernal funds under the administration of the husband, and partly with funds of the community, fall into the community.

In a suit for dissolution of the community by the wife, an allegation of the wife claiming the funds thus invested, as her paraphernal funds, will debar her of the right to claim the lands in question as her paraphernal property.

She cannot be allowed to claim at the same time the price and the thing, and will be held to that part of her pleadings in which she corrects an error in previous pleadings, in which she had omitted to claim these paraphernal funds. Property purchased

30	877
45	1367
59	877
48	1225
30	877
110	438
111	779

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during the community, in the name of the wife, will be treated as community property until proof is made by the wife to show that it was purchased for her own account and with her paraphernal funds, of which she had retained the administration. Mere recitals in the acts to that effect amount to no presumption in her favor.

The wife has the right of demanding the administration of the paraphernal property previously confided to her husband whenever she chooses, and such a demand must not be confounded with the action for the dissolution of the community.

The husband who has the administration of the wife's paraphernal funds owes no interest thereon before the dissolution of the community, or before the wife has obtained a judgment for the restitution of her separate funds.

As a general rule husbands and wives are incapacitated from contracting with each other during marriage, save in exceptional cases enumerated in Art. 2446 Civil Code. Hence, they cannot, by contract, bind the husband to pay interest on, or create a mortgage to secure the paraphernal funds of the wife, when none are due or exist under the law. But the inscription of such an act will be considered as that of an authentic declaration of the husband touching the paraphernal funds received by him, for his wife, and effect will be given to it as notice, but not as a contract.

A *dation en paiement* by the husband to the wife, on the score of detailed indebtedness from him to her, cannot stand in the face of proof that the indebtedness as therein described did not exist.

A PPEAL from the Eleventh District Court, parish of Natchitoches.
Pierson, J.

Jack & Dismukes, for Plaintiff and Appellant.

Scarborough & Carver, for Intervenors and Appellees.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff sues her husband for a dissolution of the community, and to recover a moneyed judgment for about \$20,000, in restitution of her paraphernal funds alleged to have been received by her husband and converted to his own use and benefit; the moneyed judgment to be credited with the sum of \$7,635, received by the wife through a transfer of property made to her by the husband as a *dation en paiement* on the 14th of November, 1883.

As usual, in such cases, the contest is exclusively between the wife and her husband's creditors, several of whom had intervened in this case, as judgment creditors, for the purpose of resisting plaintiff's demand, which is qualified as a fraudulent scheme to screen the husband's property from the pursuit of his *bona fide* creditors, and as entirely unfounded. Intervenors charge the *dation en paiement* of November 14, 1883, to be fraudulent, and pray for a declaration of its nullity.

The district court rejected plaintiff's entire demand, without prejudice to her rights of ownership of property transferred to her through the *dation en paiement* of November 14, 1883.

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Plaintiff appeals, and intervenors pray for an amendment of the judgment, with a view to a decree annulling the *dation en paiement* aforesaid.

To properly understand this complicated litigation, which is contained in a petition, two supplemental petitions by plaintiff, two petitions of intervention, an immense collection of documentary evidence, a mass of parol testimony, all contributing to fill two large transcripts, followed by a discussion in immense briefs, a review of the salient features of the very complicated pleading and of the principal facts in the record must precede a discussion of the issues and of the law of the case.

In her first petition plaintiff sets up two distinct amounts of paraphernal funds received and used by her husband, one of \$5000 accruing from the succession of her mother, and the other of \$8600, as the proceeds of the sale of her interest in a piece of paraphernal property sold by her; with interest thereon at 8 per cent per annum from January 1, 1866 on the first term, and on the other from November 1, 1871, subject to a credit of \$7635 as hereinabove stated.

In her first supplemental petition she charges her husband with the additional sum of \$1847.24, as her share in her mother's judgment against her father, which sum went into the hands of her husband as administrator of her mother's succession, and was retained by him as her husband. She then charges her husband with the receipt of various and large amounts of money aggregating \$14,090, as the proceeds of sale of different tracts of land, her paraphernal property, and she prays "for further judgments for the additional amounts" which she has just disclosed.

In her second supplemental petition she adopts with certain modifications her previous pleadings, and makes the following singular avowal:

"She avers that, at the time she filed her original petition, * * she was not fully and truly advised of the exact nature and extent of her rights and claims against her husband. * * She now avers that she is prepared to state individually and definitely the nature, origin and amounts of her paraphernal funds and effects received, used and alienated by her said husband, for his own use and behoof." * *

She then substantially reiterates, but with greater precision, the averments and recitals contained in her first supplemental petition. In connection with the sum of \$1847.24 accruing to her from her mother's succession, as shown by the account of administration presented by her husband, she avers as follows: "Her husband receiving

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and retaining, as stated in said tableau, \$1847.24 for and on account of your petitioner, which he thereafter used and appropriated, as will be hereafter more fully stated and shown."

In that petition she also sets up that she inherited in November, 1866, from the succession of one of her sisters, who had died without issue, a certain quantity of land and also the sum of \$125 accruing to her from that succession as a result of a compromise between herself and her co-heirs touching that inheritance, which sum was likewise received, used and appropriated by her husband. And that petition also concludes with a prayer for additional claims as therein disclosed.

The necessity and importance of these details of pleadings will be felt further on in the course of the discussion.

Now the salient and controlling fact in the case is that the only sources from which plaintiff has derived all her paraphernal property and funds, are mainly the succession of her mother, and incidentally that of her sister, Cornelia L. Bruns.

When the mother died, in November, 1865, she had a suit pending against her husband for a moneyed judgment of some \$14,000. After her death, the suit was prosecuted to judgment by Thompson, the defendant herein, who had become the administrator of her succession, and in execution thereof, lands of the husband in the parishes of Bossier and Natchitoches were seized and sold, four of the five heirs of the deceased Mrs. W. M. Burns, including plaintiff, becoming the adjudicatees.

The proceeds of these two sales added to the unpaid balance of the judgment which was divided in kind between the heirs, and subsequently bought by one of them, made up all the assets of the deceased and amounted together to \$12,643.96.

From the account of administration filed in August, 1867, it appears that, after deducting debts and law charges, the share accruing to each of the five heirs was \$1,849.24, and that plaintiff's share was received by her husband.

That succession owned no lands; hence it follows that the lands acquired by the heirs of Mrs. W. M. Burns, at the two sheriff's sales in the parishes of Bossier and Natchitoches, did not become their property as their heritable shares in said lands, but simply as any other purchasers at a forced sale.

It is nowhere alleged in either of the three petitions that plaintiff used her paraphernal funds inherited from her mother's succession as above set forth, for the payment *protanto* of the lands which were adjudicated to her at the sheriff's sales; while the reverse may be rea-

sonably inferred from her silence on the subject, coupled with her husband's official declaration as administrator, that he had received and retained the funds accruing to his wife.

According to the theory of plaintiff's case, as developed by her counsel on appeal, her purchase of one-fourth of the lands was for her separate benefit, as an investment of her paraphernal funds accruing to her under the execution of her mother's judgment as above recited.

Hence they claim the proceeds of the sales of those lands subsequently made, and amounting together to upward of \$2,000 as her paraphernal funds received at each sale, and afterwards used by her husband.

That contention presents the pivotal question in the case.

The proposition advanced by intervenors is to the effect that the adjudication, although in the name of the wife, vested the title to the lands in the community of acquets and gains existing between the spouses. They invoke the familiar rule enunciated in Article 2402 of the Civil Code, and solidly crystalized in our jurisprudence: that the community consists of the estates which the spouses "may acquire during the marriage or by purchase, or in any other similar way, even although the purchase be in the name of one of the two, and not of both, because, in that case, the period of time when the purchase is made is alone attended to, and not the person who made the purchase."

They concede the easily discerned exceptions to the general rule, recognized in jurisprudence, in favor of purchases by the wife in her own name and right, when made with her paraphernal funds of which she had retained the administration. But they argue that the burden of proof is on the wife to rebut or destroy the legal presumption existing in favor of the community, and to show, affirmatively, the existence of all the features and elements required by law to shield her claim from the application of the general rule.

And they finally urge that the record in this case contains no proof to justify plaintiff's claim that the adjudications of February 3, 1866, by the two sheriffs, characterized her purchase as one for the benefit of her separate account.

Our study of the case has led us to the same conclusion. *Pearson vs. Pearson*, 15 Ann. 119.

Every feature of the transaction, save the fact that the adjudication was made in the name of the wife, and the additional circumstance that she was entitled to one-fifth of the proceeds of the sale, strongly characterizes the purchase as one made for the account and benefit of the community.

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While only one-fifth of the proceeds accrued to her, the adjudication to her was for one fourth of the lands; and her interest in the excess of the judgment over the proceeds realized by the execution was not sufficient to meet her share of the contribution to pay out the heir who did not join in the sale, to satisfy a concurrent judgment in the sum of \$1040 and taxes and law-charges. Hence, the debits against her on account of the adjudication exceeded her heritable share by \$696 26. And the sheriffs' returns show that the full amounts of the two adjudications were paid in cash. In his account the administrator (the defendant herein) charges himself with the proceeds of the two adjudications, and he credits himself with the share accruing to his wife, as retained by him for her account.

But the real intent of the wife as to the true character of the transaction is best illustrated by her pleadings in this very suit. We must remember here that it appears nowhere in the record, and it is not even pretended by Mrs. Thompson that she ever inherited any money or property from any source beyond her share in her mother's succession, including the inheritance from her sister, and that all her alleged acquisitions and subsequent gains must be traced to that only source. Now, in all three of her petitions, she charges her husband with "\$5000 or more collected and received by him from the succession of her deceased mother, Charlotte McDaniel, wife of Wm. M. Burns, on or about the first day of January, 1866;" and judgment for that specific sum is prayed for in each of the three petitions.

But it appears that in subsequent researches, plaintiff and her counsel were confronted with the account of administration of her mother's succession, and herein above referred to; hence, reference is made to her share as disclosed by that account in the two supplemental petitions, and in each the item of \$1847 24 is added to the list of her husband's indebtedness to her, and in each, prayer is made for the increase of the judgment *pro tanto*.

We note the argument of her counsel that the allegation in which that sum is claimed as her paraphernal funds received by her husband, was made through error of fact, and that therefore plaintiff should not be subjected to its destructive effect. C. C. 2291.

But the very reverse is the precise state of the case. The manifest error in her pleadings was the loose charge of \$5000 alleged to have been collected from the mother's succession by the defendant Thompson, and the very apparent object of the two supplemental petitions was to rectify that error, and to include in the pleadings a statement of the true condition of that succession as shown by authentic records

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which would otherwise have been brought to light with damaging effect by the dreaded judgment creditors of the husband. It was that very necessity which forced from plaintiff the significant avowal of error to which we referred, and which we transcribed, in the early part of this opinion. Can she now be heard to say through her counsel, on appeal and not before, and as an argument, that her strained effort in a supplemental petition to correct an error was itself an error of fact? If such a rule could prevail, it would be next to impossible to hold any party to his pleadings, and the formality of pleadings could then be obviated and in its wake would follow, in mournful procession, all the rules of practice hitherto indispensable to a proper administration of justice.

A similar declaration is made in the act of transfer as a *dation en paiement* in November, 1883, and also in the sworn declaration of the husband for registry in the mortgage office, under date of November 9, 1885.

All these documents were offered in evidence by plaintiff herself, and together with her pleadings they contribute to make up a record from which there is no escape for her.

It is worthy of note that during the whole trial she never made the slightest effort or attempt to prove up the allegation that her husband had received "\$5000 or more" for her from the succession of her mother on the 1st of January, 1866, or at any other time, or that she had received any other funds from the succession of her mother, at any time, over and above her heritable share of \$1847 24, as shown by her husband's account of administration, presented in August, 1867.

The uncontradicted proof admits, therefore, of no other conclusion but that the purchase of the lands adjudicated to plaintiff on the 3d of February, 1866, enured to the benefit of the community, and that all the profits subsequently realized from the various sales made by the spouses of the lands thus acquired, and from the reinvestment of the proceeds of such sales, as well as the profits realized from such reinvestments, as shown in the record, likewise fell into the community. Hence they are not elements of indebtedness on the part of the husband to the wife. *Marshall vs. Mullen*, 3 Rob. 828; *Fisher vs. Gordy*, 2 Ann. 762; *Pearson vs. Pearson*, 15 Ann. 119; *Shaw vs. Hill*, 20 Ann. 531; *Pinard vs. Holton*, 30 Ann. 169; *Sentmanat vs. Soulé*, 33 Ann. 612; *Bachino vs. Coste*, 35 Ann. 570. The theory of the case, which has been impressed upon our minds as flowing naturally from this established proposition, is that the husband as head and master of the

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community, became the true and legal owner of the one-fourth of the lands sold under execution of the judgment of Mrs. W. M. Burns against her husband, and that he became indebted to his wife in the sum of \$1847 24, her heritable share in the purchase price of the lands and of the remnant of the judgment.

The argument that he could not purchase at the sale, because he was administrator of the succession, is fallacious. The inhibition of the law in such cases has reference to property, movable and immovable, intrusted to his administration. C. C. 1146. The lands which Thompson is held to have purchased did not belong to the succession which he administered, and had not, therefore, been intrusted to his administration.

Thompson is further indebted to his wife in the sum of \$125, received for her account from the succession of her sister, C. L. Burns, and for such amount as may have been received by him out of the proceeds of the sale of the portions of land inherited by his wife from her said sister. The record affords no satisfactory information on that score, hence we can make no final disposition of that item of their accounts. Her right to make proof thereof is reserved to her.

We now reach the point at which we differ from our learned brother of the District Court, in his reasons for declining any relief to plaintiff, under her prayer for the restitution of her paraphernal property, as well as for the dissolution of the community. It is settled as one of the landmarks of our jurisprudence that the wife has the right of demanding the administration of her paraphernal property, previously confided to her husband, whenever she chooses. C. C. Arts. 2387, 2391, *Irby vs. Weber*, 35 Ann. 808, and authorities cited. In this case the demand is cumulative, and it includes also the action provided for in Article 2425 of the Civil Code, for a separation of property. We find the evidence sufficient to entitle her to both reliefs.

It is true that in these pleadings intervenors deny the alleged disorder of the husband's affairs, and on trial they made an effort to show his solvent condition. But the very fact of their intervention is, to our minds, the best proof of the disorder of Thompson's affairs, as sufficiently dangerous at least to alarm his judgment creditors. If Thompson is not only solvent, but, as they allege, actually wealthy, why should they have been concerned about the business or moneyed transactions which had been projected between himself and his wife, or the litigation which she had begun against him? The answer to that question is the danger to which their judgments were exposed for fear of not finding sufficient and available property for the satis-

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faction thereof. And, after all, these intervenors have no interest to regulate the question of the dissolution of the community *vel non* between Thompson and his wife. The utmost extent of their concern in the affairs of these spouses, is to restrict the moneyed judgment which the wife may obtain against the husband within legal limits, and to uncover as much of the husband's property as may be necessary to satisfy their just demands. As already stated, we find that the wife is entitled to judgment against her husband in the sum of \$1847 24, received from the succession of her mother, and in the additional sum of \$125 inherited from the succession of her sister.

But we cannot favorably consider her prayer for interest at the rate of 8 per cent per annum from the respective dates at which the sums were received by the husband.

Having found from the record that the husband had received, and had the administration of, the wife's paraphernal funds, we conclude under the law that the fruits of her paraphernal property belonged to the community and that therefore the husband owes no interest before the date of the judgment, which will dissolve the community. C. C. art. 2386; Rowley vs. Rowley, 19 La. 581; Succession of Weldon, 36 Ann. 851.

The claim of interest, and at the rate of 8 per cent per annum, as well as a mortgage by agreement of parties, is predicated on an instrument purporting to be an act of conventional mortgage, executed between the husband and his wife on the 21st of February, 1883, and recorded in the mortgage office on the same day.

We hold that, as a contract, the act in question is simply a prohibited nullity, and that as such it created no obligation on the part of the husband to pay interest at any rate, and that it could create no mortgage, if none existed under the operation of law, irrespective of the will or act of the parties to the instrument.

The general rule of law, as clearly enunciated in article 1790 of our Civil Code, is that husbands and wives are absolutely incapacitated from contracting together; the only exception being contained in Article 2446 of the Code which enumerates the circumstances under which they may participate in contracts of sale from one to the other.

But the plaintiff contends that even if the act be stripped of all effect as a contract, due consideration must be given to its inscription, as notice of the tacit mortgage which, under the law results from the recitals therein contained.

On inspection, it appears that the act does contain the statement by

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the husband of large amounts received and appropriated by him, of the paraphernal funds of his wife.

Under the provisions of section 1 of Act No. 95 of 1869, which was intended to carry into effect article 123 of the Constitution of 1868, concerning the inscription of legal or tacit mortgages, the husband is authorized to make a written statement of the facts and circumstances under which the wife may have acquired claims against him, for the purpose of inscription. But as the law requires the statement to be sworn to, the question arises whether the husband's statement in this case, which is not sworn to, but is made in an authentic form before a notary public and in the presence of two witnesses, would be a compliance with the law, or would have the same effect as the inscription of the sworn statement described in the act.

Considering that the only effect attributed by the law to such an inscription, is notice; and that the instrument when recorded, "shall in no manner be evidence of the validity of the debt or claim, other than the law may award to acts of the kind unrecorded: (section 10, Act 95 of 1869); and that the difference for the purposes of notice by inscription, between a sworn and an authentic declaration, is not easily discernible, we feel justified to hold that the inscription of the act of February 21, 1883, as an authentic statement of Thompson that he had received paraphernal funds of his wife in a sum of \$5000, is sufficient as a notice that his wife had a paraphernal claim against him, the real amount and the correct date of its receipt and other facts and circumstances connected therewith being left to proof *aliunde*, when the time came for the enforcement of the mortgage. Hence, as notice and for no other purpose, the declaration is entitled to legal consideration.

Our jurisprudence has always recognized a broad distinction in law between the effect of registry of an act, as to notice, and the effect of such an act as proof of the contract which it purports to evidence. *Allen, West & Bush vs. Whetstone*, 35 Ann. 847; *Stallcup vs. Pyron*, 33 Ann. 1249, and authorities therein cited.

In construing the effect of inscriptions made under the provisions of the Act of 1869, this Court held that, for the purposes of notice the inscription of a tutor's affidavit of the amount which he owed to his ward was sufficient, although the law required the inscription of an abstract of the inventory. *Broussard vs. Segura*, 35 Ann. 912.

We shall therefore give effect to plaintiff's mortgage from February 21, 1883, on the amount which we have found in her favor, as above stated.

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The only question now remaining for discussion is the alleged nullity of the *dation en paiement* of Thompson to his wife under date of November 14, 1883.

The consideration of the transfer therein made to the wife of property valued at \$7635, consists of the admitted indebtedness of the husband in the sum of \$5000 for paraphernal funds received on January 1, 1866, and in the additional sum of \$8600 as proceeds of a sale of a plantation represented to be the separate property of the wife, sold to R. F. Harrison in November, 1871.

From the record it appears that Thompson and his wife owned together one undivided half of that plantation acquired as follows: by the two jointly eleven-thirty-seconds, and by Thompson alone five-thirty-seconds.

The record does not show that the payment attributed to the wife was made with her paraphernal funds of which she had retained the administration. It appears to our satisfaction that the funds thus disbursed as hers proceeded from the sale of the lands which had been purchased in her name at the sale in execution of her mother's judgment, and those funds have been shown to belong to the community.

That the property thus purchased in the joint name of the two spouses fell into the community is a question not open to discussion under our system. C. C. 2334; Rouse et al. vs. Wheeler, 4 Robinson 114; Tally vs. Steffner, 29 Ann. 583. Hence it was no debt from the husband.

In reference to the sum of \$5000 of alleged paraphernal funds which formed part of the consideration of the pretended sale, we have already shown in another part of this opinion that no such claim ever existed, and that no attempt was even made on trial to prove its existence. It follows therefore that there was no consideration, such as was made the basis of the act, in the minds of the parties for the so-called *dation en paiement*, and hence it must fall as a nullity. Isaacson vs. Mentz et al., 33 Ann. 595; Chaffe vs. Scheen et al., 34 Ann. 688.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; and, proceeding now to render such a judgment as, in our opinion, should have been rendered below, it is ordered, adjudged and decreed that plaintiff Sallie E. Burns do have and recover judgment against the defendant, George W. Thompson, in the sum of nineteen hundred and seventy-two dollars and twenty-four cents (\$1972.24) with legal interest thereon from the date of this judgment, with recognition of a legal mortgage in her favor on all the immovable property of her said husband, to take effect from the 21st of February, 1883, restoring to her the administra-

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tion of her separate and paraphernal property, and dissolving the community of acquets and gains heretofore existing between herself and her said husband, reserving her right to claim against her husband such additional sums as he may have received for her as the proceeds of sales of lands inherited by her from her sister, Cornelia L. Burns.

And it is further ordered that the act of transfer as a *dation en paiement* from G. W. Thompson to his wife, plaintiff herein, under date of November 14, 1883, be declared to be null and void, and that it be set aside. All costs to be paid by the Defendant G. W. Thompson.

Mr. Justice Watkins recuses himself, having been of counsel.

 No. 9921.

 IN THE MATTER OF THE ESTATES OF ZENON AND ELIZE LABAUVE.—
 ACCOUNT OF ADMINISTRATOR AND OPPOSITION THERETO.

In a partition of lands between two joint proprietors, a plantation falls to the share of one of them, burdened with a special mortgage in favor of the Citizens' Bank. In the act of partition there is an acknowledgment of this debt, and a stipulation that each shall be equally responsible for it, and also of mutual warranty. Such stipulations do not entitle the survivor of the contracting parties (or his heirs) to claim from the succession of the other the payment of one-half of the mortgage debt, when no eviction or disturbances has been suffered on account of the encumbrance; and where the debt is only payable through a long series of years, and no part of it has been paid by the party asserting the claim against the succession.

A judgment directing a payment to an heir out of the succession funds in the hands of the administrator, on account of the heirs' interest in the succession is erroneous, where in the same judgment the credits claimed by the administrator in his account for payments made to the other heirs are stricken therefrom, and remitted for adjustment to the partition. The claims of all the heirs should have been thus dealt with.

Where there is a conflict of testimony touching attorney's fees, and the testimony and the record do not afford sufficient information to enable the court to estimate them, the judgment of the lower court thereon will not be disturbed.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Rile, Judge *ad hoc*.

A. Talbot and J. O. Nixon, Jr., for the Administrator.

Samuel Matthews, Alex. Hébert and Thos. E. Grace, and David N. Barrow for the Opponents.

The opinion of the Court was delivered by TODD, J.

I.

OPPOSITION OF THE HEIRS OF HOTARD.

Zenon Labauve and Alexander Hotard were once joint owners of lands in the parish of Iberville. They made a partition of the same

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One of the plantations that fell to Hotard in the partition, was encumbered with a mortgage in favor of the Citizens' Bank. In the act of partition, it was stipulated with respect to this mortgage as follows :

"The parties hereto remain equally responsible to the Citizens' Bank of Louisiana for the debt and mortgage contracted by Robert Brent, and which they assumed." The act also contained a reciprocal warranty.

The administrator's account made no mention of any liability of Labauve's succession to the Hotard heirs, resulting from this partition, or any of its stipulations. They, the heirs, opposed the account and asked to be paid out of the funds in the hands of the administrator, one-half the amount of this mortgage debt, claiming to be entitled to it under the obligation incurred by Labauve from the foregoing clause in the act of partition, and the express warranty contained in the act.

The judge *a quo* dismissed the opposition on the ground that the action was premature, and the opponents have appealed.

The clause in question evidences no personal obligation on the part of Labauve to Hotard. It is only an acknowledgment of a joint debt to the bank and a recognition of the mortgage securing it, which acknowledgment added nothing to the force and effect of the mortgage.

The nature of the obligation resulting from the "warranty of partition" is best described in the Code itself.

Article 1384. The co-heirs remain respectively bound to warrant one to the other the property falling to each of their shares against the disturbance and eviction which they may suffer, when the disturbance or eviction proceeds from a cause anterior to the partition.

Article 1388 (1425). But the indemnity is only for the sum for which the object has been given by the partition to the heir who has suffered the eviction, and for the proportion which each of the heirs is bound to contribute, the amount of his own portion being extinguished by confusion ; and the heir in this case has no right to claim remuneration from his co-heirs for any damages which he may have suffered by the eviction.

Article 1396 (1433). The action of warranty among co-heirs is prescribed by five years, and the time commences to run, to wit : for the property included in the partition, from the day of the eviction, etc.

It will appear from these articles that the warranty in such case is against a disturbance of possession or eviction from the premises. The obligation of the warrantor relates alone to these contingencies.

It is equally evident that an action or claim in warranty arises only on the happening of one of these events—disturbance or eviction.

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It is not pretended in this case that any disturbance or eviction has taken place with respect to this land, and no threat of either is shown.

The counsel for opponents contend, however, that their right of action is not governed by the law relating to warranty, but under the stipulations of the act of partition in this case, is to be determined by the rules and principles relating to suretyship. He is mistaken. Suretyship has no bearing on the questions involved in this controversy. There is no evidence in the record that these opponents or their ancestor have ever paid any portion of this mortgage debt.

Besides, from the nature of this debt, being a stock mortgage, the whole of it would not become exigible for a long series of years. Act 45 of 1873.

For these reasons the judge properly held that opponents' demand was premature.

II.

Another opposition was that of Oscar Adolphe Lauve. In the account appear several items for payments made by the administrator to some of the heirs. This opponent complained that he had received nothing from the succession, and that to the other heirs had been advanced the full amounts, or even more than the sums they were legally entitled to receive. The judge *a quo*, believing that this complaint was just, decreed that the balance of certain funds of the succession, after the payment of the creditors, should be paid over to this opponent with a reservation of any further rights to be adjusted in the final partition. It appears, however, that these very items for payment made to the other heirs were, on opposition, stricken from the account, and the amount paid decreed to be as still in the hands of the administrator, to be settled between him and the heirs, so favored, in the final partition. Considering this ruling as to these other heirs, it was not proper that this opponent should be paid immediately out of the funds in the hands of the administrator, but that his claim, like those of the other heirs, should have been also remitted for settlement to the final partition.

This proceeding was simply an administrator's account and opposition thereto. It was not a proceeding in partition, and it was not the time for the adjustment of the questions relating to the distributive shares of the heirs and the collections to be made by them, but those questions, in their entirety, should have been relegated to the partition, as was done with respect to the other heirs. The decree must be corrected in this respect.

Felix vs. Wagner et als.

III.

There is an appeal from the judgment on the account by Messrs. Talbot and J. O. Nixon, attorneys at law, with regard to their fees for professional services rendered the succession. The amounts allowed them by the judgment was \$1888. They claim an additional sum.

There is a conflict of testimony in this matter—a conflict between prominent members of the bar, whose statements are entitled to equal respect, from their worth, experience and ability. We have carefully considered this evidence, and likewise examined the record for further light on this subject, but it does not afford us sufficient information touching the services rendered, or of the character of the proceedings in which they were rendered, to satisfy us that the conclusion reached by the court *a qua*, with respect to these charges, was erroneous.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court, so far as it sustains the opposition of Oscar Adolph Lauve, and orders a payment to him by the administrator, out of the funds named in the decree, be annulled, avoided and reversed, reserving the rights of this opponent to this fund and all other rights against the successions for settlement, and allowance in the final partitions of the successions among the heirs, and with this exception and in all other respects, the judgment of the lower court be affirmed, the said Oscar Adolph Labauve to pay the costs of his opposition in both courts.

No. 9806.

MRS. REBECCA FELIX VS. O. V. WAGNER, SHERIFF, ET ALS.

The Act No. 38 of 1856 provided a peculiar system of government for the parish of Jefferson, under which the various corporations composing the parish, and not therein named, were to be represented on a parish committee which were to apportion the general parish expenses between the several corporations, and the latter were to pay the same out of the funds raised by the exercise of their own powers of taxation.

When, subsequently, the city of Kenner was incorporated and vested with taxing and other municipal powers, it became one of the "corporations composing the parish of Jefferson," and fell under the operation of the Act of 1856, by the effect whereof she was entitled to representation in the parish committee, and to pay her share of general expenses through the assessment of that committee and without direct parochial taxation.

Such has been the construction of the law after its passage. The city of Kenner has never been awarded representation on the police jury, but has been excluded therefrom; and has been always recognized as entitled to representation on the parish committee and subject to its assessments, which have been annually made.

Acts No. 58 of 1874 and No. 119 of 1884, exhibit a similar interpretation of the law.

The power assumed by the police jury, in which Kenner was not represented, in 1872 and

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47	606

39	391
417	580

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subsequent years to levy direct taxes on Kenner, while she was, at the same time, subjected to assessments by the parish committee, cannot be supported. It would involve taxation without representation and the imposition of double burden, besides contravening the law of the State as interpreted by the parochial authorities, by the Legislature of the State and by the local judge of the district.

This case does not fall within the general rule that incorporated towns, in absence of special legislative exemption, are subject to police jury taxation, which is not abraded.

A PPEAL from the Twenty-sixth District Court, Parish of Jefferson.
Rost, J.

J. D. Rouse and A. E. Billings for Plaintiff and Appellee.

B. C. Elliott and Thos. C. W. Ellis for Defendants and Appellants.

The opinion of the Court was delivered by

FENNER, J. The issue in this case is whether or not the late police jury of the parish of Jefferson, left bank, had authority to impose and collect taxes upon the property of plaintiff, situated in the town of Kenner, which taxes said police jury assumed to levy during the years 1877, 1878, 1880, 1881, and 1882.

Under the parochial system prevalent in this State, the powers of government have generally been confided to bodies known as police juries, having jurisdiction over the entire territories of the parishes.

But for nearly half a century, the parish of Jefferson has been an exception to this general rule.

Prior to 1845 the whole parish was subject to the jurisdiction of a single police jury; but, in subsequent years two municipal corporations were created from its territory, viz: Carrollton and the city of Jefferson, both of which were expressly exempted from police jury control.

Under these conditions, in 1856, the legislature adopted the Act No. 138 of that year, entitled "An act authorizing the appointment of a parish committee by the several corporations composing the parish of Jefferson."

This act required the several corporations to appoint delegates, on a basis of representation therein fixed, to form a parish committee, and imposed upon this committee the duties "to determine and fix the *pro rata* of contribution by each corporation towards defraying the expenditures which by law bear upon the whole parish, the ratio thus established to be based upon the proportion of State taxes assessed within the limits of each corporation; 2d, to examine all bills or claims which may be set up against the parish and to report upon them to the several councils and police jury, who shall act finally thereupon."

In 1858 there was a further division of the territory into the right bank and left bank of the Mississippi, each of which was under the government of a separate police jury.

The act of 1856 continued in force and has never, to this day, been repealed; and the parish committee authorized thereby has always discharged the functions therein directed. Act 107 of 1858.

In 1873 the town of Kenner was incorporated and vested with powers of taxation and other municipal powers. Act 71 of 1873.

The town was composed of territory which had theretofore been under the jurisdiction of the police jury of the left bank, and the charter contained no express exemption from parochial taxation or police jury control.

The general principle is undoubtedly well established that the incorporation of a town within the limits of a parish does not exempt the property and the inhabitants thereof from parochial taxation, unless such exemption is expressed in some legislative act. *Cook vs. Dendinger*, 38 Ann. 261; *Iberia vs. Chiapella*, 30 Ann. 1143; *Benefield vs. Hines*, 13 Ann. 420; *Manrin vs. Smith*, 20 Ann. 445.

But inasmuch as the act of 1856 continued in force, providing for "the appointment of a parish committee by the several corporations composing the parish of Jefferson," and inasmuch as the then existing corporations were not named therein, it seems to have been assumed, and not without reason, that the mere creation of Kenner into a corporation vested with the taxing power, brought it within the operation of the act and of the system of parish government established thereby under which each corporation exercised exclusive powers of taxation within its own limits and contributed from the funds thus raised its *pro rata* of general parish expenses under the direction and control of the parish committee.

Hence we find that Kenner was recognized as entitled to representation on the parish committee and its *pro rata* of general parish expenses was regularly apportioned to it from year to year; and the police jury of the left bank never assumed to levy a tax on property in Kenner prior to 1878.

It further appears that in 1877, under the provisions of Act 57 of 1877, the police jury redistricted the left bank into wards, for the purpose, amongst others, of electing police jurors to represent the several wards, and Kenner was not included in any ward, and was not awarded and has never enjoyed any representation on the police jury.

In 1877, the police jury levied its tax on all property "not exempted by law," and it is in evidence that such had been the form in previous

Felix vs. Wagner et als.

years, and that the meaning and design of the exemption expressed was to exclude Kenner from the parish tax.

In 1878, the police jury levied its tax on "all property" without stating the above exemption.

In 1880 and subsequent years, the jury expressly levied the tax now claimed on property in the town of Kenner.

It does not appear whether any steps were ever taken to enforce this taxation; but it is shown that during all these years, Kenner had no representation on the police jury, and that the parish committee continued to recognize Kenner as entitled to representation therein, and continued to assess against her a proportion of general parish expenses to be paid out of the taxes levied by the corporation, precisely as in the case of the other corporations composing the parish.

The exclusion of Kenner from representation on the police jury and her inclusion in the parish committee and her assessment therein, are entirely inconsistent with the power claimed of subjecting her to direct police jury taxation; for the first involved taxation without representation, and the last subjected her to double burdens.

The legislative interpretation of the law seems to have been of similar import. The Act No. 58 of 1874, in providing for the construction of a road in the left bank of the parish, recognized the police jury of the left bank, the city of Carrollton and the town of Kenner, as independent corporations, and required each of them, separately, to pass the necessary ordinances and to levy the requisite taxes for the payment thereof, thus placing Kenner on the same footing with Carrollton.

Again, the Act No. 119 of 1884, which abolished the duplex police jury system and placed the right and left banks under the control of a single police jury, does not repeal the act of 1856, and seems to recognize the independence of Kenner and its exemption from direct parochial taxation, because, in dividing the territory subject to the new police jury into wards, it excludes the city of Kenner.

Finally, the judge *a quo*, who presides over the district, in an able opinion, reaches the same conclusion.

Confronted with this clear, customary, legislative and judicial construction of the effect of these laws, with the strong reasons by which it is supported, and with the manifest injustice which would result from subjecting Kenner to these taxes which have been levied by a body in which she has had no representation, and which, if enforced, would subject her to burdens which have already been imposed on her by the parish committee in a different form, we feel bound to affirm the judgment appealed from.

Judgment affirmed.

 State ex rel. Newman vs. Funding Board.

No. 9926.

 THE STATE EX REL. ISIDORE NEWMAN, SR. VS. THE FUNDING BOARD
 UNDER ACT NO. 104 OF 1880.

 30 555
 44 250

The constitutional ordinance for the relief of delinquent tax payers, which authorizes the funding of Auditor's warrant in baby bonds, only grants to the warrant holder the *option* of having his warrants exchanged for bonds to be exercised prior to the date therein fixed for their maturity.

The power conferred upon the Funding Board continues subsequent to that date for the sole purpose of examining, auditing and funding *nunc pro tunc* such warrants as shall have been presented to them or to some officer of the board antecedent to that date.

A PPEAL from the Seventeenth District Court, Parish of East
 Baton Rouge. *Burgess, J.*

Kennard, Howe & Prentiss for the Relator and Appellee.

M. J. Cunningham, Attorney General, for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. This is an application for a writ of mandamus, to compel the respondent board to execute and perform their official duty, under the constitutional ordinance for the relief of delinquent taxpayers, by funding relator's warrants in three per cent five dollar bonds, as provided by said ordinance and law.

Relator shows that of the total amount of warrants, the sum of \$394.80 were received by the respondent board on March 17, 1884; \$624.51 on November 20, 1885; and \$1052.06 on May 24, 1886.

That while the board concedes the validity of the warrants and that they are of a class fundable under the ordinance and the law, they decline to proceed to examine, endorse and exchange same for said three per cent bonds, on the ground that they can no longer act under said ordinance and law.

Resistance is made by the respondent board on the ground that, under the ordinance and the law, it was contemplated that said board should be of only temporary duration; and no meeting thereof has been held during the current term of office of its members, except the one of October 26, 1886, whereat they adopted a resolution, in which they declared it to be their opinion that they had no further power to act as such funding board; that they had no right or power to issue *past due* bonds; that the law never contemplated or authorized such action; that their predecessors acted for the full period contemplated and authorized by said ordinance and act; and that the relator should have exercised his rights prior to the 1st of January, 1886, and by his failure so to do, his right has lapsed.

State ex rel. Newman vs. Funding Board.

In the alternative, they aver that, if said board is still in existence, and the power is still in force, they cannot be compelled by mandamus to declare and endorse as valid the relator's warrants—an act within their legal discretion, after having examined them.

I.

The ordinance in question provides that “any valid Auditor's warrants outstanding at the date of the adoption of the Constitution • • may be funded in bonds of the denomination of five dollars, *with interest* coupons attached thereto, at the rate of three per cent *per annum* from the 1st day of July, 1880. The said bonds to be *due and payable* six years from the 1st day of January, 1880; the said coupons being payable at the State Treasury on the first of February and August of each year.”

The ordinance contains no other restriction upon the issuance of such bonds.

The statute providing for the funding of certain warrants and obligations, in pursuance of that ordinance, creates the board and designates the powers that are conferred upon them.

Section 1 of that act confers upon the board the power to fund all Auditor's warrants which they shall find to be valid, and which are declared to be fundable by constitutional ordinance.

It directs the board “to proceed, within *sixty days* from the promulgation of the act and after thirty days public advertisement, to fund said Auditor's warrants.”

Neither the ordinance nor the statute has fixed any *precise* date at which the board shall cease funding warrants therein specified. The argument of the relator is that the respondents seek to have the court establish a period of prescription unknown to the law. The failure of the argument is in mistaking his recourse against the respondent board for an *action*.

It is, at most, only an *option* given to the warrant holder, whereby he may obtain bonds of a certain description in exchange for Auditor's warrants. If not in express terms, it was the *implied* intention of the framers of the ordinance that this option should be exercised by warrant holders *prior* to the date therein fixed for the maturity of the bonds to be issued in exchange for them.

The power conferred upon the board is, only in a restricted sense, a continuing one, and solely for the purpose of auditing and funding,

Mullan vs. His Creditors.

nunc pro tunc, such warrants as shall have been presented to the board or its officers *antecedent* to the 1st of January, 1886.

From the evidence it appears that, of the total amount of the relators' warrants, the sum of \$394.80, were received by the Auditor on the 17th of March, 1884, and the sum of \$624.51 on November 20, 1885; hence he is entitled to have the board examine them, and if ascertained to be fundable, in conformity with the ordinance and the law, to have given him bonds in exchange therefor.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be amended so as to make the writ of mandamus peremptory *only* in respect to relator's warrants, aggregating \$394.80, that were presented to the Auditor on the 17th of March, 1884, and those aggregating \$624.51 that were presented on November 20, 1885; and that, when same are issued, said bonds shall bear the respective dates of their presentation, with maturity and interest according to law.

It is further ordered, adjudged and decreed that, in all other respects, said judgment is reversed.

No. 9723.

H. J. MULLAN VS. HIS CREDITORS.

Act 33 of 1870, fixing fees of appraisers in succession cases, does not apply to fees of experts in insolvencies, which are to be allowed on the basis of *quantum meruit*. Where the allowance is fair and reasonable, it will not be increased.

Tax bills in the usual forms are presumptive evidence of the assessment and of the claim.

A taxpayer cannot complain of the disparity between the bills and the assessor's certificate, where the amount on which the tax is claimed is less than that mentioned in the certificate.

Payment by preference out of the proceeds of an insolvent's movable property, of taxes on personal property, is rightfully ordered when the proceeds of such property does not include those of his real estate.

Article 177 of the Constitution dispenses from the registration of liens on movable property.

The payment of taxes on personal property is secured without registry.

Prescription urged in argument will not be considered when not pleaded below or on appeal.

Objections to the allowance of interest for years previous to the existence of the debt, have no force when the date fixed is a clerical error, which might have been corrected, if found in the original judgment, by simply calling the judge's attention to it. The judgment creditor cannot insist on an interest which he has not claimed.

Attorneys' fees, stipulated in a mortgage act in case of non-payment of the debt at maturity, are due when the mortgagee is bound to employ counsel to collect his claim, and such counsel represents him in the insolvency proceedings.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

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49	1077
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51	1673
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114	483
39	397
117	364

Mullan vs. His Creditors.

W. S. Benedict and J. O. Nixon, Jr., for the Syndic.

Nicholls & Carroll, W. H. Rogers, City Attorney, J. Ward Gurley, Jr., and Braughn, Buck, Dinkelspiel & Hart, for the Opponents.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an appeal from a judgment amending the syndic's account.

I.

The district court allowed the experts appointed to appraise the hardware to be inventoried, the sum of \$300. While these claim that they ought to have been allowed double that amount, it is urged that they are not entitled to more than \$4 per day, which would reduce the allowance by about one-third.

In support of that position, reference is made to the law of 1870, (Act No. 33, p. 66), relative to appraisers in succession matters.

That law does not apply to insolvency proceedings. Had the legislature intended to extend its provisions to cases of insolvencies, it would have, and it has not, said so.

The present case does not come within the provisions of that act, which is simply *in pari materia*.

Besides, the appraisers, whose competency was of importance in such matter, putting an evaluation on hardware, had to be and were men of experience, specially qualified in the business, who, as a rule, are not to be renumarated at the same rate that ordinary appraisers usually are.

The services rendered may be deemed as those of experts and may be compensated on the basis of *quantum meruit*.

We think the allowance made by the district judge as fair and reasonable and will not increase it.

II.

The opposition of the city of New Orleans for taxes was properly maintained.

The syndic objects to their payment on several grounds, which relate to the form of the bills of taxes, to the mode of assessment, to the privilege allowed, to the prescription barring them.

These grounds will be considered *seriatim*.

1. The bills are in the usual form, purporting to be made from the assessment rolls. It has not been shown in what they are deficient.

2. The bills are against H. J. Mullan. It was not necessary for the city to have proved that the personal property assessed existed and had been properly listed at the time.

3. If there be a variance between the bills and the certificate of

Mullan vs. His Creditors.

the assessors, as no doubt there is, to the extent of \$10,000, neither the party assessed nor his creditors can complain of it, for the reason that the difference exists against the city; the bills being for that sum *less* than the amount at which the property appears to have been assessed.

4. The court allowed the taxes, to be paid by preference, out of the funds in the syndic's hands. Nothing shows that any part of the amount allowed is to be paid out of the proceeds of the *real* estate. The probability, if not the certainty, is that the taxes (if any were due) assessed on the real estate, were paid out of the proceeds of that property when title was made to the purchaser.

5th. The Constitution, Art. 177, provides that privileges on movable property shall exist without registration, for the same, except in such cases as the Legislature may prescribe.

We have been shown no legislation requiring registry to secure a lien for the payment of taxes on personal property, and we know of none. That lien therefore exists independent of any registration.

If it be contended that such privilege exists without registry only during three years and that at the expiration of that term it dies away, the answer is that, if such be the case under Article 176 of the Constitution as to taxes on *real* estate, it is not so as to taxes on *personal* property, by reason of Article 177, which dispenses from all registration as to heirs on that sort of property.

6th. The prescription of three years levelled against the taxes of 1882, in argument, does not appear to have been pleaded either below or here, and will not be considered on appeal.

7th. It is true that the judgment appealed from does not restrict the payment of the taxes to the proceeds of the *personal* property listed; but when it is considered that the property assessed and on which the taxes claimed, viz: \$2792.25, yielded \$24,121.60, the objection must be viewed as hardly serious.

8th. It indeed appears from the record that the judgment appealed from allows interest on the taxes of 1885 from 1880; but this must be a clerical error committed in transcribing the original judgment which could not have allowed interest from that year, for the taxes of 1885, when the opposition of the city only asks interest from 1885, and the city could claim no more. If the original judgment be erroneous in that regard, the district judge, on having his attention called, would assuredly have corrected the mistake.

III.

The claim of the mortgage creditor for attorneys' fees incurred by him, after the maturity of the note and for services rendered to secure payment of his note, is well founded.

Succession of Applegate.

It was agreed by the act of mortgage that the mortgagor bound himself and his assigns to pay the holder of the note all attorneys' fees, as he may incur, in the event of the non-payment of the note at maturity.

The evidence shows, that after the sale of the mortgaged real estate, the syndic ruled the mortgagee to show cause why the inscription of his act of mortgage should not be cancelled to give a title to the purchaser.

The mortgagee was thus constrained to employ counsel to represent him and see that, if the amount went to the syndic, it would be secure in his hands. This was not a mere formality. Responsibility rested on the counsel, for which the mortgagee, under the clause, is entitled to recover the compensation, as fixed in the contract.

The record further shows that legal steps had to be, and were, taken by the counsel in the name of the mortgagee to exact payment of what remained due on the note.

The attorney took a rule to coerce payment, which afterwards was dealt with as an opposition to the account.

This Court has decided that attorneys' fees in similar cases form part of the capital. So that, where the face amount of the note only is paid, it cannot be said that the claim is satisfied. The fees of the attorney remaining unpaid have to be satisfied out of the proceeds.

Under the circumstances, the allowance was just and proper.

Judgment affirmed, with costs.

No. 9775.

SUCCESSION OF M. H. APPELATE.

The widow of a deceased party by second marriage will not be allowed to claim, as administratrix, either in her own right, or on behalf of creditors, money expended by the husband for the maintenance and education of his children by a first marriage, when it appears that he made no such charge when living, and had never intended to make it; that the first community was solvent, that he was solvent during the existence of the second community, and at the moment of his death, and that the creditors whose rights are championed by the administratrix, were not creditors of the first community, and only became creditors of the deceased in due course of commercial dealings, immediately preceding his death. Affirming decision in the succession of Boyer, 36 Ann. 506.

A PPEAL from the Civil District Court for the parish of Orleans.
Monroe, J.

Honor & Lee, for the Administratrix, Appellant.

White & Saunders, for the Opponents, Appellees.

The opinion of the Court was delivered by

Succession of Applegate.

POCHÉ, J. The facts bearing on the only point of controversy in this appeal are as follows:

The deceased had been twice married. At his death he left three minor children, issue of his first marriage, and the widow and a minor child of the second marriage.

The children of the first marriage inherited a considerable estate from their mother, consisting of her separate property and of her share in the community, which was largely solvent.

At the death of Applegate, his second wife, the widow, was appointed and qualified administratrix of his succession.

In the account of her administration, which she presented to the Court, she charged the three minor children, issue of the first marriage, with the cost of their maintenance and education, at the rate of \$1000 per annum for seven years and a fraction, footing up the sum of \$7833 33. The charge was opposed by the tutor of said minors, and was disallowed by the district judge. Hence, her present appeal involves the legality of the charge, which she proposes to make against the minors of the first marriage. It is in proof, and in fact, admitted, that M. H. Applegate did not at any time make such a charge against the revenues of his children, and that he had never thought or intended to raise and educate them otherwise than at his own expense.

It also appears that during each and all of the seven years covered by the charge, as proposed by the administratrix, he was engaged in a prosperous business, from which he annually drew, for living and family expenses, an average of six thousand dollars; that from the death of his first wife, up to and including the time of his own death, he was continuously solvent, and that he had ample means for the maintenance and education of his said minor children, without requiring a dollar of their income derived from the succession of their mother, and from the first community.

Under this showing, the controversy presented by this appeal is entirely covered by the principle announced, and by the rules of law adopted and enforced by this Court, in the case of the succession of Boyer, 36 Ann. 506, in which it was held: "The widow in community has no claim for money expended for the deceased husband in the maintenance of his heir, child of a former marriage, either during the minority or majority of such heir, in the absence of all evidence of any intention on the part of the husband, while living, of making such charge, and the community is entirely solvent and possessed ample revenues during its existence."

Succession of Applegate.

Conceding that, under the effect of that decision, she is precluded from making the claim as widow in community, the administratrix argues that she herein represents the creditors of the community, which she holds out as insolvent. Hence, she urges that her charge is predicated on the facts and circumstances which characterized the case of *Mercier vs. Canonge*, 12 Robinson, 394.

In order to claim shelter under the principles of that decision, the administratrix would be required to make proof of the following facts:

That the community between Applegate, the deceased, and his first wife was insolvent; that he had no other property; that the income of his minor children, out of their separate estate, was about sufficient to meet the cost of their maintenance and education, and that the creditors, whose rights she has undertaken to champion, were creditors at the date of the dissolution of the first community, or at least during the years for which she proposes to charge the minors for their maintenance and education.

These are substantially the facts and circumstances which make up the groundwork of the decision which she invokes in support of her contention, and in which the tutor was required to charge the expenses of his minor children to the revenues derived from their separate estate, in order to subject the revenues of the insolvent community to the action of its creditors. Only one of those features is disclosed by the record in this case, and that is an income out of the minors' separate property about sufficient to maintain and educate them. In every other feature the two cases are essentially different.

As we have already stated, the record in this case contains overwhelming evidence of the absolute solvency of the first community, and that none of the creditors of the second community were creditors of the first community which was dissolved by the death of the first wife in June, 1874.

It appears from the account that the rights of the creditors whose claims may be in conflict with the alleged rights of the minors of the first marriage, are evidenced by accounts current in the course of trade with the deceased, immediately preceding his death, while he was actively carrying on his business of plumber and gas-fitter.

And it also appears that at the very moment of his death, Applegate was thoroughly solvent and in excellent commercial condition, even in view of the allowance made by the district judge in favor of his said minor children.

The inventory of the second community shows assets amounting to \$37,281.86, and debts, privileged and ordinary, in the sum of \$20,-

Barrow et al. vs. Wilson et al.

250.32. Through the allowance made in favor of the minors the debts are increased by \$12,666.78, and otherwise reduced by \$2000.

It may be, as suggested by the administratrix, that on the final settlement of the succession and community, the amount of assets realized may not be exactly sufficient to extinguish the entire indebtedness of the community. But this result, which is not yet determined, because the assets have not as yet all been reduced to cash, will be solely attributable to the inevitable shrinkage in the value of a large stock of goods, when sold at auction, and the customary losses in the collection of bills receivable due to a commercial house, whose going business is suddenly checked by the death of the head of the house.

The test of the solvency of such a concern is to be found in its condition as shown by the inventory of the property made at or about the time that the house ends its career with the death of the owner. Thus tested, the community is shown to be solvent.

Our study of the case has led us to the conclusion that it must be governed by the decision in the Succession of Boyer, 36 Ann. 506, and that the district judge has correctly decided the issue which has been submitted to our review.

Judgment affirmed.

No. 9789.

R. R. BARROW ET AL. VS. MRS. M. WILSON ET AL.

Emancipation by marriage does not terminate the suspension of prescription as to minors, which continues until the actual majority of such minor. Plea of prescription of ten years overruled.

As to the property purchased at tax sale, the prescription of three years is pleaded under section 5 of Act 105 of 1874, which declares: "Any action to invalidate the titles to any property purchased at tax sale under and by virtue of any law of this State, shall be prescribed by the lapse of three years from the date of such sale."

This statute has never been repealed. Being a statute of prescription it is legitimately retrospective, and operates on tax sales made prior to its passage, at least from the date of the law.

Section 62 of Act 42 of 1861, under which this sale was made, providing for obtaining an Auditor's deed of sale, does not impair the effectiveness of the tax collector's deed as a title.

The section 5 of the Act 105 of 1874 is distinctly a prescription of an action. It does not purport to cure defects in titles; nor does it concern itself with the rights of parties. It simply says, whatever be the rights, they must be asserted within three years or else the action is barred.

The power of the legislature to pass such laws is undisputed and the courts are bound to enforce them.

In this case, defendants have a title derived from a tax sale made under a law of the State, under which they have held open, public and notorious possession for thirteen years

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and for more than three years since plaintiffs reached the age of majority, before this action to invalidate their title was instituted.

The statute is a bar to the action. The question fully considered under numerous authorities: *Lague vs. Boagni*, 32 Ann. 912, distinguished from the case at bar. *Person vs. O'Neal*, 32 Ann. 237, overruled.

A PPEAL from the Twenty-fourth District Court, parish of Plaquemines. *Livaudais, J.*

E. Howard McCaleb for Plaintiffs and Appellants :

1. Minority suspends prescription. R. C. C. 3523, 3544.
2. Prescription is suspended against a minor emancipated by marriage until her majority. 33 Ann. 356; *Troplong Prescription*, T. 2, No. 740; *Marcadé Prescription*, art. 2252; C. N. Bousquet Dict. Pres. Tit. *Mineur*; Laurent, p. 32, No. 46. But it commences to run against a minor emancipated by judgment of court under article 385, C. C. from the date of the decree. 36 Ann. 250.
3. Even possessors in good faith are liable for fruits and revenues gathered and received since the time of the owner's claim for restitution. R. C. C. 3453, 503.
4. The prescriptions in favor of tax titles established by Act No. 101 of 1873, and 105 of 1874, cannot avail in this case because (1) the former applies *ex vi termini* to "sales made to satisfy judgments for taxes; (2) these statutes have been repealed by subsequent laws before plaintiffs attained the age of majority; (Act 96, E. S. 1877 and Act 9, E. S. 1878); and (3) the property in dispute was not assessed in the name of the true owner. 32 Ann. 912.
5. The prescription of three and five years only cures informalities—and not radical defects and illegalities in the assessment and sale of property for taxes. 15 Ann. 15; 34 Ann. 107; 32 Ann. 228; 34 Ann. 407; 35 Ann. 954.

Zacharie & Howard for Defendants and Appellees :

The rules laid down in the Civil Code pertain to the legal relations of the people among themselves, and do not apply to the State in its sovereign capacity, especially in tax matters, unless the code so specially provides. *Dropsie's Mackeldy Dw.* 1. § 8; *Justinian* 3. § 4; *Domat*, tom. 1, chap. 11, §§ 41, 44; *Demolombe* tom. 1. p. 14; *Mourlon* tom. 1, p. 7, § 10; *Marcadé* tom. 1, p. 24; *Duranton* tom. 1, p. 17.

Under all systems of law prescription cannot be maintained against the sovereign unless it be established by statute. Prescription does not run against laws of public order. *Bacon's Abridg.* L. 4, 201; *Justinian*, Ins. Lib. 2, tit. 6; *Code* tit. 38, § 7, 3; *Pothier*, part 3, § 685; *Troplong Pres.*, chap. 1, *Disp. Jen.* § 132, 3; *Laurent*, tom. 32, p. 249; *Domat*, chap. 11, No. 40; *Laurent*, tom 1, p. 83, § 48; *Boileaux*, tom. 7, p. 743; *Laurent*, tom. 32, p. 743; *Moreau & Carelton's Partidas*, p. 373, tit. 29, law 6; *White's Recopilacion*, vol. 1, pp. 348, 350.

If this be correct, then none of the interruptions or suspensions of prescription on account of minority or coverture established by the code are of force in suspending prescription running under a tax law.

Under Act No. 42 of 1871, sec. 62, two years possession of real estate, under a tax deed vested title completely and fully, and under sec. 2, Act No. 101 of 1873, under such a deed, after two years the former owner is deemed to have acquiesced, and waived all informalities, in the tax sale, and the deed is made conclusive.

But even if it is conceded, for the sake of argument here, that the rules of the Civil Code apply under C. C. art. 543, in case of public sales, and the prescription of five years runs on tax sales, and is not suspended by minority and coverture.

All informalities and irregularities of tax sales arising subsequent to the decree (assess-

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ments, are governed by the same rules, and the deeds are placed on the same footing as judicial sales, and are subject to the same rules as sheriff's deeds "in regard to the five years prescription." 30 Ann. 1125; 25 Ann. 237; 29 Ann. 115; 35 Ann. 893; 31 Ann. 662; 34 Ann. 205.

The cases cited contra by our opponent, 10 Ann. 777, 12 Ann. 748, 14 Ann. 909, do not apply here, as they were simply actions of nullity, and the question of prescription was not involved. In 15 Ann. 15, cited by him, there was a glaring error of assessment. So in 33 Ann. 520; 34 Ann. 108; 33 Ann. 913; was a case "in which the gravest irregularities and absolute nullities have been propounded and were known to the party purchasing." 35 Ann. 952 and 34 Ann. 409, were cases of radically defective assessments. In 33 Ann. 873; 23 Ann. 231; 28 Ann. 354; 24 Ann. 454, the question of prescription was not raised.

The possessor in good faith, if evicted, is entitled to be reimbursed the amount expended for taxes, improvements, and interest thereon, and the fruits and revenues are his own until the date of the institution of the suit for eviction. Hen. Dig. p. 1195; 14 Ann. 605; 10 R. 178; 34 Ann. 1163; 35 Ann. 1086; 13 Ann. 494; 2 R. 137; 2 Ann. 347; 26 Ann. 388; 18 Ann. 407; 27 Ann. 398; 32 Ann. 927; 32 Ann. 1293; 34 Ann. 705.

Especially where the land, as in the case at bar, was unimproved, open land, producing no rent, and to which the tax purchasers contributed its only rental value by their improvements and disbursements. 34 Ann. 1163; 2 R. 137; 16 Ann. 414 2 Ann. 347; 18 Ann. 407.

The opinion of the Court was delivered by

FENNER, J. This case was before us in 1886, when we rendered the opinion and decree reported in 38 Ann. 213.

We then remanded the case for further evidence on the question whether the prescription of ten years pleaded by defendant was defeated by suspension resulting from the minority of plaintiffs.

The record now returns to us with full proof that plaintiff, R. R. Barrow, was fully emancipated in 1876 and became 21 years of age in 1879, and that Mrs. Slatter, the other plaintiff, only attained the age of majority in 1875, though emancipated by marriage in 1871.

This action was instituted in 1884. It follows that ten years had not elapsed from the majority of either plaintiff, unless the marriage of Mrs. Slatter terminated the suspension of prescription as to her. The question as to whether the emancipation of a minor by marriage ends the suspension of prescription resulting from minority, does not appear to have been directly decided by this Court.

But the French authorities, under a like provision in the French Code, are quite unanimous in holding that prescription against a minor emancipated by marriage remains suspended until actual majority. 32 Laurent, No. 46; 2 Troplong, Prés., No. 74; Marcadé, Prés., Art. 2252, C. N.

In a recent case, discussing the nature and effect of emancipation by marriage, we said: "Marriage did not relieve her from the disabilities which attach to minors, and did not vest her with the power and right

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of doing and performing all acts as validly as if she had attained the age of twenty-one years. She could not mortgage or alienate real estate without the consent of a family meeting and the authority of the judge. Her powers are of administration only." Succ. Mitchell, 33 Ann. 356.

These limitations on the effects of emancipation by marriage are the foundations of the French doctrine that it does not end the suspension of prescription. That doctrine seems to us to be sound and applicable under our law, and we therefore approve and adopt it.

I.

This terminates the controversy as to the tract of land held by defendants under the State patent, as to which there was no defense having the slightest merit, except the prescription of ten years, which is now overruled.

II.

The other tract of land is held by defendants under a tax sale made to their author in 1871. Against the attack in this sale, defendants pleaded the prescription of five and three years, both of which had fully run, after the majority of plaintiffs, before the suit was brought. Art. 3543 C. C., provides: "All informalities connected with or growing out of any public sale made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale, after the lapse of five years from the time of making it, whether against minors, married women or interdicted persons."

Section 5 of Act 105 of 1874 declares: "Any action to invalidate the titles to any property purchased at tax sale under and by virtue of any law of this State, shall be prescribed by the lapse of three years from the date of such sale."

We have thus placed the two provisions side by side, in order to exhibit the broader and more sweeping effect of the latter law. While the article of the Code covers *informalities* only, the act of 1874 creates a positive bar against "any action to invalidate" a tax title.

Fearful that in the labyrinth of laws and decisions, on the subject of taxes and tax titles, there might be some law or decision repealing or modifying the effect of this statute, we took occasion to call the attention of the able and distinguished counsel engaged in this case to the subject, and to invite further argument thereon.

The statute has never been repealed. The only subsequent enactments pointed to as having such effect are Sec. 57 of Act 96 of 1877 and Sec. 6 of Act 9 of 1878; but, taken in connection with the limited repealing clauses in those acts, it is too clear to require further notice;

that the sections quoted are not inconsistent with the statute, and, therefore, do not operate its repeal.

It is claimed, however, that under Section 62 of Act 42 of 1871, under which this sale was made, the deed of sale from the tax collector could not operate as a basis of prescription, but was a mere inchoate title until perfected by a deed of sale issued by the Auditor of Public Accounts as therein provided. The mere reading of the section makes it obvious that the procuring of the Auditor's deed is a matter purely optional with the purchaser, conferring, perhaps, some additional rights, but the omission of which, in no manner, invalidates the tax collector's deed as a muniment of title. We, therefore, find that the statute continues in force.

There is no question of the legislative power to pass such a statute, and, being a statute of prescription, it is legitimately retrospective and operates on the title of defendants, at least from the date of the law. *DeArmas vs. DeArmas*, 3 Ann. 526; *3 Municipality vs. Ursuline Nuns*, 2 Ann. 611; *Municipality vs. Wheeler*, 10 Ann. 745.

It now becomes our duty to ascertain the effect of such a statute upon the rights of parties under such sales. This is distinctly a statute of prescription. It operates not upon the rights of the parties. It does not purport to validate a title which, otherwise, would be invalid. It simply limits the time within which the owner of the original title shall be allowed to assert his rights against the purchaser at a tax sale.

Mr. Blackwell well says: "There must be a period fixed by positive law, within which a right shall be prosecuted in courts of justice. Public policy demands the enactment of such laws, and they are universally sanctioned by the practice of nations and the consent of mankind. Such laws have been emphatically and justly denominated statutes of repose. The best interests of society require that causes of action should not be deferred an unreasonable length of time. This remark is peculiarly applicable to land titles." *Blackwell Tax Titles*, p. 643.

Cooley says: "The statutes limiting a short time within which the owner of the original title shall contest the tax claim are supposed to be enacted in pursuance of a sovereign authority vested in the Legislature to fix a reasonable time within which a party shall be allowed to assert his rights by suit, or be debarred. The policy of such laws is unquestionable, and the power to enact them is undisputed." *Cooley on Tax*, p. 376.

The Supreme Court of the United States has said: "Prescription is

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a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation over all persons and property within its jurisdiction." *McElmoyle vs. Cohen*, 13 Peters, 312.

A statute of the State of Arkansas provided that: "All actions against the purchaser, his heirs or assigns, for the recovery of lands sold by any collector of the revenue for the non-payment of taxes, shall be brought within five years after the date of such sale, and not after."

In passing on the effect of this statute, the Supreme Court of the United States said: "In order to entitle the defendant to set up the bar of this statute, after five years' adverse possession, he had only to show that he and those under whom he claimed, held under a deed from a collector of the revenue of lands sold for the non-payment of taxes. He was not bound to know that all the requisitions of the law had been complied with, in order to make the deed a valid and indefeasible conveyance of the title. If the Court should require such proof, before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute, before he could be entitled to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax title." *Pillow vs. Roberts*, 13 How. 472.

A Wisconsin statute provided that any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid or the lands redeemed, as provided by law, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter. Under this statute, the Supreme Court of that State held that if the tax purchaser's possession had been actual and open, the statute would protect him, even if his tax deed was void upon its face." *Lindsay vs. Fay*, 25 Wis., 460.

A Pennsylvania statute provided that no action for the recovery of lands sold under the act should lie unless brought within five years after the sale. The Supreme Court of the State refused to apply the statute literally, and held that it began to run, not from the sale, but from the time of possession under it, for the reason that the owner was not allowed to bring ejectment against one not in possession. But a subsequent statute having been passed, authorizing ejectment in such case, it was held that the limitation was perfect after the lapse of five years from the delivery of the deed to the purchaser." *Stewart vs.*

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Trever, 56 Penn. St. 385; Rogers vs. Johnston, 67 id. 48; Johnston vs. Jackson, 70 id. 164.

Now, in the case before us, the defendants have held since 1871, under tax title, perfectly valid on its face, reciting that the tax collector, in making it, acted "by virtue of the authority vested in him by Act 42 of 1871, after having fulfilled and complied with all the previous legal requisites." The land, when sold, was unimproved; and the purchasers have not only had possession of it, but have cleared and cultivated and converted it into a plantation. And now, thirteen years after the sale, and more than three years after the plaintiffs had been freed from all the disabilities of minority, the latter brings this action to invalidate their title. The defendants simply say: "We hold a title to this property, purchased at a tax sale under a law of the State, and, in the language of the statute, your "action to invalidate" it is "prescribed by the lapse of three years from the date of such sale." The statute does not concern itself with the strength of one title or the weakness of the other. The plaintiffs had a right which could only be enforced by an action. The law maker had the power to fix a reasonable time within which such action should be brought, under penalty of its being thereafter barred by prescription. That power has been exercised, and when the time fixed has expired the courts are bound to enforce the limitation, and to deny the action.

Under the authorities which we have quoted, the foregoing conclusion seems sufficiently clear.

In the case of *Lague vs. Boagni*, 32 Ann. 912, we refused to apply this prescription to the particular case therein mentioned, which was one where the property of *Lague* had been assessed in the name of *Nunex*, where *Lague's* title was spread on the public records of the parish, and where the purchasers were shown to have known of these defects. No such radical defect exist in the assessment in the instant case. The property had belonged to H. L. Hunley, a non-resident of the parish, and the parish records exhibited no translation of his title. The assessment was made in the name of H. L. Handley, which variance is cured by the principle of *idem sonans*, as being a mistake not liable to mislead. *Burroughs Tax*. p. 203; 37 N. H. 307; 39 Barb. 479; 40 N. J. Law 269; *Deety on Tax*. 613.

Moreover, it does not appear, in the case of *Lague vs. Boagni*, that the purchaser had actual and open possession for the requisite period. When such possession is shown, it puts the original owner under notice of the necessity of bringing his action, and if he fail to bring it within the time prescribed, the bar of the statute applies.

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We are also referred to the case of *Person vs. O'Neal*, 32 Ann. 237, where the Court said, in commenting on this statute: "Whatever defects in a tax-sale may be cured by the lapse of three years, the want of personal notice to the owner, or his agent or curator, cannot be, because such notice is a condition precedent to the seizure, without which there could be no sale." We are compelled to overrule this decision.

It is in direct conflict with a former decision, which held that even under Art. 3543 C. C., want of such notice was a relative nullity cured by the lapse of five years. *Allen vs. Couret*, 24 Ann. 24; *Mulholland vs. Scott*, 33 Ann. 1045.

It is a mistake to treat this statute as one intended to *cure defects* in tax titles. It is a statute of prescription, barring an action, regardless of the merits or demerits of either title.

We are sensible that this Court has hitherto exhibited hesitation in applying these statutes of prescription in favor of tax titles according to the trenchant principles by which they should be governed; but it is time that such hesitation should cease, and that the clearly expressed legislative will, in the exercise of undoubted legislative power, should be firmly enforced by the courts.

We are, therefore, bound to hold that, as applied to the facts of this case, the prescription of three years bars the plaintiffs' action for the land covered by the tax title.

III.

It only remains to adjust the claims of the parties for rents and improvements in reference to the tracts of land held by defendants, Geo. T. Wilson and Mrs. Margaret Wilson, and which are awarded to the plaintiff.

The former opinion of this Court (38 Ann. 213) held that these defendants were possessors in good faith. Hence it follows: 1st, that they are not responsible for the revenues except from the date of the institution of the suit; and 2d, that they are entitled to recover the amount expended for their improvements, or a sum equal to the enhanced value of the soil resulting therefrom. C. C. art. 508.

These defendants have called their author, John Burton, in warranty, and have prayed for judgment condemning him as warrantor with a reservation of their right to claim from him the purchase price with damages in a separate action.

Burton has appeared and admitted his obligations as warrantor, and, in case of judgment evicting his vendees, has asked judgment against

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plaintiffs for the value of improvements put on the land by him or for the enhanced value of the soil.

These questions have never been passed on by the lower court, and we do not find the evidence in such shape as to enable us satisfactorily to dispose of them. We shall, therefore, remand the case as to these questions.

It is, therefore, ordered, adjudged and decreed that there be judgment in favor of defendants, Mrs. Leonard Edgcombe and Diedrich Wischhusen, maintaining their plea of prescription and rejecting plaintiffs' demand as against them with costs in both courts.

That there be judgment in favor of plaintiffs and against the defendants, George T. Wilson and Mrs. Margaret Wilson, declaring the said plaintiffs to be the true and lawful owners of the property referred to in the petition and more fully described in the separate answers of said defendants and condemning said defendants, respectively, to deliver up the lands so held by them into the possession of said plaintiffs; that the right of plaintiffs to recover the revenues of said properties from the date of institution of this suit be recognized, with the correlative right of said defendants to recover from plaintiffs the amount expended by them in improvements as the enhanced value of the soil resulting therefrom; that there be judgment in favor of defendants and against John Burton, recognizing his liability to them as warrantor of their respective titles, and reserving their right to sue him in a separate action for reimbursement of the price and for damages; that his right to recover from plaintiffs the amount expended by him or his author for improvements or the enhanced value of the soil resulting therefrom be recognized; that the case be remanded to the lower court for further proceedings in order to settle the amounts due on account of rents and improvements between the respective parties; and that the execution of the decree placing plaintiffs in possession of the land in controversy be stayed until after final judgment settling the said questions of rents and improvements; that defendants, George T. Wilson and Mrs. Margaret Wilson, pay half the costs of the lower court and of this appeal, and that the other half be paid by plaintiffs.

No. 9602.

LOUIS BARTOLI VS. VIRGINIE HUGUENARD, HIS WIFE.

The statement, contained in the order of appeal, that there is not sufficient time to prepare the record by the next regular return day for appeals from the court *a qua*, even if suggested by appellant's counsel, must be held as adopted by, and as emanating from, the trial judge.

39	411
46	1494
39	411
49	970
39	411
52	1879
39	411
1120	278

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Hence, the Court will not consider *ex parte* certificates, or affidavits, or other evidence outside of the record, touching the alleged error of such a statement.

Under Section 4 of Act 45 of 1870, Extra Session, the trial judge has the legal discretion to fix a different return day if time is required to prepare the record for appeal, and the Supreme Court will not presume that he has abused of the discretion vested in him by law.

There can be no reckoning between the spouses *inter sese* as to the *quantum* of labor bestowed, or capital by either withdrawn, during the existence of the community.

The distinct interest of the wife attaches at the dissolution of the marriage; but neither spouse can sue for half the price of any specific thing acquired during the marriage, when the liquidation of the community does not show any *gains* to be divided.

The value of improvements and ameliorations made, upon separate property of either spouse, during the marriage, is at the expense of the community, *only* when it is *not* due to the ordinary course of things, to the rise in the value of property, or the chances of trade.

A PPEAL from the Twenty-fourth District Court, Parish of Plaquemines. *Ivaudais, J.*

F. C. Zacharie and F. Michinard for Plaintiff and Appellant:

1. Revenues of paraphernal property of either spouse, during marriage, form part of the community, when the husband has had the administration of the same. R. C. C. 236v. 2402, 2406; 16 L. 1; 17 L. 296; 19 L. 574; 3 Ann. 611; 4 Ann. 248; 6 Ann. 634.
2. The wife and her heirs and assigns have the privilege of exonerating themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains. R. C. C. 2410.
3. The wife who renounces loses every sort of right to the effects of the partnership or community of gains. R. C. C. 2411.
4. The wife separated from bed and board, who has not, within the delays above fixed to begin from the separation finally pronounced, accepted the community, is supposed to have renounced the same; unless, being still within the term, she has obtained a prolongation from the judge, after the husband was heard, or after he was duly summoned. R. C. C. 2430.
5. She ought also to make her renunciation within the same delays which are allowed the beneficiary heirs within which to explain his intentions. R. C. C. 2414; 12 Ann. 76; 15 Ann. 416.
6. Under R. C. C. art. 1032, the duty is imposed upon the beneficiary heir of having an inventory of the succession made. Under Art. 1050, R. C. C., he is given thirty days within which to deliberate whether he will accept or reject the succession. 12 Ann. 76; 15 Ann. 416.

E. Howard McCaleb for Defendant and Appellee:

1. Where the witness is neither dead nor absent, but shown to be present in the parish at the time of the trial, and his attendance could have been compelled by an attachment, testimony taken in a former suit between the same parties is not admissible, if objected to. 6 N. S. 351; 5 L. 364.
2. The renunciation of the community is presumed from the mere silence of the wife separated by judgment *a mensa et thoro* during the time prescribed by law. 11 Ann. 70; 12 Ann. 76; 15 Ann. 416.
3. The separate property of the wife, not shown to have been increased or improved during the marriage, by the common labor and expense, cannot be held liable to the husband especially where the increase, if any, is attributable to the ordinary course of things. R. C. C. 2408.

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4. One-half of the enhanced value of the wife's separate property, at the dissolution of the marriage, caused by improvements made thereon by the community, must be accounted for by her on final settlement. 4 R. 278; 6 R. 508; 10 R. 373. The compensation due the community is regulated by the value of the improvements at the time of the dissolution of the marriage. 8 R. 182; 12 R. 389, 390; 2 Ann. 30. Here no improvements were made on the wife's property during marriage, consequently she owed nothing at its dissolution.
5. The increase in the annual sales of the orange crops, due to the fertility of the soil and not proven to have been the result of the common labor of the spouses, creates no liability on the part of the wife or her separate estate. 10 Ann. 258.
6. There is a striking analogy recognized by law between the relations of the usufructuary and the owner and the community to the wife as regards her paraphernal property. 6 Ann. 636; 10 R. 46.
7. The community cannot recover for ordinary repairs made, nor for taxes paid upon the wife's property. For such expenditures the usufructuary, and not the owner, is liable. R. C. C. 571-578. The wife cannot be held for the fruits of her paraphernal property administered by her husband and consumed during the existence of the community.

ON MOTION TO DISMISS

The opinion of the Court was delivered by

POCHÉ, J. The ground of the motion is error in the return day, imputable to appellant.

The order of appeal bears date October 16, 1885, and the appeal is made returnable on the first Monday of December following; to the order is added the statement, "there not being time to prepare the transcript for the next ensuing term."

It is contended, and it is not denied, that the return day was suggested by appellant's counsel. The question is therefore the alleged error of the return day.

The law of the case is Act No. 45 of the Legislature, approved March 16, 1870.

Under its first section, appeals from the parish of Plaquemines are returnable to this Court at New Orleans on the first and third Mondays of each month of the session here.

This appeal should therefore have been made returnable on the first Monday of November, 1885, unless the judge had the legal discretion or authority to select a different day.

Section 47 of the act provides in substance: That in all cases of appeal, the judge of the court from which it is taken shall make the appeal returnable to the Supreme Court at the next return day for appeals from the parish, if there shall be time enough after granting it to give the notice required by law and to prepare the record; if not, then he shall fix the return day for some day within the next term after the appeal is granted.

In this case the order contains the information that the record could

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not be prepared in time for the ensuing term. But appellee contends that the statement is erroneous, and in support of the contention her counsel presents two certificates to which he directs our attention.

In granting the order as framed by appellant's counsel, the judge must in law be held to have adopted the statement for the necessity of a change of the regular return day, as well as his suggestion of the return day itself. Hence, this Court is authorized to conclude and it must therefore hold, that in the opinion of the judge *a quo* there was not sufficient time to prepare the record by the next regular return day.

That statement is part of the record, the size of the transcript corroborates its truth, and we find nothing in the record to contradict it.

We cannot and we shall certainly not go out of the record for evidence to contradict that which appears in the record. Hence, we must decline to consider either the certificates annexed by appellee or the counter affidavit filed by appellant's counsel. *Wooten vs. LeBlanc*, 32 Ann. 695.

We cannot presume that the judge in allowing the statement to be of record, that more time was necessary to prepare the transcript, meant to say otherwise, or erred in the statement which, under the effect of his ruling, became his own.

It is not even intimated that any attempt was made to deceive him, or to obtain any undue advantage over the appellee. The appeal taken is devolutive, and it could have been brought up by petition at any time within the year.

We have considered the cases relied on by appellee; they are not applicable to the restricted issue involved in this motion.

In those cases the motion hinged upon a motion day absolutely erroneous under the law, in which the judge transgressed the law at the suggestion of appellant, whereas in the instant case the inquiry is directed to the exercise of legal discretion by the judge of the court whence the appeal was taken. *Wooten vs. LeBlanc*, 32 Ann. 692; *State ex rel. Lee vs. Jumel*, 35 Ann. 980.

In the present order the judge has acted within the bounds of the legal discretion vested in him, and the appeal must be sustained.

The motion to dismiss this appeal is therefore overruled, with costs.

ON THE MERITS.

WATKINS, J. At the suit of the defendant a judgment was rendered, decreeing a separation from bed and board, and a separation of property, and *dissolution* of the community theretofore existing between herself and plaintiff.

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The plaintiff brings this suit for a *settlement* of the community between himself and wife, "from the date of their marriage, on the 3d of February, 1873, to the date of the judgment, April 25, 1885."

He alleges that defendant has tacitly renounced all her rights in the community having failed to signify her acceptance of it within the time prescribed by law, and hence he is owner of the entire community property in his own *individual* right.

He claims that the *revenues* and *crops* of defendant's paraphernal property, during the existence of the community, amounted to \$17,100; and that he advanced about \$1000 for the benefit of defendant's separate property.

He claims further that the community owns a stock of goods, kept in a store on defendant's property, worth \$600, with some outstandings, of small value.

He claims further that he "has placed repairs on said store to the amount of \$80, out of *his* separate means; and upon the defendant's separate property, *through his own labor, material, bills paid, improvements in the way of ditches, fences, cultivation and other works, and repairs*, to the amount of \$7000.

He prays judgment against defendant for the \$18,330, and that he be decreed the owner of all the community property.

There was judgment for the defendant in the court below, and plaintiff has appealed.

I.

The salient facts are these :

When defendant married the plaintiff she was Widow Virginia Rogas, and as such, the owner, in *her own* right, of one-half of the community theretofore existing between herself and Felix Rogas; and the half inherited by the children of the marriage was adjudicated to her, upon an order of court, on July 30, 1874, thereby investing her with full and complete title.

The property consisted of two pieces of improved real estate, situated in parish of Plaquemines, valued at \$10,000, and movable effects valued at \$4,725 82. There were, also, two pieces of property in New Orleans valued at \$12,500.

The value of the entire amount of her separate estate aggregated \$27,275 82.

At the time of the marriage, the plaintiff was possessed of *no means or property of any kind*.

The defendant was the mother of four children by her former marriage, two of them minors.

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After the marriage with plaintiff, she settled with her children by making sales of her separate estate.

The whole of the defendant's separate property passed under her husband's administration, and the *fruits and revenues* thereof fell into the new community.

Defendant does not deny that she has renounced and abandoned the community; and avers that she owes the plaintiff nothing; and that her separate property has been in no way benefited, or improved by the community, or its value enhanced.

At the dissolution of the community, by the judgment, there was *no community property on hand*, except the *claims* enumerated against defendant, as assets.

A quantity of testimony was introduced in the court below, for the purpose of proving that the plaintiff was a sober, industrious, hard-working man; and that the value of the orange crops produced annually, on defendant's separate property, had greatly *increased*, under his management, and were *sold for more money* than theretofore.

But the fruits of the paraphernal property were not *in esse* at the dissolution of the community. They had been *used and consumed* during the husband's administration, and, presumably, for the account of the community. They were absolutely at the plaintiff's disposal. R. C. C. 2404.

II.

The matrimonial community is not a partnership. R. C. C. 2807; 32 Ann. 792, Succession of Cason.

Therefore, there can be had no reckoning, as between the members, *inter sese*, as to the *quantum* of labor bestowed, or capital, by either withdrawn. The legal import of the words "community property" is *a community of property*.

R. C. C. 3401 declares that the community consists of "the *profits* of all the effects of which the husband has the administration, and enjoyment, either of right or in fact, of the *produce* of their *reciprocal* labor and industry of both husband and wife, etc."

In the same manner, the debts contracted during the marriage enter into the community, and must be acquitted out of the common property. R. C. C. 2403.

At the *dissolution* of the community, "all effects which both husband and wife reciprocally possess, are presumed common effects, or gains," until the contrary is shown. R. C. C. 2405.

It is provided by R. C. C. 2406, that "the effects which compose the
* * community of gains, are divided into two *equal* portions be-

Bartoli vs. Huguenard.

tween the husband and wife, or between the heirs, *at the dissolution* of the marriage; and it is the same with respect to the *profits* arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by the husband and wife conjointly, *although what has thus been brought in marriage, by either the husband or wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.*

When the effects of the community are partitioned, the husband and wife are equally liable for the debts contracted during the marriage. R. C. C. 2409.

But the wife may exonerate herself from them by renouncing the community. R. C. C. 2410.

She thereby loses all right to the community assets; but she may retake her paraphernal property. R. C. C. 2411.

The wife, separated from bed and board, who has not evinced her intention to accept the community, within the time allowed to beneficiary heirs for deliberating, is presumed to have renounced it. R. C. C. 2414, 2420; 12 Ann. 76.

"The *distinct* interests of the parties attach at the *dissolution* of the marriage, subject to the right of the wife, or her heirs to renounce, and be exonerated from community debts." 9 La. 583, German vs. Gay; 4 O. S. 652, Gale vs. Davis.

"Although the *distinct* interests of the wife or her representatives attach at the *dissolution* of the marriage, subject to the right to renounce, they can claim nothing until the debts be paid. *They cannot sue for half the price of any specific property acquired during the marriage, where the liquidation of the community does not show any gains to be divided.*" 1 R. 378; 7 R. 378; 2 Ann. 30.

"In settling a community between a surviving partner and the heirs of the deceased, particular reference must be had to its affairs at the *dissolution.*" 16 La. 40, Thibodeaux vs. Thibodeaux.

"The property, found at the *dissolution* of the marriage, *constitutes the body of acquets and gains.*"

Reduced to this last analysis, this suit is for the recovery from the wife of one half of the alleged *profits of her separate property, while under the administration of the plaintiff*, and which he had the right to use at pleasure, and his alienation and enjoyment thereof could not have been prevented by the wife; and the whole of which have been consumed by the community, and *not one tithe of which is now in existence.*

Bartoli vs. Huguenard.

The effect of his recovery would be to entitle him to take from the wife's *separate* property enough to reimburse him, and thus confiscate her estate.

If such an interpretation be placed upon the provisions of the Code in relation to the community of acquets and gains, the paraphernal property of the wife would be completely at the mercy of the husband. By his administration its fruits and revenues become subjected to his absolute control; and the wife is powerless to restrain either his *use* or *abuse* of them.

But when used and consumed—according to plaintiff's theory—he is entitled to cast up all accounts, for the value of his labor, material employed, bills paid, cost of cultivation of crops and the value of crops produced and sold during the community, and charge up to the wife's debit one half and collect it out of her separate estate.

In our view of the law, it is subject to no such construction.

The partition and settlement of the community must be predicated upon the condition of things *at the date of its dissolution*. Whatever property there is remaining at that date, is subject to the payment of community debts and the *residue* may be divided between the spouses. If the debts exceed the value of the property, or there be a likelihood of it, the wife may relieve herself from responsibility by making a renunciation. But, in no event, can any part of the *expenses* or *expenditures* of the community be charged against the wife's separate property.

To permit this to be done would be to violate a prohibitory law.

“The wife, whether separate in property by control or judgment, or not separated, cannot bind herself for her husband, or conjointly with him, for debts contracted by him before or during the marriage.” R. C. C. 2398.

The law could contradict itself by denying the wife the power to bind herself for debts contracted by the husband, and yet authorize the husband to use and consume the property of the community and charge her separate property, without her consent, for its value.

This view of the law dispenses us from the necessity of passing upon plaintiff's bill of exceptions, reserved to the rejection by the court of the evidence of his witness, Antonio Piaggini, which had been taken on a former trial and which comes up with the record annexed to the bill. It would be of no avail.

III.

With respect to the plaintiff's claim for improvements placed, during the existence of the community, upon the wife's separate property,

State vs. Duffy.

whereby its value became enhanced; and for debts of the wife paid by the community, the proof is desultory and unsatisfactory.

The Code provides that when the separate property of *either* spouse has been *increased or improved* during the marriage, the other shall be entitled to one half the value of the increase, "but there shall be no reward due if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or the chances of trade." R. C. C. 2408. 2 Ann. 30, *Depas vs. Ruz*: 6 R. 514; 4 R. R. 236: 33 Ann. 540, *Succession of Roth*: 38 Ann. 700, *Succession of Foreman*: 38 Ann. 728, *Succession of Beaux*.

The evidence fails to establish plaintiff's demands.

Judgment affirmed.

No. 9851.

THE STATE OF LOUISIANA VS. JOHN E. DUFFY.

Continuance on the ground of absence of witnesses, who are out of the State and beyond the process of the Court, will only be enforced in strong and clear cases in which three elements must concur: (1) Materiality and admissibility of the evidence: (2) due diligence; (3) affirmative showing that the absent witnesses can and will be produced at the future term.

The judge *a quo*, having exhibited strong reasons, showing that these requirements have not been complied with, and having concluded that the application was made for delay, his ruling will not be interfered with.

The *proces verbal* of the coroner's inquest is admissible for the restricted purpose of showing the fact and cause of death.

The Constitution authorizing the appointment of an assistant coroner, his authority to hold inquests is recognized, the holding of such inquests being the main and nearly sole purpose for which the office of coroner exists.

Where the *proces verbal* is signed by the assistant coroner, it will be presumed that he was the officer who held the inquest, although there had been a failure to correct the formal recital that the inquest was held before the coroner.

It appearing that no hurt to justice resulted to the prisoner, technicalities will not be strained to avoid a trial and sentence.

A PPEAL from the Criminal District Court for the parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee.

Walter H. Rogers for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The record presents three bills of exceptions which we will consider in the following order:

39	419
44	1115
39	419
50	311
39	419
52	1366
39	419
108	226
39	419
115	966
39	419
116	83
117	886
39	419
118	102
39	419
121	1054

State vs. Duffy.

1st. A bill was taken to the refusal of a motion for continuance, based on the absence of material witnesses and supported by affidavits.

These affidavits contain all proper allegations as to diligence and good faith on the part of accused; but they disclose that the witnesses required are absent in the State of Mississippi, and out of the process of the Court. It further appears from the statements of the judge that, at a former trial of the case, the same witnesses had been summoned, and that it then appeared that all of them, except one, were returned by the sheriff as not found, or out of the city, and that the one, who then appeared in answer to the summons, was not, at that trial, put on the stand. No showing is made in the affidavits of any reasonable certainty that, if the case were continued, the attendance of the witnesses could and would be procured. The only statement on the subject is the following: "that the witnesses are laboring men, and your deponent is informed that they have procured work across the lake, in the State of Mississippi, which will occupy them some time, but not more than a month; that they are residents of this city, which is their home, and won't return before the next term of court," coupled with the additional statement that "the presence of said witnesses can be had at the next term of court." It, moreover, appears on the face of the affidavits that the defendant had long been aware of the transient character of these witnesses and of their liability to be absent, for he wrote to the District Attorney more than a month before requesting a trial on the ground that "his witnesses were laboring men, and were liable to take work whenever offered;" yet he took no steps to secure their attendance, or to guard against their probable absence. R. S., 1014. Moreover, the affidavits make no showing than the evidence expected would have been admissible. Four of the witnesses were expected to prove previous threats of the deceased against the life of the accused; and the fifth was expected to prove not only the making of such threats, but that he communicated them to the accused.

Another element is essential to make such evidence admissible, viz: proof of an overt attack or hostile demonstration by accused against the deceased. 33 Ann. 1087; 34 Ann. 1078; 37 Ann. 443, 491, 644, 782, 896.

The affidavits make no suggestion of the intention or ability to tender such proof. The judge states that the evidence taken on the former trial satisfied him that no such proof could be made; and it further appears, from the judge's statement in refusing the motion for a new trial on the same ground, that no such foundation was laid for

State vs. Duffy.

the admissibility of the evidence, even had the witnesses been present.

The authorities positively, and with great reason, discountenance continuances on the ground of absence of witnesses who are not within the process of the court. As said in one case: "If trials for capital offenses could be postponed on affidavits of this sort very few cases would ever be tried at all, and none at the first court after the arrest of the offender, unless he were willing. * * No compulsory process can issue to obtain their testimony. The presumption is that they would not attend at another court, or they would have attended at the trial when the life of the defendant was in jeopardy." *State vs. Files*, 3 Brev. S. C. 304.

The rule is that three things must concur to support such a continuance: "(1) That the witness is really material (including, of course, admissibility of his expected evidence), and appears to the court so to be; (2) that the defendant has been guilty of no neglect; (3) that the witness can be had at the time to which the trial is deferred." *King vs. D'Eon*, 1 Wm. Bl. 510; *Mull's case*, 8 Gratt. 695; 3 Whart. Cr. L. § 3022, *et seq.*; 1 Bishop Cr. Proc. §951 (a); Wharton's Cr. P. & P. 589.

The judge *quo* concluded that none of these requisites sufficiently appeared in the affidavits and facts of this case and expresses his conviction that the application was made for delay.

We fail to discover any such manifest error or injustice as would alone authorize us to interfere with the discretion of a trial judge in a question of continuance. 36 Ann. 86, 853; 37 Ann. 129, 787.

2d. A bill was reserved to the overruling of the objections of defendant to the admissibility of the proces-verbal of the coroner's inquest to prove the fact and cause of the death of deceased. The objections are of two classes, viz: First, general, to the admissibility of the coroner's inquest at all, under any circumstances or for any purpose; second, special, to the admissibility of this particular proces-verbal on the grounds of its irregularity and defectiveness.

So far as the general objections are concerned, we consider them precluded by the jurisprudence of the State.

In *Parker's case*, the same general objections were considered, and it very deliberately ruled that the *proces-verbal* of the coroner's inquest was admissible for the restricted purpose of establishing the *fact* and *cause* of the death.

It was then contended that the existence of a special statute authorizing the introduction of the inquest as evidence before the grand jury,

Succession of Applegate.

Conceding that, under the effect of that decision, she is precluded from making the claim as widow in community, the administratrix argues that she herein represents the creditors of the community, which she holds out as insolvent. Hence, she urges that her charge is predicated on the facts and circumstances which characterized the case of *Mercier vs. Canonge*, 12 Robinson, 394.

In order to claim shelter under the principles of that decision, the administratrix would be required to make proof of the following facts:

That the community between Applegate, the deceased, and his first wife was insolvent; that he had no other property; that the income of his minor children, out of their separate estate, was about sufficient to meet the cost of their maintenance and education, and that the creditors, whose rights she has undertaken to champion, were creditors at the date of the dissolution of the first community, or at least during the years for which she proposes to charge the minors for their maintenance and education.

These are substantially the facts and circumstances which make up the groundwork of the decision which she invokes in support of her contention, and in which the tutor was required to charge the expenses of his minor children to the revenues derived from their separate estate, in order to subject the revenues of the insolvent community to the action of its creditors. Only one of those features is disclosed by the record in this case, and that is an income out of the minors' separate property about sufficient to maintain and educate them. In every other feature the two cases are essentially different.

As we have already stated, the record in this case contains overwhelming evidence of the absolute solvency of the first community, and that none of the creditors of the second community were creditors of the first community which was dissolved by the death of the first wife in June, 1874.

It appears from the account that the rights of the creditors whose claims may be in conflict with the alleged rights of the minors of the first marriage, are evidenced by accounts current in the course of trade with the deceased, immediately preceding his death, while he was actively carrying on his business of plumber and gas-fitter.

And it also appears that at the very moment of his death, Applegate was thoroughly solvent and in excellent commercial condition, even in view of the allowance made by the district judge in favor of his said minor children.

The inventory of the second community shows assets amounting to \$37,281.86, and debts, privileged and ordinary, in the sum of \$20,-

Barrow et al. vs. Wilson et al.

250.32. Through the allowance made in favor of the minors the debts are increased by \$12,666.78, and otherwise reduced by \$2000.

It may be, as suggested by the administratrix, that on the final settlement of the succession and community, the amount of assets realized may not be exactly sufficient to extinguish the entire indebtedness of the community. But this result, which is not yet determined, because the assets have not as yet all been reduced to cash, will be solely attributable to the inevitable shrinkage in the value of a large stock of goods, when sold at auction, and the customary losses in the collection of bills receivable due to a commercial house, whose going business is suddenly checked by the death of the head of the house.

The test of the solvency of such a concern is to be found in its condition as shown by the inventory of the property made at or about the time that the house ends its career with the death of the owner. Thus tested, the community is shown to be solvent.

Our study of the case has led us to the conclusion that it must be governed by the decision in the Succession of Boyer, 36 Ann. 506, and that the district judge has correctly decided the issue which has been submitted to our review.

Judgment affirmed.

No. 9789.

R. R. BARROW ET AL. VS. MRS. M. WILSON ET AL.

Emancipation by marriage does not terminate the suspension of prescription as to minors, which continues until the actual majority of such minor. Plea of prescription of ten years overruled.

As to the property purchased at tax sale, the prescription of three years is pleaded under section 5 of Act 105 of 1874, which declares: "Any action to invalidate the titles to any property purchased at tax sale under and by virtue of any law of this State, shall be prescribed by the lapse of three years from the date of such sale."

This statute has never been repealed. Being a statute of prescription it is legitimately retrospective, and operates on tax sales made prior to its passage, at least from the date of the law.

Section 62 of Act 42 of 1861, under which this sale was made, providing for obtaining an Auditor's deed of sale, does not impair the effectiveness of the tax collector's deed as a title.

The section 5 of the Act 105 of 1874 is distinctly a prescription of an action. It does not purport to cure defects in titles; nor does it concern itself with the rights of parties. It simply says, whatever be the rights, they must be asserted within three years or else the action is barred.

The power of the legislature to pass such laws is undisputed and the courts are bound to enforce them.

In this case, defendants have a title derived from a tax sale made under a law of the State, under which they have held open, public and notorious possession for thirteen years

39	403
43	791
45	489
39	403
47	795
47	1563
47	1608
39	403
48	53
48	347
39	403
50	38
50	40
51	644
51	673
51	1635
39	403
107	598
107	600
39	403
108	18
39	403
118	97

The effect of his recovery would be to entitle him to take from the wife's *separate* property enough to reimburse him, and thus confiscate her estate.

If such an interpretation be placed upon the provisions of the Code in relation to the community of acquets and gains, the paraphernal property of the wife would be completely at the mercy of the husband. By his administration its fruits and revenues become subjected to his absolute control; and the wife is powerless to restrain either his *use* or *abuse* of them.

But when used and consumed—according to plaintiff's theory—he is entitled to cast up all accounts, for the value of his labor, material employed, bills paid, cost of cultivation of crops and the value of crops produced and sold during the community, and charge up to the wife's debit one half and collect it out of her separate estate.

In our view of the law, it is subject to no such construction.

The partition and settlement of the community must be predicated upon the condition of things *at the date of its dissolution*. Whatever property there is remaining at that date, is subject to the payment of community debts and the *residue* may be divided between the spouses. If the debts exceed the value of the property, or there be a likelihood of it, the wife may relieve herself from responsibility by making a renunciation. But, in no event, can any part of the *expenses* or *expenditures* of the community be charged against the wife's separate property.

To permit this to be done would be to violate a prohibitory law.

"The wife, whether separate in property by control or judgment, or not separated, cannot bind herself for her husband, or conjointly with him, for debts contracted by him before or during the marriage." R. C. C. 2398.

The law could contradict itself by denying the wife the power to bind herself for debts contracted by the husband, and yet authorize the husband to use and consume the property of the community and charge her separate property, without her consent, for its value.

This view of the law dispenses us from the necessity of passing upon plaintiff's bill of exceptions, reserved to the rejection by the court of the evidence of his witness, Antonio Piaggini, which had been taken on a former trial and which comes up with the record annexed to the bill. It would be of no avail.

III.

With respect to the plaintiff's claim for improvements placed, during the existence of the community, upon the wife's separate property,

State vs. Duffy.

whereby its value became enhanced; and for debts of the wife paid by the community, the proof is desultory and unsatisfactory.

The Code provides that when the separate property of *either* spouse has been *increased* or *improved* during the marriage, the other shall be entitled to one half the value of the increase, "but there shall be no reward due if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or the chances of trade." R. C. C. 2408. 2 Ann. 30, Depas vs. Ruz; 6 R. 514; 4 R. R. 236: 33 Ann. 540, Succession of Roth; 38 Ann. 700, Succession of Foreman: 38 Ann. 728, Succession of Beaux.

The evidence fails to establish plaintiff's demands.

Judgment affirmed.

No. 9851.

THE STATE OF LOUISIANA VS. JOHN E. DUFFY.

Continuance on the ground of absence of witnesses, who are out of the State and beyond the process of the Court, will only be enforced in strong and clear cases in which three elements must concur: (1) Materiality and admissibility of the evidence; (2) due diligence; (3) affirmative showing that the absent witnesses can and will be produced at the future term.

The judge *a quo*, having exhibited strong reasons, showing that these requirements have not been complied with, and having concluded that the application was made for delay, his ruling will not be interfered with.

The *proces verbal* of the coroner's inquest is admissible for the restricted purpose of showing the fact and cause of death.

The Constitution authorizing the appointment of an assistant coroner, his authority to hold inquests is recognized, the holding of such inquests being the main and nearly sole purpose for which the office of coroner exists.

Where the *proces verbal* is signed by the assistant coroner, it will be presumed that he was the officer who held the inquest, although there had been a failure to correct the formal recital that the inquest was held before the coroner.

It appearing that no hurt to justice resulted to the prisoner, technicalities will not be strained to avoid a trial and sentence.

A PPEAL from the Criminal District Court for the parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and Lionel Adams, District Attorney, for the State, Appellee.

Walter H. Rogers for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The record presents three bills of exceptions which we will consider in the following order:

39	419
44	1118
39	419
50	311
39	419
52	1356
39	419
108	236
39	419
115	966
39	419
116	33
117	386
39	419
118	102
39	419
121	1054

State vs. Duffy.

1st. A bill was taken to the refusal of a motion for continuance, based on the absence of material witnesses and supported by affidavits.

These affidavits contain all proper allegations as to diligence and good faith on the part of accused; but they disclose that the witnesses required are absent in the State of Mississippi, and out of the process of the Court. It further appears from the statements of the judge that, at a former trial of the case, the same witnesses had been summoned, and that it then appeared that all of them, except one, were returned by the sheriff as not found, or out of the city, and that the one, who then appeared in answer to the summons, was not, at that trial, put on the stand. No showing is made in the affidavits of any reasonable certainty that, if the case were continued, the attendance of the witnesses could and would be procured. The only statement on the subject is the following: "that the witnesses are laboring men, and your deponent is informed that they have procured work across the lake, in the State of Mississippi, which will occupy them some time, but not more than a month; that they are residents of this city, which is their home, and won't return before the next term of court," coupled with the additional statement that "the presence of said witnesses can be had at the next term of court." It, moreover, appears on the face of the affidavits that the defendant had long been aware of the transient character of these witnesses and of their liability to be absent, for he wrote to the District Attorney more than a month before requesting a trial on the ground that "his witnesses were laboring men, and were liable to take work whenever offered;" yet he took no steps to secure their attendance, or to guard against their probable absence. R. S., 1014. Moreover, the affidavits make no showing than the evidence expected would have been admissible. Four of the witnesses were expected to prove previous threats of the deceased against the life of the accused; and the fifth was expected to prove not only the making of such threats, but that he communicated them to the accused.

Another element is essential to make such evidence admissible, viz: proof of an overt attack or hostile demonstration by accused against the deceased. 33 Ann. 1087; 34 Ann. 1078; 37 Ann. 443, 491, 644, 782, 896.

The affidavits make no suggestion of the intention or ability to tender such proof. The judge states that the evidence taken on the former trial satisfied him that no such proof could be made; and it further appears, from the judge's statement in refusing the motion for a new trial on the same ground, that no such foundation was laid for

State vs. Duffy.

the admissibility of the evidence, even had the witnesses been present.

The authorities positively, and with great reason, discountenance continuances on the ground of absence of witnesses who are not within the process of the court. As said in one case: "If trials for capital offenses could be postponed on affidavits of this sort very few cases would ever be tried at all, and none at the first court after the arrest of the offender, unless he were willing. * * No compulsory process can issue to obtain their testimony. The presumption is that they would not attend at another court, or they would have attended at the trial when the life of the defendant was in jeopardy." *State vs. Files*, 3 Brev. S. C. 304.

The rule is that three things must concur to support such a continuance: "(1) That the witness is really material (including, of course, admissibility of his expected evidence), and appears to the court so to be; (2) that the defendant has been guilty of no neglect; (3) that the witness can be had at the time to which the trial is deferred." *King vs. D'Eon*, 1 Wm. Bl. 510; *Mull's case*, 8 Gratt. 695; 3 Whart. Cr. L. § 3022, *et seq.*; 1 Bishop Cr. Proc. §951 (a); Wharton's Cr. P. & P. 589.

The judge *a quo* concluded that none of these requisites sufficiently appeared in the affidavits and facts of this case and expresses his conviction that the application was made for delay.

We fail to discover any such manifest error or injustice as would alone authorize us to interfere with the discretion of a trial judge in a question of continuance. 36 Ann. 86, 853; 37 Ann. 129, 787.

2d. A bill was reserved to the overruling of the objections of defendant to the admissibility of the proces-verbal of the coroner's inquest to prove the fact and cause of the death of deceased. The objections are of two classes, viz: First, general, to the admissibility of the coroner's inquest at all, under any circumstances or for any purpose; second, special, to the admissibility of this particular proces-verbal on the grounds of its irregularity and defectiveness.

So far as the general objections are concerned, we consider them precluded by the jurisprudence of the State.

In *Parker's case*, the same general objections were considered, and it very deliberately ruled that the *proces-verbal* of the coroner's inquest was admissible for the restricted purpose of establishing the *fact* and *cause* of the death.

It was then contended that the existence of a special statute authorizing the introduction of the inquest as evidence before the grand jury,

State vs. Duffy.

impliedly excluded it as evidence before the petit jury; but the court said: "The direction of the statute, that the coroner's inquest is to be used as evidence before the grand jury, is not an exclusion of its use before the petit jury."

The special statute above referred to has not been included in the revised statutes and is claimed to have been repealed under the general repealing clause; and it is now contended that the fact of such repeal prevents the admission of the inquest before the petit jury. There is less force in the latter than in the earlier position. The decision in Parker's case rests on reason and authority, independent of statute. It has been since followed and we adhere to it. *State vs. Parker*, 7 Ann., 84; *State vs. Melville*, 10 Ann., 457; *State vs. Roland*, 38 Ann., 19.

The special objection urged to this particular *proces-verbal* is that, while reciting in its body that the inquest was held "Before me, Dr. J. J. Finney, coroner for the parish of Orleans," and purporting to be signed "by said coroner and jurors," the same is not signed Dr. Finney, but by "Stanhope Jones, M. D., assistant coroner." The Art. 147 of the Constitution authorizes the coroner of this parish to appoint an assistant at a salary not exceeding \$3000. Such a provision would seem to be self-operative. As, under the provisions of law regulating the office of coroner (R. S. Sec. 649, *et seq*) there seem to be no substantial duties except those connected with the holding of inquests, it might be inferred that the object in having an assistant was to hold inquests when the coroner himself was otherwise engaged. Moreover, independent of this provision, the Sec. 667 of the R. S. authorized the coroner to appoint a deputy to perform his duties "in case of sickness or necessary absence." Faulkner's case settles the principle that where the appointment of an assistant or deputy is authorized by law and is made, it will be presumed that the conditions existed under which the law authorized the appointment. *State vs. Faulkner*, 32 Ann. 725.

We are authorized to assume that Dr. Jones was regularly appointed and acted within the limits of his authority.

We are not disposed to attach importance to the recitals in the act as showing that the assistant coroner, who certified the *proces-verbal*, did not hold the inquest.

It is a suggestion too powerful to be resisted, that the discrepancy is the result of a mere clerical omission to alter a recital in a printed form of *proces-verbal*, and it is nowhere asserted as a fact that Dr. Jones did not actually hold the inquest. But, in every event, the

Dwyer vs. Woulfe et als.

judge in his reasons says: "Dr. Jones, the assistant coroner, being absent from the State, the proces-verbal was admitted solely to prove the cause of death. The accused has never denied that he killed Gardner, but claims that he acted in self-defense. Counsel does not even pretend that there is any dispute as to the cause of death. Expert testimony was not necessary to prove the cause of death; death was almost instantaneous as a result of knife-wounds."

Under such circumstances, it would be straining technicalities beyond all reasonable limits, to remand this case for so immaterial a matter, which would not advance, but only hinder, justice. Judgment affirmed.

No. 9805.

WIDOW PATRICK DWYER VS. JAMES J. WOULFE ET ALS.

Want of consideration and knowledge of circumstances of relief, under which a note was issued and a mortgage consented to secure its judgment, may be pleaded against a third party, but cannot exonerate the drawer and mortgager, unless fully established against such party whose presumed innocence is always implied.

Representations of indebtedness and of ownership by one and acted upon by another, in good faith, conclude the former and protect the latter.

A PPEAL from the Civil District Court for the parish of Orleans.
Rightor, J.

Posey & Ker for Plaintiff and Appellee.

Sam. L. Gilmore for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This suit was originally brought against the present named defendant and as co-defendant against the succession of W. J. Castell and the surety of the latter as a notary public in this city.

The substantial allegations were that the plaintiff is the holder of a certain note for \$5000 of Woulfe, to his own order and by him endorsed, secured by mortgage on real estate, described in the act which was executed before Castell, as notary; that said act was not seasonably recorded in the mortgage office; that shortly after the execution of this act, Woulfe issued another note of \$1500, which was secured on the same property, and that this act was recorded; that it was only some time afterwards that the plaintiff had her act recorded in the mortgage office; that for whatever damage may result to her from the non-registry of said act of mortgage, she is entitled to indemnity by Woulfe, Castell and his surety.

Dwyer vs. Woulfe et als.

Exceptions were filed by Woulfe and the succession of Castell and the surety, which were sustained in part, dismissing the action, except as against Woulfe, and reserving plaintiff's rights on the notes against the defendant, Woulfe.

The defendant then answered, pleading non-liability not only for want of consideration, but also because the property mortgaged did not belong to him; that the note issued by him was executed for Castell's benefit, and that plaintiff *knew* of those material facts.

From a judgment in favor of plaintiff, defendant appeals.

As no appeal was taken by plaintiff from the judgment on exceptions, which dismissed the suit as against Castell's succession and the surety, the only controversy before us presently involves the liability of the defendant to plaintiff on the \$5000 note issued by him and secured by mortgage, as already stated.

The record contains notes of objections from both parties, designed to serve as bills of exceptions taken to rulings touching evidence admitted or rejected. There was no mention made of them here, either in the oral or in the printed argument. As they appear to have no force, it must be presumed that the parties against whom they were made have abandoned them.

The plaintiff has introduced in evidence the note sued on and the act of mortgage by which it is secured, and also certificates of registry in the mortgage office.

Interrogatories on facts and articles having been propounded to the plaintiff, she answered, and her answers were filed in evidence. She, herself, was sworn as a general witness in her own behalf. She testified in chief and was cross-examined.

The defendant did not testify.

A witness was heard for plaintiff to show how it happens that the act of mortgage was recorded by plaintiff after Castell's death, namely, that plaintiff having ascertained then only that it had not been registered at the time it ought to have been, had it recorded.

The only defenses set up by Woulfe are, 1st, want of consideration; 2d, knowledge in plaintiff that the property mortgaged belonged to Castell, and that the note issued by him was uttered for Castell's benefit.

To prove want of consideration, the burden being on him, as the note is *for value received*, and as the act of mortgage confesses a loan, the defendant relies on the evidence of the plaintiff, which is to the effect that she never gave *him* any money.

If this statement was to stand alone, the defendant would have

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made some showing ; but the plaintiff did not stop there. She gave the history of the whole matter in a way which explains the discrepancy between her counsels' averment in the petition and her testimony on the stand.

She, substantially, says that she had given \$5000 to Castell to be invested by him for her ; that he gave her his note therefor, accompanying it with several small mortgage notes ; that some while after, he suggested to her that it would be preferable for her to have, instead of these small notes, a large mortgage note ; that he offered the note of Woulfe secured on his (Castell's) residence, which was amply worth the amount ; that this note was issued and the mortgage was executed, and that Castell gave her his note and Woulfe's mortgage note pinned together.

She says she does not know what Castell did with the money, or what passed between him and the defendant ; that all she knows is that Castell got her money, gave her his note and Woulfe's note pinned together in place of it.

It may be that Castell invested her money in Woulfe's note and secured its payment by giving his note in pledge ; or it may be that he invested the money in his own note and gave Woulfe's note as collateral security.

Castell is dead, and there is no evidence on the subject, save that of plaintiff, defendant, Woulfe, not having testified.

In the first case she became the owner of Woulfe's note ; in the second she acquired Castell's note.

It is true that being asked, whether Castell had given the mortgage note to her in *pledge*, she announced in the negative.

This proves nothing to relieve defendant ; she could have sued, either as owner or as pledgee of the note, as she wished ; and it was a matter of the utmost indifference to the defendant in what capacity he was sued by her. He owed his note, whether the plaintiff had a title to it one way or the other.

The facts speak louder than plaintiff's words, particularly when it is not shown that she *knew* the meaning of the technical term *pledge*.

It was an unnecessary—nay idle work—to aver in the petition that the plaintiff had loaned any money to the defendant. It would have been sufficient to allege possession of the note and the granting of the mortgage without setting forth ownership. 3 A. 268.

This averment was controlled by the act of mortgage, copy of which was annexed to the petition as part, which showed that the defendant had issued the note for *value received* and had given a mortgage in favor

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of another party, named in the act, on property of which he claimed to be the owner.

As to the defense that plaintiff knew that the property mortgaged was Castell's and that the note sued on had been issued for his benefit, it should suffice to say that such knowledge has not been shown.

The plaintiff testifies to the reverse and states that Castell several times told her he had no property.

It is true that the defendant attempted to introduce a counter letter given by him to Castell, but that document could not be received, as it had not been recorded previous to the date of the mortgage in question and was therefore in no way binding on third parties, plaintiff being viewed in that light.

The circumstance that Castell told the plaintiff that Woulfe's note would be secured on his (Castell's) residence cannot be construed so as to infer from it that Castell thereby declared that the property belonged to him and not to Woulfe.

Numerous indeed are the parties who occupy as their residences, the property of other persons.

At that rate, how lucky would tenants be, who could by one word transform themselves into landlords.

If the facts were as defendant represents them to have been, it was his privilege and interest to have had himself heard in his own behalf, as a witness, but he has selected not to do so.

From this version, the court cannot do less than infer that he kept silent either because he could not by himself establish his own defence, or that, if heard, he would testify adversely to himself.

The fact is that in the act of mortgage he has acknowledged an indebtedness for the amount of the note and has consented a mortgage to secure its payment on real estate which he held out to the world not only by his act of purchase, but in the act of mortgage, as belonging to him.

After admitting such indebtedness represented by the note issued for *value received* and after claiming ownership and exercising rights inherent thereto, and thus inducing an innocent third party to act on such representations, he cannot be permitted now to deny the truth of them or charge their falsity, so as to affect rights which may have been acquired by such third party acting on them.

The defendant finally contends that, if plaintiff did not have *actual* she had *constructive* knowledge of the *double* fact that the property

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belonged to Castell and that the note had been issued for his convenience.

To establish that circumstance, he urges that all that which the agent has notice of, must be imputed to the principal.

The rule, however well founded it be, can be enforced in such cases *only* in which the law allows it to be applied and is not without exceptions, which it is unnecessary to enumerate.

It is more than enough to say, that it has no bearing whatever in the instant controversy which is removed from its operation for the dazzling reason that there is not the remotest shadow of proof, that the property in question was Castell's property and that the note was issued for his accommodation.

The plaintiff says she did not know it, the defendant has not testified and the act of mortgage shows that the property mortgaged was acquired by defendant from Castell.

How can it be pretended that an agent knew of a certain fact and that this knowledge binds his principal, where it is not proved that the fact existed, or what is worse, where it is established by evidence concluded the party making the defence, that the fact did not exist.

We, therefore, conclude that the District Court has correctly determined the issue.

Judgment affirmed.

No. 9346.

TOWNSEND LAWRENCE vs. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY.

The owner of lands, who allows a railroad company to occupy and use the same for the construction of its road and other appurtenances necessary to the operation of a railroad, without remonstrance or complaint, will be held to have acquiesced therein and such a waiver will bar his action to dispossess the company.

But such a waiver will not defeat his right of action for damages or for the value of the lands thus taken by him. Affirming *St. Julien vs. Railroad*, 35 Ann. 994.

The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the beds of its road, or water for its engines, and the like. *Morgan vs. Louisiana*, 93 U. S. 217.

Such franchise includes the right of appropriating lands for the construction of necessary appurtenances, without which the road could not be successfully operated.

Such a franchise is transferred in a marshal's sale of a railroad and all its franchises to the purchaser, even if he is a natural person.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

39	427
116	264
39	427
118	438

Lawrence vs. Railroad Company.

B. R. Forman and Edward Simon for Plaintiff and Appellant.

Leovy & Leovy, J. T. Blair and Farrar & Kruttschnitt for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff appeals from a judgment rejecting his demand in a petitory action for the recovery of several tracts and strips of land, situated in Morgan City, in the possession of the defendant company, and on which it has erected depots for freight and passengers, several railroad tracks, switches, workshops, coal yards, cattle pens and steamboat landings and wharves, all used for the purposes of a common carrier, both by land and water.

Both parties claim title under Robert B. and Thomas T. Brashear, who once owned the plantation from which Morgan City was carved out, and which included the lands now in controversy. In addition to the plea of ownership through an alleged claim of title, the defendant company urges numerous other grounds of defense, among which is the averment that the present claimant and his alleged authors witnessed the possession of defendant of the several tracts of land in suit, were cognizant of the structures which the company placed thereon, from the year 1859 to the date of the suit, as the needs of the business required; that none of them ever objected to the company's possession and use of the lands aforesaid for the purposes of the company's business as a common carrier, and that such acquiescence is a bar to plaintiff's action to dispossess the present corporation, which has lawfully acquired all the rights of its predecessors and authors.

Although we have considered all the other features and bearings of the case, we reach the conclusion that this defense finds ample support in the record, as well as in the law governing the case, and we shall rest our decision on that plea.

The principle which underlies that ground of resistance was discussed before this Court, and it received the serious attention which was commensurate with the importance of the results likely to flow therefrom, in the case of *St. Julien vs. Railroad Company*, 35 Ann. 924.

In that case, under the guidance of a most respectable authority, this Court crystalized the principle into the following rule: "One who permits a railroad company to occupy and use his land and construct its road (a *quasi* public work) thereon, without remonstrance or complaint, cannot afterwards reclaim it free from the servitude he has

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permitted to be imposed upon it. His acquiescence in the company's taking possession and constructing its works under circumstances which made imperative his resistance, if he ever intended to set up illegality, will be considered a waiver. But while this presumed waiver is a bar to his action to dispossess the company, he is not deprived of his action for damages for the value of the land, or for injuries done him by the construction or operation of the road."

From the record we gather the following facts which have a bearing on this branch of the defense :

The lands in suit are situated at the point which was for many years the actual terminus of the railroad which had been built by the original incorporators, the New Orleans, Opelousas and Great Western Railroad Company, under a charter granted by the Legislature of Louisiana in 1853, and under the obligation to continue the construction of the road west of that point, namely, Berwick's Bay to the Sabine river.

In divers transactions, some in 1853, others in 1856, and others in 1857, that corporation obtained grants of lands for the construction of tracks, switches, depots, and other railroad appurtenances from R. B. and T. T. Brashear, the then owners of these lands, and from their legal representatives.

As the State of Texas soon became, in its trade with New Orleans, one of the principle feeders of the traffic of that road, it was found necessary, in view of the unfinished condition of the road, to reach Texas ports by steamers plying between the terminus of the road and Berwick's Bay and sundry points in Texas.

The needs of that kind of transportation soon required landing facilities at the Bay for freight, live cattle and passengers to and from the steamers, which resulted in additional grants of land, in order to meet the exigencies of the newly developed purposes from the then owners of the adjacent lands.

In July, 1869, the road, with all its branches and franchises, was bought at a United States marshal's sale by Charles Morgan, who owned and operated it as the "Morgan's Louisiana and Texas Railroad" until April, 1878, when the whole was acquired by the defendant corporation by purchase from him.

During Morgan's ownership many additions and improvements were made and erected, in order to supply means necessary to a double transportation, by land and water, and some additions have been made since the purchase of the present defendant.

Many of these improvements called for additional appropriations

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of land, although many works were erected on water and some railroad tracks were laid on portions of the public streets, with permission of the municipal authorities of Morgan City.

Now plaintiff rests his claims of ownership under a probate sale made in the successions of R. B. and T. T. Brashear, in May, 1871, and many of the improvements and works for which additional tracks or strips of the lands which he claims were used, have been erected since the date of his purchase. And although he was all that time a resident of the place, the record is barren of any proof of the slightest remonstrance or complaint on his part against any of the acts of the company, either under Morgan or under the present corporation.

As to his predecessors, the proof of their acquiescence in every act of either the old company or of Morgan, in occupying portions of their lands for the purposes of their *quasi* public works which thus were almost continuously erecting, is still more affirmatively shown. Such an acquiescence dates as far back as 1857, when the owners of the Brashear plantation, laid out a town at that point, which in time became Brashear City, the name being afterwards changed to Morgan City.

On their sale maps, they marked out and specially designated the various portions of their lands which they then and there dedicated to the use of the railroad company.

Their express consent, which is more than an acquiescence, to the occupation by the company of the far greater portion of the lands now in suit, is contained in the various acts of transfer and grants which we have herein above referred to.

We note that these transfers are alleged by plaintiff to be null and void, for many reasons not necessary to be herein mentioned. For the purposes of the present discussion we are not required to pass upon that contention, as our consideration of them has been specially restricted to their effect as indicia of acquiescence, or absence of remonstrance or complaint; and not as muniments of title.

Plaintiff also contends that the acquiescence of his authors and of himself cannot benefit the alleged encroachments of Morgan during his ownership, because a natural person cannot exercise corporate rights. But this argument has already been met and answered in several adjudications of this court, and of the Supreme Court of the United States, in suits involving the discussion of the very rights which Morgan had acquired under his purchase of the Opelousas railroad in 1869. In the case of *Morgan vs. Louisiana* 93, U. S. 217, the Supreme Court in defining what were the franchises of which the pur-

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chaser of the road had acquired at the marshal's sale, said: "But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value: such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked."

It takes no argument to show that the foregoing description impliedly includes the right of appropriating strips of land necessary to the construction of depots, cattle pens, coal bins, sheds and the like, without which this road could not have been successfully operated. *State vs. Morgau*, 28 Ann. 482; *Fazende vs. Morgan*, 31 Ann. 549; *St. Julien's case*, 35 Ann. 924.

Under the face of these authorities, we hold that, as one of the rights acquired by Morgan under his purchase, he became vested with all the franchises of the Opelousas railroad corporation, whose road was a *quasi* public work, for the successful operation of which was included the right of appropriating lands necessary for the construction of indispensable works.

Under the conclusions which we have reached, the defendant company is left in the occupation of the lands in suit, and plaintiff is not stripped of his right to urge such claims as he may have for the damages which may have been inflicted on him, or for the value of the lands which may have been taken from him.

Judgment affirmed.

Mr. Justice Todd recuses himself.

39	431
118	486

 No. 9372.

C. PAUL BERTRAND VS. N. KING KNOX ET ALS.

A citation judicially held to be absolutely null is not sufficient to interrupt prescription running in favor of a defendant.

Hence, the citation served on a married woman, under a petition in which she is sued as a single woman, cannot subsequently, after the defendant is sued as a married woman and duly cited, be invoked as a citation sufficient to interrupt prescription.

Through such a citation the married woman was not made a party to the suit, and if the service of the legal citation is made after prescription has acquired, the defendant having been cited too late, the plea of prescription is good, and it will defeat the action.

Bertrand vs. Knox et als.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Greeves*, Special Judge.

Favrot & Lamon for Plaintiff and Appellant.

D. N. Barrow and *Knox & Laycock* for Defendants and Appeilees.

The opiuion of the Court was delivered by

POCHÉ J. Plaintiff, as a judgment and mortgage creditor of Mrs. Adele Bory, brought this suit for the purpose of annulling and setting aside a judgment obtained by the defendant, Knox, against Mrs. Bory, his co-defendant, on the 18th of November, 1882, on the grounds, substantially, that said judgment was rendered by a court without jurisdiction, and that it was fraudulent and collusive between the parties thereto, at a time when the defendant therein was insolvent to her knowledge as well as to that of the plaintiff, Knox, to whom Mrs. Bory was not indebted at the time that the judgment was rendered.

The judgment of the District Court rejected plaintiff's demand, and he prosecutes this appeal.

This case was before us last year, and it was then remanded for the purpose of bringing into court Mrs. Bory, who was found to be a necessary party in the case. The defect potuted out in plaintiff's proceedings was, in substance, as follows :

In his first and supplemental petitions he has omitted or failed to state that Mrs. Bory was a married woman, and, hence, citation was served on her as though she was a single woman, without joining her husband therein, and without an order of court authorizing her to stand in judgment. Subsequently, more than a year after the suit had been pending, on an amended petition by plaintiff, stating that Mrs. Bory was married and that her husband was absent and in France, an order was made by the District Court, authorizing her to stand in judgment in the suit. The order was not served on her, but immediately after its rendition a default was entered against her and the trial proceeded to judgment.

On appeal, this Court set aside the judgment as null and void for want of allegations making Mrs. Bory a party, and it was then held that by the mode of proceeding against her, she had not been made a party to the suit. When the case reached the District Court, Mrs. Bory was served with the order authorizing her to appear and defend the suit. She is now legally a party in the case.

But the delay incurred by the plaintiff in reaching that line of

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attack, which was accomplished in July, 1886, has allowed the defendant, Knox, time to seek shelter behind another intrenchment.

We note here that Mrs. Bory has never made any defense or appearance whatever during the whole contest.

Her co-defendant, Knox, has interposed the plea of prescription of one year under the provisions of Article 1994 of the Code, which reads as follows :

"The action given by this section is limited to one year, if brought by a creditor individually, to be counted from the time he has obtained judgment against the debtor, if brought by syndics or other representatives of the creditors collectively, from the day of their appointment."

The right of Knox to plead this prescription derives from Article 3466 of the Civil Code, which provides, in substance, that all persons who may have an interest which can be subserved by prescription, have the right to make the plea even when they from whom they desire this right or title should renounce it. *Giddens vs. Mobly*, 37 Ann. 900, and authorities therein quoted. In this case Mrs. Bory has not renounced prescription, but her silence is equivalent thereto. Having in our previous opinion sustained Knox's plea that Mrs. Bory was a necessary party, we must consistently recognize his plea of prescription as to her.

It appears from the record that the two judgments which plaintiff holds against Mrs. Bory were rendered respectively on the 13th of December, 1883, and the 4th of January, 1884; hence, more than one year had elapsed in July, 1886, when the citation on Mrs. Bory was legally perfected.

But plaintiff's contention is that the service of citation on his original petition made on Mrs. Bory, on the 28th of February, 1883, and of his supplemental petition on the 12th of February, 1884, was sufficient in law to interrupt prescription, although confessedly insufficient to bring Mrs. Bory into court as a defendant.

In support of his contention plaintiff relies on a line of authorities in our reports which have "established a distinction between the technical sufficiency of a citation as a basis for the maintenance of proceedings and judgments, and its sufficiency for the purpose of interrupting prescription," and he confidently argues that his case is covered by the decisions which have held that a defective citation is sufficient to interrupt prescription.

But the conclusions announced in our opinion remanding his cause

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do not simply qualify the defect of his proceeding as an imperfect citation, but they reach much further, and amply justify the inference that there was a total want of citation.

The fundamental error which the opinion discloses is that Mrs. Bory had not been made a party at all, and that, therefore, the paper served upon her, purporting to be a citation, was, in law and in fact, an absolute nullity.

The practical effect of the decision is that a petition asking for process on Mrs. Bory (apparently) a single woman, in her own rights, could not bring into court Mrs. Adele Bory, wife of Dr. Adolph Bory, a person absolutely incapacitated to become a party to a suit without the authorization of her husband, or in default thereof, that of the court.

After reciting the salient facts connected with the attempt to bring Mrs. Bory into court, the opinion contains the following language:

"We think a recital of the above facts sufficiently answers the question as to whether she was made a party to the suit. It could not be claimed that the judgment rendered by default had any validity or had any effect against her. And why? Because by any straining of the law it could not be reasonably asserted that she was ever a party to the suit. The proposition is not maintainable by law or reason that she was legally brought into court by the order of the tenth of March, 1884, more than a year after she had been served with a citation and of which order she was totally ignorant. * * * In the petition it was not stated that Mrs. Bory's husband was absent nor even that she was a married woman, and there was no prayer of course for her authorization. She was sued as a single woman. * * * We conclude therefore that Mrs. Bory was never legally a party to the suit, and we have shown that she was a necessary party."

The necessities of the present discussion required the foregoing copious quotation from our opinion, mainly for the reason that the case is reported only by syllabus. 38 Ann., P. 350; Bertrand vs. Knox, et al.

From the tenor of that opinion it appears clear to the legal mind that the question which concerned the court was an issue much more serious and more vital to the legality of the proceedings than the question involving merely the technical sufficiency of the citation. As already stated the court was called on to decide whether under the allegations and the prayers of plaintiff's three petitions, the process which had issued against, and had been served on Mrs. Bory, was sufficient under any circumstances to make her a party to a suit in which she was an indispensable or necessary party.

Hence, the court ruled that because she had been sued as a single woman, because the order predicated on the amended petition filed in March, 1884, did not allow her any delay for answering or for making her defence, and because the order of authorization in question had not yet been served on her, she had not yet been made a party to the suit at all, or in other words, that she had not been cited. Now such service was confessedly not made before the month of July, 1886, and it was therefore only at that time that she became a party to the suit, more than two years after the latest of the two judgments held against her by plaintiff. Hence the plea of prescription is good. Although that plea had been made before our previous decision was rendered it is plain that we were powerless then to entertain it. Holding as we did that Mrs. Bory was not before the court, a ruling on any other question would have been an idle and meaningless ceremony, and a ruling which would have been binding on no one.

It is that feature of the case, as determined in the language herein above quoted from our previous opinion, which removes the discussion beyond the scope of Article 3518 of the Civil Code, and clearly distinguishes the plea herein made from the issues decided in the cases on which plaintiff rests his greatest reliance.

In the case of *Bush vs. Margaret Decuir and Husband*, 11 Ann. 503, the court held that citation served on the wife, and not on the husband, was sufficient to interrupt prescription. But it appears that the defendant was sued as a married woman, that her husband was made her co-defendant, hence the plaintiff was not legally responsible for the neglect or omission of the clerk to issue citation for the husband. The service of the citation on the wife was lawful, and although incomplete, it was the beginning of a legally sufficient citation as the basis of a valid judgment, and as such sufficient to interrupt prescription.

The case of *Satterley vs. Morgan*, 33 Ann. 846, involved a plea of prescription in a suit for damages. The defect of the citation consisted in its being addressed to "Charles Morgan, New Orleans," the Sheriff's return showing service on "Charles Morgan, through A. C. Hutchinson, agent in person." On exception the suit was dismissed, with right reserved to plaintiff to obtain legal citation. When properly cited the defendant pleaded prescription, but this court held the previous defective citation as sufficient to interrupt prescription. It was shown in that case that A. C. Hutchinson was the agent of Morgan with authority to receive citation, it had been served on him; and the only error in the pleadings was to treat Morgan as a resident, and to

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have omitted to state in the petition that Hutchinson was his attorney-in-fact.

This imperfect statement is sufficient to demonstrate the material difference between that class of cases and the issue now under discussion.

Our conclusions may operate a hardship on plaintiff, but they are the unavoidable results of his own laches—and through them we make a similar disposition of the case which was done by the District Judge, although we reach it through a different process of reasoning.

Judgment affirmed.

CONCURRING OPINION.

I.

BERMUDEZ, C. J. The right of Knox to set up the defense of prescription, to protect himself and not Mrs. Bory, appears unquestionable.

The law accords to all creditors and persons, who have an interest in the extinguishment of an allegation, the right to plead prescription for themselves, even if the person bound by the obligation should renounce such prescription. R. C. C. 3466; C. N. 2225.

“Ce serait une erreur de croire que la prescription n'a d'effet qu'autant qu'elle est opposée par celui qui a prescrit et que c'est au profit de ce dernier une faculté personnelle. * * Les créanciers peuvent exercer les droits de leurs débiteurs. Bigot Préamenen Disc. et Motifs, 8 Mars, 1804.”

“Cette règle est une des conséquences de la règle générale qui réprovoque, soit les dispositions et les arrangements frauduleux, conçus pour éluder des obligations, soit même des actes qui ne sont que le produit d'un penchant trop libéral, ou d'un faux calcul, lorsqu'ils tournent au détriment de personnes envers lesquelles on s'est obligé. Dans tous les temps, cette classe d'individus a excité toute la sollicitude des législateurs et des tribunaux. Que deviendraient leurs droits, le plus souvent, s'ils étaient livrés à la discrétion des débiteurs? Vazeille Presc. No. 353.

“Il n'est pas d'un homme juste, de sacrifier ses obligations les plus étroites à celles qui ont moins de faveur et de force.” Troplong Presc. V. I. No. 100, Duranton V. 21, No. 152.

See, also, Larthet vs. Hogan, 1 Ann. 330; Succession of Gill, 6 Ann. 342; 2 Ann. 546, 367; 8 Ann. 505; 12 Ann. 661.

II.

There can be no doubt that prescription may be interrupted by whoever has an interest to keep a claim alive, whether the debtor wishes or not, and that the presumption of remission or abandonment of the right may be rebutted and removed by showing and proving such interruption.

It is not, however, any act of the creditor that can produce that effect. The law requires that the debtor shall have been cited. This means that the creditor shall *sue* the *debtor*, and have the process of law properly and seasonably served on him.

If the debtor be an incapacitated person, such as a minor or a married woman, the creditor must, as a condition precedent to the service of the citation, put that debtor in a legal position to appear and defend himself, by making him legally a party to the suit, even where the same is brought before an incompetent court. C. P. 115, 118; R. C. C. 121, 124, 125, 3518.

If a suit is brought against a minor instead of being instituted against the tutor directly, or against a married woman, without joining her husband, neither the minor nor the woman being made a party and put in a condition to appear and defend the suit, it is evident that service on them of the process of court will not justify a default and confirmation of it, or a judgment rendered after appearance and answer. This is so, because the person cited had no capacity as such to appear or plead.

"Tout écrit de forme propre à faire annuler une assignation, est de nature à empêcher l'interruption de la prescription, sans qu'il y ait à rechercher s'il vient d'une faute grossière, ou s'il tient à l'inobservation de formalités trop minutieuses." Vazeille, No. 107.

"Il faudrait également regarder l'interruption comme non avenue, si la citation était donnée à une personne incapable de se défendre, ou à tout autre qu'a l'administrateur légal de ses biens." Duranton, V. 21, No. 266.

In the present instance, this Court, between the same parties, in this same suit, has decided that Mrs. Bory had never been made a *party*. It annulled the judgment rendered against her and remanded the case for the purpose of enabling the plaintiff to *make her a party* and serve the process of court.

This decision is not only authority, but constitutes *res judicata*.

Had the plaintiff originally asked that Mrs. Bory and her husband be cited, a service on her would have interrupted prescription (C. P. 192; Bush vs. Decuir, 11 Ann. 503); but this was not done. The

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omission is fatal. Hence, Mrs. Bory, not being a party to the suit originally, could not be legally served with a citation so as to interrupt prescription. This is so, for the plain reason that a mere citation served on one who is not a party to the suit, does not interrupt prescription.

The law relieves a creditor from defects in a citation served when they are not the results of his own acts, or not attributable to him; but it holds him responsible for any omission occurring by his fault or negligence. The penalty is the loss of his claim when the plea is set up.

As the plaintiff ought to have put Mrs. Bory, when he first sued on, in a condition to appear and defend herself, either by asking that her husband be cited, or by having her authorized by the court to do so during his absence (as was subsequently done), she was not a party; she was not in court; she had no right to protect herself judicially, and he must stand the consequences of his derelictions.

It is true, that the plea of prescription now insisted upon was previously before us; but we would not even consider it, as Mrs. Bory was not then a party to the suit, her presence being necessary.

The original citation did not interrupt prescription, and the plea set up is well maintained.

DISSENTING OPINION.

FENNER, J. I dissent from the opinion and decree herein.

1st. The same prescription was vehemently urged by Knox when the case was here before, and, if the views now taken are sound, should they have been maintained? It was useless to remand the case to perfect the citation of Mrs. Bory, if the prescription pleaded by Knox was then a bar to the further prosecution of the suit under any subsequent proceedings.

2d. The citation of Mrs. Bory, though she was not, at the time of service, authorized either by the Court or her husband, even if not valid as a basis for proceedings and judgment, was, under well established jurisprudence, sufficient to interrupt prescription. *Bush vs. Decuir*, 11 Ann. 503; *Satterlee vs. Morgan*, 33 Ann. 846, and authorities there cited, in not one of which was the citation sufficient to make the defendant a party, or to bring him into court.

3d. The suit is one by a creditor to annul a judgment obtained by Knox vs. Mrs. Bory. There is no dispute that Knox was cited in

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time, and even if Mrs. Bory was not, she is now cited, and does not plead prescription. There is no principle or authority supporting the right of Knox to interpose the plea for his co-defendant.

Art. 3466 C. C. and the decisions based thereon apply to a class of cases too different from this to give them the slightest application.

Todd, J., concurs in this opinion.

No. 9935.

THE STATE OF LOUISIANA VS. J. NATAL, ET ALS.

39	439
51	856

A change in the charter of a municipal corporation, or a substitution of a new charter to the old one, will not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation.

39	439
105	211
106	212

The city of New Orleans, founded by Bienville in 1718, is identically the city of New Orleans in 1887.

Its present charter, 1882, repeals all laws in conflict or inconsistent with, or contrary to its provisions, and by irresistible implication maintains all special laws, not at such variance with them.

Act 100 of 1878, relative to private markets, in furtherance of which ordinance No. 4798 A S. has been adopted, forbidding private markets within six squares of a public market, is a special law and is not in conflict with the charter of 1882 and has not been repealed, neither has been said ordinance, which being legal, justifies the infliction of fine, etc., in cases of violation of its prohibitions.

A PPEAL from the First Recorder's Court.
Davey, J.

W. H. Rogers, City Attorney ; *L. O'Donnell*, Assistant City Attorney ;
 and *Blanc & Butler* for Plaintiff and Appellee.

Belden & Armbruster and *S. J. N. Smith* for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendants appeal from judgments rendered against them for the payment of a fine and in default of payment sentencing them to imprisonment for the violation of ordinance No. 4798 A. S., which forbids the keeping of private markets within six squares of a public market within the limits of the City of New Orleans.

The facts are admitted.

Several defences are set up, the main of which is that the law in furtherance of which the ordinance was adopted, as well as the ordinance itself, have been abrogated, annulled and repealed and are no longer in force ; that, therefore, the fine imposed under the authority

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of the ordinance, is illegal for want of a law and that this court has consequently jurisdiction over the causes.

It is claimed that this repeal results from the adoption of the present city charter, in 1882, with which the law conflicts.

The defendants further urge that the laws of 1878, under the provisions of which the ordinance was passed, contemplated a monopoly and was abrogated by the present charter, and is in violation of the Constitution of the United States.

We consider that these and other objections to the constitutionality or legality of the ordinance in question and others similar to it, have been already considered and judicially determined in favor of the regulation.

Besides, the defendants in the instant cases have not urged them on appeal and may be considered as having abandoned all resistance on those grounds. Dillon on Mun. Corp. 380, 3 La. 217; 4 Ann. 335; 27 Ann. 417; 31 Ann. 544; 36 Ann. 986; No. 8603 of the docket of this court, not reported in full; also in cases Nos. 9582, 9583, 9584 not yet reported.

So that, the only question now to be solved is whether the ordinance was or not repealed.

The ordinance in question, No. 4798 A. S., was adopted in 1878, under the provisions of act No. 100 of the Legislature previously adopted in the same year, the object of which was the regulation of private markets in the city of New Orleans. From that time to the present day, it has uniformly been enforced; what resistance was ever made to its application, having been judicially pronounced groundless and unauthorized.

The defendants in the present controversy however, argue that the city of New Orleans in existence at the date of the passage of the law and of the adoption of the ordinance, has ceased to exist as such, under the operation of act 20 of 1882, which is the charter of the city now in existence; that said law and said ordinance were not perpetuated, but were ignored and abrogated by the last charter, and that the present prosecutions are attempts to enforce a defunct municipal regulation, in violation of constitutional and statutory law and of the personal rights of the defendants.

The theory thus advanced rests upon the assumed proposition that the city of New Orleans in existence in 1878, is not the city of New Orleans existing in 1887.

This is a fallacy arising from a misconception and a confusion of ideas on the subject.

The city of New Orleans, founded by Bienville about 1718 has never ceased to exist as an agglomeration of human beings for social, commercial and industrial purposes.

It is a growing fact, which no legislation has ever blotted out and which no power can annihilate in a free country, although it be true that the form of government to which its inhabitants have been remitted, or the mode in which it may exercise its rights and powers, has from time to time been modified or changed. It is the *civitas* or *polis* of ancient times.

The inhabitants had a right to congregate and to establish a city for their greater comfort and welfare. In the absence of any charter incorporating them, they are like the rest of citizens in the country ruled by the general laws enacted for the government of all throughout the territory.

In 1805 those inhabitants were given a charter, for the first time since the cession of 1803, and that charter has been altered or amended some way or other, in subsequent years, viz: 1812, 1818, 1833, 1835, 1837, 1846, 1850, 1852, 1870 and 1882, but the city, the existence of which was generally recognized by the various constitutions, has retained its identity, not only as a matter of fact, but also as a matter of legal necessity.

Whatever rights it originally possessed, whether because expressly conferred by the sovereign or because indispensably inherent to its nature and existence, it has continued to possess, unless where such rights have been recalled or denied by the properly constituted authority.

The present Constitution, Art. 254, gave authority to the General Assembly to cancel its charter and to remit its inhabitants to another form of government, if necessary.

The Legislature did not, however, formally cancel its previous although it changed the form of the municipal government.

This is apparent from the reading of the last section of the charter of 1882, which merely repeals the laws in conflict, inconsistent with or contrary to the provisions of the act.

By irresistible and clear implication, this section contemplates in effect the maintenance and continuation in favor of special laws not falling within the purview of the act, namely not conflicting with it.

It will not do to say that, in the beginning of the act, it is declared that the inhabitants of the Parish of Orleans were *created* a body corporate and established as a political corporation by the name of the City of New Orleans, for the fact is, that the Legislature did not and

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could not *create* the city of New Orleans which had existed long before the act of 1882.

To *create* is to bring to life, to animate, to vivify, that which never existed before.

What the Legislature did was to continue the City of New Orleans as a municipal corporation, and to invest it with powers which it did not previously possess, or to impose on it obligations to which it had not been subjected. The charter is the machinery whereby the city is put in motion and operates.

This is so true that the charter of 1882 transfers to the actual city all the rights, of any nature whatever, which the city then in existence possessed and enjoyed. Sec. 28.

The laws which, from time to time, have been specially framed for the government and administration of the municipal affairs of the City of New Orleans, have, therefore, continued in force, except such as may have been modified or repealed, expressly or impliedly.

The same may be said of such ordinances and regulations as the city may have passed in furtherance of these laws. Hence, when the laws are modified or repealed, the municipal legislation, in pursuance thereof, is altered or recalled; but when those laws remain unchanged, as in the present case, that municipal legislation continues in full force and effect while it remains subject itself to modification by its framers.

This proposition is so palpably evident that it is upon it that the defendants have built up the theory that the act of 1878, under the authority of which the ordinance in question was adopted, having been repealed, the ordinance in question, which is an outgrowth of it, has died away with it.

The city charter of 1882 does not purport to have repealed, in any manner, express or implied, the act of 1878, which is a special law. On the contrary, as that act is in no way in conflict, or inconsistent with, or contrary to the provisions of the new charter, the irresistible inference is that it has continued in full force, and that the ordinance passed in execution of it, to regulate the distance at which *private* markets shall be kept from *public* markets, has likewise continued in effect, and must be enforced in all proper cases.

The conclusions which we have reached are supported by good authority. Dillon on Mun. Corp., 3d Ed., Nos. 171, 172; City of Mayaville vs. Schultz, 3 Dana Ky. 11; City of Olney vs. Harvey, Ill. Rep. 50, 454; Trustees Erie Academy vs. City of Erie, Pa. R. 31, 517;

Succession of Harris.

Frank vs. City of San Francisco, 21 Cal. 668; Girard Heirs vs. Philadelphia, 7 Wall 1, and Broughton vs. Pensacola, 93 U. S., p. 266.

In this last case the highest tribunal in the land distinctly held that a change in the charter of a municipal corporation, or the substitution of a new charter in place of the old one, will not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation.

See, also: Toullier Dr. Cir. Fr., i, i, t, i, No. 202; Henry de Pansey, Pourin Municipal, pp. 36, 37; also, 2 Woods 632, Milners' Admrs. vs. Pensacola.

It is, therefore, ordered and decreed that the judgments appealed from be affirmed, with costs.

No. 9830.

SUCCESSION OF ALEXANDER HARRIS.

A party is not estopped by judicial declarations made for the purpose of simplifying proceedings and for the common interest and convenience of all parties concerned, and which have neither misled nor damaged anyone.

Heirs who intervene in a succession proceeding as opponents to an account filed by the executor and ask therein for an order directing the executor to pay over the money to them, thereby recognize the existence and validity of the succession proceeding, and cannot set up its nullity as a ground for relief.

Taxes levied on the business of a partnership form part of the expenses of the business, and, when recovered back from the government, are to be distributed among the partners according to the terms by which the expenses were shared.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Chas. F. Claiborne for the Executor, Appellee.

Jonas & Nixon on the same side.

W. H. Rogers and *Bayne & Denegre* for Opponents and Appellants.

The opinion of the Court was delivered by

FENNER, J. From 1860 to 1869 three brothers, Alexander, Aaron and Levi J. Harris were members of a commercial partnership, engaged in the exchange and brokerage business, under the firm name of Alexander Harris. The firm was dissolved in 1869 by the death of the two brothers, Alexander and Aaron Harris.

Alexander left a will appointing his widow and his brother, Levi J. Harris, testamentary executors, who qualified and fulfilled their trust

Succession of Harris.

and were duly discharged, after what was supposed to be a full settlement of the estate in 1870.

Subsequently, it was discovered that certain internal revenue taxes which had been paid to the United States Government by the firm of Alexander Harris, might be recovered, and Levi J. Harris employed Judge William R. Whitaker as his attorney to prosecute the claim.

Although it was well known to all parties concerned that the claim belonged to the firm, yet as it was necessary, in any event, that there should be a legal representative of Alexander Harris, and as the payment and receipts had all been made in his exclusive name, the attorney deemed it best to prosecute the claim in his sole name and account, without disclosing the other parties in interest.

Accordingly the attorney prepared and filed a petition in the Civil District Court, in the name of Levi J. Harris, setting forth his prior appointment and discharge and the subsequent discovery of this claim in favor of the succession and the necessity that "some one should be authorized to further prosecute said claim and administer the proceeds thereof on behalf of said succession," and praying to be reappointed as executor. The appointment was made, and, thereafter, a petition was filed in the United States Court of Claims, in the name of L. J. Harris, as executor of Alexander Harris, containing the allegations that the taxes had been paid by Alexander Harris, and praying for judgment for the amount thereof. The sum of \$6606.08 was recovered and collected by L. J. Harris, executor, and, in 1885, he filed, in the succession of Alexander Harris, his account, proposing the following distribution thereof:

Amount paid J. G. Kimball and Wm. R. Whitaker, attorneys to prosecute and collect the claim against the United States Government, 25 per cent thereof.....	\$1,658 15
Commission of executor, 2½ per cent.....	165 15
Attorney of succession.....	75 00
Reserved for future costs.....	50 00
	<hr/>
	\$1,948 30
Balance.....	4,657 78
	<hr/>
	\$6,606 08

To be equally divided in the proportion of one-third each between the members of the late firm of Alexander Harris or their heirs, or each the sum of \$1552.59.

The heirs of Alexander Harris oppose this account, claiming that the whole amount collected should be paid over to them.

Succession of Harris.

1st. They claim that Levi J. Harris is estopped, by his judicial declarations and conduct, from disputing that this fund was recovered for, and belongs to, the succession of Alexander Harris.

We think the estoppel pleaded has no foundation in law or justice.

The general doctrine that a party is bound by his judicial declarations and is estopped from subsequently denying them is well established and supported by the numerous authorities cited by the learned counsel for opponents. But, as we very recently said in reference to a like plea of judicial estoppel: "The doctrine of estoppel, however apparently emphatic, is full of exceptions, which vary according to circumstances, and was never designed to apply to a case like the instant one, in which the declaration made has led no one astray and occasioned damage to nobody." *Stockmeyer vs. Oertling*, 38 Ann. 102.

The Supreme Court of the United States has said: "The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when, in the faith of that denial, others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up." *Brant vs. Virginia*, 93 U. S. 335.

There is no dispute that this tax was paid by the firm, and the repayment was due to the firm, and that Judge Whitaker was employed to prosecute and recover the claim for the benefit of the parties interested in the firm. The proceeding in the name of Alexander Harris solely was taken under his advice and direction, and for convenience merely, and all the pleadings were framed by him for the purpose of forwarding this end.

As said by Mr. Greenleaf, in discussing estoppels: "It is, however, in such cases material to consider whether the admission is made independently and because it is true, or is merely conventional, entered into between the parties from other causes than a conviction of its truth and only as a convenient assumption for the particular purpose in hand." 1 Greenleaf Ev., § 204.

It is obvious that the declarations made in the proceedings here were so made for the purpose of advancing the convenience and interest of all parties in interest, and have subverted that purpose. The heirs of Alexander Harris have been in no manner injured or prejudiced thereby, and it would be the grossest injustice to allow them, on such technical grounds, to defraud their associates of their fair share of this partnership fund.

2d. Opponents claim that the re-opening of the succession of Alexander Harris, after the same had been fully closed, and the re-appoint-

Succession of Harris.

ment of Levi J. Harris as executor, are nullities, and that L. J. Harris, thus stripped of the quality of executor, has nothing to do but to turn this money over to the heirs of Alexander Harris, as whose agent he received it, leaving himself and the heirs of Aaron Harris to their personal action against said heirs for the recovery of any claim they have in the funds. Whatever may be the propriety and validity of those proceedings under the circumstances of this case, the fact remains that L. J. Harris was actually appointed, qualified and confirmed as executor, that he collected money as such, and that he is bound to account therefor to the court which appointed him. Opponents might have ignored these proceedings or might have taken action to annul them, and might have relied on a personal action against L. J. Harris to enforce their rights; but when they intervene in these proceedings as opponents to the account of the executor, and ask for an order directing him to pay over these funds to them, they necessarily recognize his executorship, in which capacity alone is he before the court or subject to its orders and direction. The case presents no feature of a personal action against L. J. Harris, individually; and, even if it did, the principles governing the distribution would not be different.

3d. We think the court did not err in dividing this fund equally between the three partners in the concern of Alexander Harris.

Although the interest of the parties in the profits was not equal until the last two years of the partnership, yet the junior partners, Aaron and Levi J., never bore less than one-third each of the expenses, and, as the taxes on the business were part of the expenses, they are entitled to an equal share in this sum paid on that account and now recovered.

For two years prior to the dissolution, the three parties shared equally in expenses and profits.

We are referred to a *dictum* of Mr. Lindley in his work on partnership, to the effect that "under ordinary circumstances and in the absence of any agreement to the contrary, money earned ought to be treated as profits of the year in which they are *paid*, and not as profits of the year in which they are *earned*." If this rule were applied, then even if this collection were treated as *profits*, its division would be properly governed by the interests of the partners as existing at the close of the partnership. We doubt, however, if this rule would be applicable to cases in which there had been a change in the respective interests of the partners. But we think there is no doubt

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that the taxes paid were properly expenses and as such should be shared.

4th. We can perceive no relevancy in the suggestion that these taxes had been charged by the firm to its customers. The tax was levied on the firm, collected from the firm, and recoverable only by the firm or for its account. Whatever may be the rights of the customers, the partners stand on an equal plane in regard to each other and the heirs of Alexander have no greater rights than those of Aaron or than Levi J. Harris. If the funds are to be received at all by any or all of the partners, each must receive his proper share.

We find no error in the judgment appealed from.

Judgment affirmed.

No. 9887.

JOHN D. FISHER VS. O. B. STEELE, AUDITOR, AND E. A. BURKE.
TREASURER, OF THE STATE OF LOUISIANA.

The State of Louisiana has the inherent right to regulate her finances and to use her revenue according to her own judgment, unless restrained by any contract obligation or verbal right created by the Legislature in favor of creditors, as to any portion of the same.

Any balance remaining to the credit of one or more of the separate funds created by law, after the satisfaction of all warrants drawn against the same, is the property of the State, with full power in the Legislature to apply the same to any lawful purpose under the constitution.

Holders of warrants drawn against the general fund of 1884 have no contract or vested right to any balances for taxes due in 1883 and previous years, which were destined by Act 107 of 1884 to the general fund of 1884, sufficient to defeat the legislative will, as expressed in Act 79 of 1886, ordering certain described taxes for said years, to be placed to the credit of a special levee fund, and adopted before the collection of such taxes had been effected.

Act No. 79 of 1886 is not a special or local law within the intendment of Article 48 of the State Constitution; hence, it is not affected by the omission of the notice prescribed in that article.

Levee districts are not corporations within the scope of the prohibition contained in Article 56 of the Constitution. They are State functionaries exercising delegated powers as parts of the government. An act of the Legislature authorizing one of the levee boards to build a levee in the State of Arkansas, if necessary, to protect a portion of the State from overflow is not violative of any article, prohibition or provision of the State Constitution.

Act 79 of 1886 is not an appropriation of money within the meaning of the constitution, as it does not purport to draw any money out of the treasury. It merely directs a transfer of a contemplated revenue, from a separate fund, to which it was destined under a general act, to a special fund, and thus moves money within the treasury, but not out of it. A statute of Louisiana authorizing the construction of a levee within the State of Arkansas, with its consent, for the protection of Louisiana lands, is not amenable to

39	447
47	1690
47	1697

39	447
115	656
115	661

39	447
124	482

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the prohibition of the second paragraph of Section 10 of Article I of the Constitution of the United States, forbidding any State, without the consent of Congress, to enter into any agreement or compact with another State. It is an exercise of no greater power than the requisition of the Governor of one State on the Governor of another, for the arrest of a fugitive from justice.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

Kennard, Howe and Prentiss for Plaintiff and Appellee.

H. P. Wells for Defendants and Appellants.

The opinion of the Court was delivered by

POCHE, J. Plaintiff has sued out an injunction to restrain the State Auditor and Treasurer from executing Act No. 79 of 1886, of the Legislature of Louisiana, entitled, "An act authorizing the tax due by the Vicksburg, Shreveport and Pacific Railroad Company to the State, for the years 1880, 1881, 1882 and 1883, to be placed to the credit of the Tensas Basin Levee District and Fifth Levee District, for levee purposes, and authorizing the parishes of Ouachita, Richland and Madison to appropriate money to said district for the same purpose."

His contention is that the taxes contemplated in the act should have been placed to the credit of the general fund of the year 1884, against which he holds warrants, aggregating the sum of \$25,000, drawn by the Auditor on the Treasurer, duly issued, for the expense and purpose of maintaining the government of the State and the public institutions thereof.

That, as all the Auditor's warrants payable out of the general fund of 1883, and of previous years, had been paid or otherwise settled, the holders of warrants payable out of the general fund of the year 1884 had acquired a vested right to the taxes referred to in said Act 79 of 1886, under the provisions of the last paragraph in Section 5 of Act No. 107 of 1884, which reads: "The several funds herein provided for shall be continuous funds, and the State Treasurer shall, without legislative action, transfer any and all balances remaining in the treasury to the credit of the separate funds, after providing for the payment of all warrants drawn against said funds, for any year, to the credit of the same funds for each succeeding year," * * and that under the enactment just quoted, the warrant-holders aforesaid were vested with rights amounting to a contract in the premises.

He, therefore, charges said Act No. 79 of 1886 to be unconstitutional, null and void, for the following reasons:

1st. Because it impairs the obligations of the contract created by and between the State and himself as a warrant-holder as aforesaid.

2d. Because it divests, without compensation, his vested rights acquired under the provision of Act 107 of 1884, hereinabove quoted.

3d. Because it is a local and special law, passed without the notice required by Article 48 of the Constitution.

4th. Because it grants the funds of the State to a corporation, in violation of Article 56 of the Constitution.

5th. Because it applies taxes collected under the authority of the State to the construction of levees in the State of Arkansas, in violation of Articles 204, 213, 214, 215 and 216 of the Constitution.

6th. Because it is an appropriation made within five days of the final adjournment of the session of the Legislature, and (if otherwise valid) it violates Article 55 of the Constitution.

7th. Because it undertakes to use funds of the State upon some agreement or compact between the States of Arkansas and Louisiana, in violation of the second paragraph of Section 10 of Article I of the Constitution of the United States.

The defendants made a nominal defense, but the serious contest is made by the two levee districts intended to be the beneficiaries of the act, who, by intervention, pleaded a general denial, and set up the special plea that plaintiff has shown no intent to present the issues tendered in his petition, for the reason that he has no right to, or lien, or privilege on the tax which is the subject of the controversy.

From an admission in the record, it appears that the amount of taxes paid by the railroad company for the years 1880, 1881, 1882 and 1883 amount to \$9687.62, and that the portion of the same which would have gone to the general fund of 1884, in the absence of Act 79 of 1886, amounts to \$5198.34.

The District Judge pronounced the act to be unconstitutional as violative of article 55 of the State constitution and perpetuated the injunction in so far as the amount which would have gone to the General Fund is concerned. Intervenors have appealed.

Our study of the case has led us to a different conclusion from that of the District Judge, and we hold that his judgment is erroneous.

In our disposition of the numerous constitutional objections levelled by plaintiff against the Statute under discussion, we have been guided by the rule that the attempt of a private individual to control any portion of the finances of the State, and so restrain the proper officers from the performance of a plain and unequivocal duty in their admin-

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istration of funds of the State, by invoking the aid of the judicial power to that end, and to annul and avoid as unconstitutional an act of the Legislature imposing the duty, and regulating the mode of disposing of such funds, involves the exercise of a formidable, but delicate power, which courts will be slow to assume, and will never attempt to exercise in doubtful cases.

In treating of a kindred subject, Chief Justice Marshall, as the organ of the court, in the case of *Fletcher vs. Peck*, 6 Cranch. 128, used the following cautious language: "The question whether a law be void for its repugnancy to the constitution is, at all times a question of much delicacy, which ought to be seldom, if ever, to be decided in the affirmative, in doubtful cases, * * * It is not on slight implications and vague conjectures that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the Judge feels a clear and strong conviction of the incompatibility with each other."

Judge Cooley wrote on the same subject as follows: "The statute is assumed to be valid until some one complains whose rights it invades. *Prima facie*, and on the face of the act itself, nothing will generally appear to show that the act is not valid: and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the Legislature, therefore, concurs with well established principles of law in the conclusion that such an act is not void but voidable only; and it follows, as a necessary legal inference from this position that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by a stranger." Cooley Constitutional Limitation, 4th Ed., p. 199.

That principle is suggestive of a grave doubt of the right of plaintiff in this case to assail the constitutionality of the statute under discussion, beyond the first two grounds contained in his petition, which present the averments that the act impairs the obligation of his alleged contract, and divests his vested rights to the proceeds of the taxes. For it appears to our minds, as a proposition, not even susceptible of controversy, that the State of Louisiana has the right, of every sovereign, to regulate her public revenue, and apply her own funds as her own judgment may suggest, unless by contract or by previous legislation, she has subjected any portion thereof to a legal

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preference in favor of a creditor or contracting party. But giving the benefit of the doubt to plaintiff we shall now proceed to consider his numerous objections.

1st. As the warrants which he holds were issued "for the expense and purpose of maintaining the government of the State and the public institutions thereof" it is evident that the obligation of the State to pay his warrants does not spring from a contract. To this he does not even pretend; he sets up the provision of act 107 of 1884 as the source of his contract.

But the language of the enactment will not bear such a construction. The direction therein contained for the future guidance of the Treasurer, is to "transfer any and all balances remaining in the Treasury to the credit of the separate funds after providing for the payment of all warrants drawn against said funds, for any year, to the credit of the same funds for each succeeding year;" but the taxes due by the Railroad Company for the years 1880, 1881, 1882 and 1883, and which were paid only on the 26th of July, 1886, *never remained* in the Treasury as a balance to the credit of any fund whatever. Before the payment thereof, by act 79, approved on the 8th of July, 1886, and before the funds became liable to the effect of the general direction contained in the provision now under discussion, the Treasurer was directed to place them to the credit of another, and a special fund, nor could those funds have been contemplated by the law-maker in the provision of the act 107, 1884, for, at that time, the tax was resisted by the company as shown by litigation pending in this court, and subsequently in the Supreme Court of the United States, of which facts we must take judicial cognizance. *Dennis vs. Railroad Company*, 34. Ann. 954.

An argument by the State to enhance the rights of claimants to a general fund of any year by adding thereto unclaimed balances in said fund for previous years cannot be construed as a contract affecting a fund not then available and which it could not be conjectured would reach the Treasury with any certainty or in any given year.

Nor can it be evoked as a contract by a holder of warrants which had not yet been issued at the date of the legislation which is held up as a contract. Act 107 was adopted on July 10, 1884, and the sample warrant filed in this case bears the date of October 21, 1884.

2d. We are at as great a loss to conceive of the grounds on which plaintiff rests his alleged vested rights to the taxes in question for the payment of his warrants.

It is undeniable that the balances which may at any time remain in

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the Treasury to the credit of any of the separate funds created by law, are the lawful property of the State of Louisiana, with full power to dispose thereof as any private individual has a right to do with his unencumbered property.

Now, what is the legal meaning and effect of a legislative direction to transfer such balances to the same funds of the ensuing year?

It surely cannot amount to anything more than an act of gratuity on the part of the State in favor of the holders of warrants against the particular fund for the year to which the surplus is thus transferred.

What power or authority can be invoked to hold the State to the full gratuity, if she subsequently desires to decrease it to any extent, and to compel her to give the whole "pound of flesh" as "denominated in the bond?"

A fortiori will no one be heard to claim, under such legislation, any vested right to a fund which had then no existence, and which therefore could not have been included in an appropriation for the benefit of any one.

3d. It is difficult to understand how a statute directing the transfer of certain moneys from one fund to another in the treasury, can be amenable to the objection that it is a local or special law; and to thus subject it to the provisions of Article 48 of the Constitution which requires previous notice by the publication of the intention to apply therefor. As this objection has not been argued by plaintiff's counsel, we are left to the inference that the ground may be intended to apply to the acts creating the two levee districts which are the beneficiaries of the act in question. In that event, the argument is met by Article 46, which provides that: "The General Assembly shall not pass any local or special law on the following specified objects: * * *

"Creating corporations, or amending, renewing, extending or explaining the charter thereof; *provided*, this shall not apply * * * to the organization of levee districts and parishes." But the question is no longer an open one, since the decision recently made by this Court in the case of the Planting Company vs. Green Tax Col., in which plaintiff's counsel herein successfully maintained the reverse of their present contention on this point.

4th. Plaintiff's counsel have not favored us with an argument in support of this fourth objection, and it is doubtless, because they shrank from the task of attempting to prove that a "levee district" created by the State as one of its functionaries, charged with the duty

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of providing for the general welfare of the people by protecting them from inundation, could, by any reasoning, be considered as an association or corporation, distinct from, and independent of, the State within the intendment of the prohibition contained in Article 56 of the Constitution, when it says: "The funds, credit, property, or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private."

The funds thus applied in these two acts do not cease to be moneys of the State, but the use thereof is merely directed to a designated object, which is in itself a State function.

5. Plaintiff's counsel are also silent on this objection, which is levelled at the right of the State to build levees in the State of Arkansas. The object of the levee which the act authorizes the board to build in Arkansas, is expressed to be for the protection of said district from overflow. The object is, therefore, within the logical and reasonable purpose contemplated by the Constitution in the system of levees which it has provided for in Articles 204, 213, 214, 215 and 216.

It is passing strange that the very articles which the Legislature manifestly intended to carry out by this measure are invoked by plaintiff as obstacles to the enactment.

6th. This objection, which invokes the nullity of the act because it is an appropriation of money made within the last few days of the session, is the ground which the District Judge sustained. It must have appeared ominous to plaintiff to have seen the District Court rest its judgment on the weakest ground of his pleadings. As an argument, it is answered by the text of the act, which reads: "All the State taxes due by the Vicksburg, Shreveport and Texas Pacific Railroad Company, in and for the parishes of Ouachita, Richland and Madison, for the years 1880, 1881, 1882 and 1883, shall, when paid into the treasury of the State, be at once placed to the credit of the Tensas Basin Levee District, * * to be used in the manner now provided by law, in constructing, repairing and maintaining any and all levees in the State of Arkansas (said State consenting), that will protect said district from overflow." What portion of that language can be construed as an appropriation of money, we are at a loss to appreciate.

The real object of the act is to provide additional means for the purposes of the works to be made by the State, through that levee district, towards the preservation of the property of its people, and

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to that end, certain taxes therein described, are designated as a special levee fund in addition to resources previously provided for to the credit of the board charged with the performance of that duty. The act merely directs that certain funds, when they reach the Treasury, shall be placed to the credit of a special fund, instead of being distributed ratably among the four separate funds created by law, and designated as the "General Fund," the "Current School Fund," the "Interest Fund," and the "General Engineer Fund." It partakes more of the nature of an act creating a revenue for a special purpose than one appropriating any portion of an existing revenue. It is therefore immaterial whether the act was passed and signed within the time specified in article 55 of the Constitution.

7th. The seventh objection invokes the second paragraph of section 10 of article 1 of the Constitution of the United States, which reads: "No State shall, without the consent of Congress, * * * enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay."

On reading that objection in connection with the constitutional prohibition just quoted, the mind would naturally expect a charge that the State of Louisiana was projecting a treaty of alliance with the State of Arkansas, or contemplating some joint scheme of commercial or industrial enterprise, or perhaps conspiring for the establishment of a new confederacy; but great is the relief when the mind is informed that the purpose which plaintiff resists with such a powerful shield, is merely to build a piece of levee in the State of Arkansas if necessary, and if that State does not object, or consents.

It is indeed too clear for argument that such a transaction is no more a prohibited compact between two States than is contained in the requisition of our Governor for, and the consent of another to, the capture and arrest of a fugitive from justice.

We conclude that the statute under discussion has successfully withstood all of plaintiff's attacks, which are manifestly more formidable in their number than in their intrinsic strength.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; that the preliminary injunction issued herein be dissolved, and that plaintiff's action be dismissed at his costs in both courts.

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No. 9915.

EXCELSIOR PLANTING AND MANUFACTURING COMPANY VS. T. K. GREEN, TAX COLLECTOR, ET ALS.

Act No. 44 of 1886 does not violate Art. 29 of the Constitution, that "Every law shall embrace but one object, which shall be expressed in the title." The act embraces but one broad and comprehensive object, and its various provisions embrace means for its accomplishment, appropriate and referable to the object, and all of which are expressed in the title.

The act does not violate Art. 48 of the Constitution, prohibiting local or special laws, without previous published notice having been given of the intention to apply for them. This law is removed from the operation of Art. 48 by Arts. 213 and 214 of the Constitution, the first of which provides that "a levee system shall be maintained in the State," and the other authorizes the establishment of levee districts, etc. The power granted by Art. 213 is ancillary to the duty imposed by Art. 214. The power and duty so expressly conferred by these articles passed to the Legislature untrammelled by the restrictions of Art. 48, affirming 33 Ann. 568; 35 Ann. 492; 35 Ann. 1142.

The power conferred by Art. 214 of the Constitution to levy a tax of five mills on all the property of the district, was not exclusive of the power of local assessments for the same purpose. The intention was to grant a new and additional power, which, but for such express grant, would have been prohibited by other articles of the Constitution, not to destroy powers already possessed.

Arts. 35, 43, 53 and 55 of the Constitution have no application, because this is not an appropriation or a revenue bill within the meaning of those articles.

Arts. 44 and 56 do not apply, because this act does not "contract or authorize the contracting of any debt or liability on behalf of the State;" and the bonds authorized are for the benefit of the levee district corporation itself, and not for any other person or corporation, as intended by Art. 56.

The assessments levied by the act are not violative of Arts. 203, 209, 214 and 242, on the subject of taxation, affirming, after discussion, former decisions, holding that "local assessments for public works, levied, not on taxable property generally for common public benefit, but only on particular property specially benefited by the works as an equivalent for the direct benefit conferred, although an exercise of the taxing power are not considered as taxes within the scope and meaning of constitutional restrictions on the general power of taxation."

Although the legislative power to levy local assessments is thus recognized, yet it does not follow that every exaction may be supported by simply calling it a local assessment. Three elements must concur to make a valid local assessment: 1st. The work must be public, and of a character to confer special benefit on the district assessed, as distinct from the general benefit to the State at large. 2d. The assessment must be supported by benefits, actually or presumptively received by the persons or property subjected to it. 3d. The contribution must not manifestly exceed the benefit conferred.

Any pretended assessment wanting in these elements would cease to be taxation, and become a taking of property without process of law and without adequate compensation.

When, however, the Legislature, in the exercise of legislative power, has levied local assessments which are not clearly wanting in the foregoing elements, it is not the province of the judiciary to annul and set them aside.

Local assessments are, as a general rule, levied on land alone; but this is only because land is the kind of property which is usually benefited; but there exists no such constitutional or other restriction on the legislative power; and when particular personal

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property has enjoyed a benefit from the works to which it owes its existence and preservation, nothing prevents the Legislature from assessing it.

Under this act the cotton is assessed, not simply as a bale of cotton, but as a bale of cotton which has been produced on lands protected by the levees, and has, during the period of its cultivation and growth, enjoyed the benefit of its protection. No one dealing with such cotton can be prejudiced, because all are advised by the law, from the moment when the cotton is planted, that, when it reaches the condition of a ginned bale, it must pay this tax.

The provisions of the fourteenth amendment to the Constitution of the United States and of Arts. 6 and 158 of the State Constitution on the subject of taxing property, without due process of law, or without adequate compensation previously made, do not apply to local assessments, but only to exactions made under the right of eminent domain.

We have no jurisdiction over the reconventional demand.

A PPEAL from the Ninth District Court, Parish of Concordia.
Young, J.

Elam & Luce, Conner & Conner, and F. L. Mason for Plaintiff and Appellant.

Steele, Garret & Dagg and Kennard, Howe & Prentiss, for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. The objects of this action are to enjoin the execution of the provisions of the act of the General Assembly, No. 44 of 1886, and to have said act decreed to be unconstitutional, null and void.

The general objects of the act referred to are to establish a levee District composed of certain territory therein defined; to create for said district a body corporate styled "The Board of Commissioners for the Fifth Louisiana Levee District;" and to vest said board with various powers and duties therein enumerated, having in view the principal purposes of "the construction and maintenance of levees, and to establish a comprehensive levee system * * * for the purpose of permanently securing the entire district from destructive floods," and of providing the necessary revenues for carrying out said objects.

The constitutional objections urged are numerous, and we shall consider them separately.

I.

It is claimed that the title of the act does not comply with the requirements of Art. 29 of the Constitution which provides that "every law shall embrace but one object and that shall be expressed in its title." The title is very long and very specific and certainly expresses and covers every provision embraced in the law. Indeed

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the complaint is, not that the title fails to express the object of the law, but that the law itself embraces more than one object. Hence the decisions relied on by plaintiff's counsel in the Irwin case, 33 Ann. 63, and *State vs. Baum*, 33 Ann. 982, have no application. In those cases we were concerned exclusively with the sufficiency of the titles; and finding that the laws contained provisions of a character not expressed or suggested in the titles, we decreed their nullity. Language used to distinguish the provisions expressed, from those not expressed, in the title, as being "distinct and separate," is not to be interpreted as meaning that they were so separate and distinct that they could not have been embraced in the same law if they had been properly expressed in its title.

We have, heretofore, held that a law is not invalidated because it contains "several particular objects, all of which are properly referable to, and subdivisions of, a single general object." *State vs. Henderson*, 32 Ann. 781; *Weise vs. Thibaut*, 34 Ann. 556. (Reported by syllabus only; see opinion.)

Cooley lays down the proper principle governing the application of this constitutional requirement: "The general purpose of such provisions is accomplished when the law has but one general object which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of the general object, to be provided for by a separate act relating to that alone, would not only be unreasonable but would actually render legislation impossible." *Cooley Const. Lim.*, p. 143.

The proper application of the foregoing principles renders the objections to statute under this head so untenable and futile that we really feel it unnecessary to particularize them. The law has one broad and comprehensive object fully expressed in its title, and its various provisions only embrace means for its accomplishment, appropriate and referable to the object itself. Under plaintiff's theory the Legislature, to effectuate this object, would have been obliged to pass a dozen separate acts, each of which, standing alone, would have been meaningless.

II.

The next objection urged is that the act violates Art. 48 of the Constitution which provides that "no local or special law shall be passed on any subject not enumerated in Art. 46, unless notice of the intention to apply therefor shall have been published, etc., at least thirty days prior to the introduction into the General Assembly of such bill."

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Waiving the question as to whether this is a local or special law, it is removed from the operation of Art. 48 by Arts. 213 and 214, the first of which provides that "a levee system shall be maintained in the State," and the last declares "the General Assembly may divide the State into levee districts, and provide for the appointment or election of levee commissioners in said districts, who shall, in the method and manner to be provided by law, have a supervision of the erection, repairs and maintenance of the levees in said districts; to that effect it may levy a tax, not to exceed five mills, on the taxable property situated within the alluvial portions of said districts subject to overflow."

The power thus expressly conferred by Art. 214 is ancillary to the duty imposed by the previous Art. 213, and it passed to the Legislature untrammelled by the restrictions contained in Art. 48.

The Constitution imposed upon the General Assembly the *duty* to maintain "a levee system," and, as an aid in the furtherance of such duty, it conferred the *power* to establish "levee districts."

We are bound to presume that, in passing this statute, the General Assembly has concluded that, for the efficient performance of its duty to maintain a "levee system," it was essential to exercise this power of establishing a "levee district."

We have held in three cases that where the Constitution has, in express terms, conferred on the General Assembly the duty, or even the power, to adopt legislation on a particular subject, even though local in character, such duty and power are not subject to the restrictions imposed by Art. 48. *Taxpayers vs. City*, 33 Ann. 568; *Davidson vs. Houston*, 35 Ann. 492; *State vs. Dalon*, 35 Ann. 1142.

We can add nothing to the reasoning presented in those cases, and content ourselves with referring to them.

III.

It is claimed, however, that the act violates Art. 214 itself, which has just been quoted, because the last clause thereof authorizing the levy of a "tax, not to exceed five mills, on the taxable property situated within the alluvial portion of said districts subject to overflow," is a provision of the means for the exercise of the prior power granted, which is restrictive and impliedly prohibitive of a resort to any other means, and that this prohibition is violated because the act, after authorizing the levy of the five mill tax, proceeds to authorize the collection of certain local contributions or assessments on particular property benefited by the levees.

We consider the reasoning of plaintiff's counsel on this subject

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entirely fallacious. They assimilate this provision to the clause of the Constitution authorizing the General Assembly "to exempt from taxation property actually used for church, school or charitable purposes," and to another clause fixing the salary of the judges of this Court at \$5000 *per annum*. It has been held that no other property than that enumerated can be exempt from taxation; and we should, of course, hold that no greater salary than \$5000 could be conferred upon the judges. We carry the analogy to its fullest extent when we say that, under Art. 214, the power granted to levy the five mill tax would be exclusive and prohibitive of any levying of any greater tax; but the analogy entirely fails when the effort is made to extend the prohibition to the provision of other means than taxes. It is obvious that the object of the last clause of Art. 214 was not to exclude the power of local assessment, but simply to confer the power of taxation. It was necessary for the latter purpose, because, without it, such power could not have been exercised, being in violation of other constitutional provisions on the subject of taxation. But the power of local assessment (if it exists at all, which will be considered hereafter) existed entirely independent of this and all other provisions on the subject of taxation. To hold that the power of local assessment was taken away, because the power of taxation was conferred, would be to reverse the purpose of the article, and to convert what was evidently intended as the grant of a new and additional power into a destruction of power already possessed.

No sound rule of interpretation supports such a construction and we sustain the legislative interpretation which has rejected it.

IV.

The objections that the act violates Arts. 35, 53, 55, 43, 44 and 56, may be disposed of *in globo*.

As to the first four articles, they have no application, because it is evident that this is not an appropriation or revenue bill within the meaning of those articles.

As to Arts. 44 and 56, they are equally inapplicable, because the act does not "contract, or authorize the contracting of, any debt or liability on behalf of the State;" and it does not loan, pledge or grant the funds, or credit, or property of the State, or of any political corporation thereof "to or for any person or persons, association or corporation, public or private." The bonds authorized to be issued by the corporation are issued for its own exclusive purposes and benefit.

As to the grant to the corporation of certain lands of the State, we

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need not now discuss its constitutionality, because it does not affect the issues in this case, and even if that part of Section 11 were unconstitutional (which we do not decide) the rest of the act might well stand without it. The same remarks apply to the exemption of said granted lands from taxation.

V.

Section 9 of the Act authorizes the board to "levy, annually, a local assessment or forced contribution of five cents on each and every acre of land within the district;" and Section 10 provides: "that in case the said board shall deem the funds heretofore provided for, inadequate to locate, repair and construct levees so as to prevent disastrous floods, the said board shall have authority to levy a special assessment or forced contribution, not to exceed fifty cents per bale on each and every bale of cotton produced in the district upon lands subject to taxation under the provisions of this Act."

The contributions levied under the foregoing provisions are the main subjects of controversy. They are assailed as violative of Articles 203, 209, 214 and 242 of the State Constitution.

It is not necessary to quote these articles. It is sufficient to say that they all contain certain directions, regulations and limitations which the framers of the organic law have ordained as controlling the exercise of the power of taxation by the State and its subordinate political corporations.

It is self-evident, that if the contributions here involved are embraced within the scope and meaning of the words "taxes," and "taxation," as employed in those articles, they would unquestionably violate both their letter and spirit.

But in a recent case, very analogous to the instant one, we have held, after the most careful consideration, that "local assessments for public works, levied, not on taxable property generally for mere common public benefit, but only on particular property specially benefited by the works, as an equivalent for the direct benefit conferred, are not considered as taxes within the meaning of constitutional restrictions on the power of taxation." *Charnock vs. Levee Dist. Co.*, 38 Ann. 323.

In so holding, we followed a long line of precedents in the jurisprudence of this and of other States, approved by the standard text writers. 11 Mart. 324, 9 Rob. 333; 2 Ann. 330; 4 Ann. 2; 11 Ann. 220, 370; 14 Ann. 998; 20 Ann. 499; 21 Ann. 51; 32 Ann. 888; 33 Ann. 276; 34 Ann. 362; 36 Ann. 670, 38; *Burroughs on Taxation*, Chap. 22;

Cooley on Taxation, Chap. 20; and numerous authorities from other States cited by those authors.

We have considered attentively the respectful but vigorous assault made on the correctness of our opinion holding that this principle is applicable under the peculiar provisions of the present Constitution.

Our minds have been open to conviction, and, to paraphrase the nervous language of Chief Justice Black, if satisfied we had stumbled, we should, by no means, feel compelled to stumble again every time we came to the place where we stumbled before.

But on the most careful reconsideration of the question under all the additional light thrown upon it by the arguments of counsel and by their researches into the proceedings of the Convention, as recorded in its journal, we remain fully convinced of the correctness of our former decision.

The journal of its proceedings shows that the Convention absolutely refused to embody in the Constitution any regulation whatever of the power of local assessment; and amongst the propositions offered and rejected, was the following :

“Art. —. No specific tax or assessment for local improvements shall be levied or collected if the tax or assessment shall exceed the amount of the benefit conferred on the property.” Official Journal, Conv. of 1879, pp. 201, 209, 261, 325

It is impossible to resist the inference that the Convention, having the subject of local assessments repeatedly brought before it, knowing that, under uniform jurisprudence, that subject was held not within the grasp of general provisions on the subject of taxation, and thus refusing to adopt any regulations whatever concerning it, determined to leave that power, where it had always rested, in the hands of the Legislature, to be exercised according to its discretion, limited only by other constitutional principles.

This is the conclusion reached by us in the Charnock case and we are bound to adhere to it.

VI.

We are next to consider whether, admitting the legislative power to levy local assessments, the particular contributions exacted under this act are local assessments properly so called; for, as Judge Cooley wisely says, “a man’s property is not to be taken from him with impunity, and without redress, by simply calling the appropriation an assessment, when it is not such in its elements.” Cooley on Taxation, p. 460. We must understand what are the principles underlying this

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and supporting this peculiar species of taxation, which is thus enfranchised from the constitutional restraints imposed upon the ordinary exercise of the taxing power.

We consider Cooley's definition of these principles to be clear and correct, viz: "Special assessments are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of the property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it." *Cooley Taxation*, p. 416.

Three elements must concur, viz:

1st. The work must be public and of a character to confer special local benefits on the district within which the assessment is levied.

2d. The assessment must be supported by benefits actually or presumptively received by the persons or property subjected to it.

3d. The contribution must not manifestly exceed the benefit conferred.

Where these elements or any of them are clearly wanting in contribution exacted under the name of a local or special assessment, the legislative action cannot be sustained. But the province of determining for what objects, in what districts, and on what persons or property, such assessments may be levied, is wisely and, indeed, necessarily confided to the legislative department, and it is only where the assessment is so manifestly unjust, oppressive and violative of the foregoing requirements as to give demonstration that they have been disregarded, that a court would be justified in overruling the legislative judgment. Indeed, Cooley says: "It is conceded that the legislative judgment that a certain district is or will be so far specially benefited by an improvement as to justify a special assessment is conclusive, and that its determination as to what shall be the basis of the assessment is equally conclusive. To invoke the intervention of a court for relief against the results of its conclusion is to give its judgment controlling effect over that of the Legislature, in a matter of the apportionment of a tax, which, by concession on all sides, is purely a matter of legislation. This is confessedly inadmissible in any case where the legislative power has not been exceeded by an apportionment merely colorable." *Cooley Taxation*, p. 459.

Applying these principles to the instant case, there can be no question that the object for which the assessments are levied, viz: The

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building of levees, is a public and proper one, and that the property within the district will be undoubtedly benefited.

It has been held by this court, and is unquestionably true, that the main object of the public levee system in Louisiana is to protect arable lands from overflow and thus to enable crops to be produced upon them. *Cash vs. Whitman*, 13 Ann. 401, 38 Ann.

It is equally evident that such open and arable lands, by reason of the ability thus secured to make crops, derive greater benefit from levee protection than uncleared or uncultivated lands. It would have been competent, and clearly just, for the legislature to have imposed a greater contribution on the former than on the latter.

So, considering that the fairest measure of the additional benefit derived by the cultivated lands would be the crops actually produced, that would likewise form the safest guide in apportioning the additional contribution.

Nor do we see any reason why the crops themselves, thus protected and saved might not be subjected to assessment.

Now, it is a fact of which we may take judicial cognizance, that the principal agricultural product of the region comprised within the levee district is cotton, to which all other crops are subsidiary, and which is, as a general thing, the marketable and money-producing crop.

The Legislature, doubtless, concluded that the cotton produced on land would be as reasonable and fair a measure of the extra benefit derived by such land as any other, and that this cotton, having been protected during the whole season of its growth by the levees, had enjoyed a benefit which formed a just basis for its assessment. In this the Legislature certainly acted within the range of its power and in thorough conformity with the principles of special assessment. The only question was how and when to apportion and collect the assessment on such cotton. The simplest and most practical method was evidently that adopted, to-wit: to apportion it on the ginned bale, which is the mercantile form to which all cotton is reduced for marketable purposes.

We can see no objection to this method.

The contention that this is a simple tax upon an article of personal property, which, at the moment it is taxed, has reached a condition in which it cannot possibly be benefited by levees, is entirely too narrow. The basis of the tax is not merely that the thing is a bale of cotton, but that it is a bale of cotton which has been produced on land

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protected by the levees, and has, during the period of its cultivation and growth, enjoyed the benefits of such protection.

Every person who plants, cultivates, gathers or deals with this cotton, from first to last, knows, from this law, that when it passes to the stage of being ginned and baled, it is to pay the specified assessment as an equivalent for the protection it enjoyed during the period of its growth.

Thus the tax, in effect, attaches to the crop from the moment of planting the cotton and adheres until paid.

It is vain to say that a bale of cotton is personal property, and that local assessments can only be levied on real estate. There exists no such constitutional or other restriction on the legislative power. It is true, as Mr. Burroughs says, that "as a general rule, the local assessment is solely upon land, and not on personal property." Burroughs on Tax'n, p. 473.

But this is because, ordinarily, land is the kind of property which receives the benefit of such public improvements by increase of value.

Cooley says: "Personal property is not commonly thus assessed. The reason is manifest in the fact that special benefits generally accrue almost exclusively to lands." He refers to many cases, however, in which the assessment does embrace personal property as well as land. Cooley, Tax'n, p. 457.

When, as in the instant case, the particular personal property assessed has enjoyed a benefit from the works, to which it owes its existence and preservation, and when the Legislature has, in the exercise of its judgment, determined that it should contribute for such benefit, no principle or precedent can be found which would justify a court in overruling its decision.

VII.

The provisions of the 15th amendment to the Federal Constitution, and of articles 6 and 156 of the State Constitution prohibiting the taking of property "without due process of law" and the taking of private property "for public purposes without just and adequate compensation being first paid," have no application to contributions levied under the taxing power, but only to exactions made in the exercise of the right of eminent domain.

Cooley says: "that local assessments are an exercise of the taxing power, has over and over again been affirmed until the controversy must be regarded as closed;" quoting a large number of authorities. Cooley on Tax'n. 430.

We so held in the Charnock case, 38 Ann. 323.

It is well settled that the foregoing constitutional provisions have no application to local assessments possessing the elements essential to their validity, such as we have held these to be. If they were wanting in these elements, the case would be different; they would then "cease to be taxation and become a taking of private property for public use without just compensation." Burroughs on Tax'n., p. 467.

We have thus disposed of all the constitutional objections to the law. In reaching our conclusions we have been guided by the following cardinal principles which, though elementary, cannot be too often repeated as fixing the proper relations between the judicial and legislative departments of the government:

1st. That the legislative department of the State possesses complete and sovereign legislative power except so far as restrained by limitations imposed thereon by the Constitutions of the State and of the United States.

2d. That whoever assails the validity of a legislative act passed in the exercise of legislative power, must point to the portions of the State or Federal Constitutions which, expressly or impliedly, prohibit the adoption of such an act.

3d. That the judiciary, recognizing the right and duty of the Legislature to construe and determine primarily its own power under the Constitution, will never overrule that determination unless clearly convinced of such radical inconsistency between the law and Constitution that the two cannot be reconciled.

The presages of dire woes to result from the recognition of such power in the legislative department, are not, in our opinion, foreshadowed by the prudent and equitable exactions imposed by the present law, which, we trust, will be abundantly repaid by the benefits received. We have, however, indicated, in the present opinion, conservative principles which control and restrain the power and would afford protection in the improbable contingency that the Legislature should violate the trust that the people have reposed in its wisdom and patriotism.

The learned judge *a quo*, in a forcible opinion, reached the same conclusions which we have announced, on every point except the validity of the assessment on cotton.

We are clearly without jurisdiction of the reconventional demand. It is, therefore, ordered, adjudged and decreed that the judgment appealed from be amended by annulling that portion thereof which partially maintains the injunction, and by now decreeing that the injunction sued out herein be dissolved and plaintiff's demand be rejected, plaintiff to pay costs of the lower court as of this appeal.

Succession of Piffet.

No. 9806.

SUCCESSION OF CHARLOTTE PIFFET.—ON RULE OF A LEGATEE FOR POSSESSION.

The executors of a will who deliver possession of an immovable to the usufructuary under the will, legally lose seisin of the property, which does not revert to the succession if the usufruct expires before the functions of the executors have expired; the usufruct then becomes incorporated with the ownership. Hence, in such a case the legatee of the naked ownership of the immovable cannot demand delivery of his legacy of the executors.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Fred. D. King for Plaintiff and Appellant.

T. Gilmore & Sons for the Executor, Appellee.

The opinion of the Court was delivered by

POCHÉ, J. The last will of the deceased contained a special legacy of two pieces of immovable property, on Bourbon street, in this city, in favor of Joseph R. Meghill, subject to the usufruct thereof, for his lifetime, bequeathed to J. B. Piffet, the decedent's husband. The will was probated, and in due course Piffet was placed in possession of the property, subject to his usufruct, and Piffet died in September, 1885.

A short time thereafter Meghill, the legatee for the naked ownership of that property, instituted these proceedings, to be put in possession thereof, on the ground that the usufruct established by the will in favor of J. B. Piffet had ceased at his death. He made the executor a party to his rule.

The latter made no opposition or appearance by pleadings. On the trial the relief prayed for by plaintiff in rule was denied for the time being, and further consideration of the rule was postponed to the trial of the opposition of J. B. Piffet, now represented by his heirs at law, claiming the marital fourth of the succession of Charlotte Piffet.

From that judgment Meghill has taken the present appeal.

The District Judge rests his judgment on the following considerations, that in view of the claim urged by the Piffet heirs for the marital fourth, which, if sustained, would take precedence over the legacy in favor of Meghill, plaintiff in rule, and that by parting with portions of the property of the succession the executors might eventually be without sufficient means to meet the payment of said

Succession of Piffet.

marital fourth, although many other legacies under a particular title had already been delivered, it was thought proper not to grant the relief prayed for at that stage of the succession. The record is not a condition to justify us in reviewing the reasons of the judge, as we find no issue to pass upon. It is true that the consideration adopted by the judge had been suggested, in argument, by counsel for the heirs of Piffet.

But it appears that the Piffets filed no intervention or pleadings of any kind. Now the executor, who did not join issue below, states here by brief that he has no interest in the matter, as his seisin of the property terminated with the delivery thereof to the usufructuary; and that at the end of the usufruct the property cannot revert to the succession, but the possession is then legally joined to the naked ownership.

That proposition is undeniable in law, and hence the executor was not the proper party to be made a defendant in rule.

Article 1630 of the Civil Code provides: "The delivery of legacies under a particular title must be demanded of the testamentary executor, who has the seisin of the succession. If the testamentary executor has not the seisin, or if his functions have expired, the legatees must apply to the heirs."

It is argued by appellant's counsel that the executors have yet the seisin of the succession; that may be true as to certain portions thereof, but it surely cannot be extended to a piece of property which is the object of a legacy under a particular title, and which under the will has gone out of the control of the executors.

It thus appears to our minds that when this rule was tried there was no issue joined or to be tried before the court, and that the rule should have been discharged for want of parties.

Since the death of Piffet the property in question must be in possession of some one, subject to the right of possession of the legatee of the naked ownership. It is not in the possession of the executors, and it is not intimated that it is in the possession of the succession of J. B. Piffet. The way may be open to the legatee, but if he is resisted he has his proper recourse.

It is therefore ordered that the judgment appealed from be annulled and set aside, and it is now ordered that the rule for possession by Meghill be discharged at his costs in both courts, without prejudice to his right of taking possession of the property described in his rule, or of judicially claiming the same in a proper proceeding.

Gallion et al. vs. Keegan.

No. 9908.

39	468
51	1167

ELLA D. GALLION ET AL. VS. JAMES E. KEEGAN, ADMINISTRATOR.

The petition in this case exhibits an action by a former minor arrived at the age of majority against the succession of a deceased tutor, to recover an amount alleged to be due by him in virtue of his gestion as tutor.

As such, it stands in the same position as if the tutor were alive and the action were directed against him.

More than four years having elapsed after the majority of plaintiff before the suit was brought, the plea of prescription of four years is sustained.

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

W. R. Rutland for Plaintiff and Appellee.

W. H. Jack for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. A careful scrutiny of the petition filed by plaintiff in this case, satisfies us that it is an action brought by her against the administrator of the succession of her former tutor to recover judgment for an amount due her by said tutor on account of property and funds received by him in that capacity and never accounted for.

Plaintiff was the sole heir of her father, Dewitt Iverson Ellzey, who died in 1860. She avers that her grandfather, Wm. Ellzey, caused her father's succession to be opened, and was appointed and qualified as administrator thereof, and caused an inventory to be taken showing property to the value of \$7,823; that, after the death of her mother, which occurred in 1862, her said grandfather "was duly appointed tutor to your petitioner, who was then a minor, and he qualified as such, and he caused an inventory to be taken of all the property belonging to her, which was worth its appraised value say \$8,418.10, and that, as such tutor, he took possession of said property and held it under his own control until his death, which occurred about January, 1866."

She then avers that Keegan was qualified as administrator of the succession of her said grandfather and former tutor, and has been and still is acting as such administrator; that "he refuses to pay her the balance due her by her former tutor, say \$8,418.10, less a credit of \$1,600 paid in 1867. * * She avers that she has demanded of said administrator the payment of this amount and that he refuses to pay the same, and she has also demanded that he allow the said claim which he refuses to do, and that he also refuses to file an account as administrator of said successions in which she might force

Gallion et al. vs. Keegan.

him to tabulate her said claim. She avers that she is now a major and has been long since emancipated by marriage, and has a right to be paid the balance due her by her former tutor out of his succession or estate which is in the hands of his said administrator, J. E. Keegan, but that she has failed to get him to do so after amicable demand, and he also refuses to tabulate her claim;" and she prays for judgment against him for the sum claimed.

The foregoing extracts sufficiently establish the true nature of the suit to be an action against the administrator of a deceased tutor to recover an amount due by him in virtue of his gestion.

It is, in no respect, different from what the action would have been if the tutor were alive and the action were directed against him.

Amongst numerous defences, the defendant pleads the prescription of four years under Art. 362 of the Civil Code, providing: "The action of the minor against his tutor, respecting the acts of the tutorship, is prescribed by four years, to begin from the day of his majority."

Plaintiff was born in December, 1858; became of age in December, 1879; and this action was only filed on November 8, 1884.

The evidence conclusively shows that the defendant administrator never received possession of any property belonging to the minor.

The inventory of the minor's estate shows that it consisted of four items, viz: 1st., lands; 2d., slaves; 3d., two beds and bedding; 4th., certain notes and accounts appraised at \$2,618.

It is shown that the plaintiff is in possession of the lands and furniture; and the slaves, of course, were disposed of by emancipation.

Nothing remains to be accounted for but the notes and accounts. One of these notes was that of her grandmother, and on his death-bed her grandfather placed, in a sack, the amount thereof in gold, and gave it to her aunt to be kept for plaintiff, and it was actually paid over to her guardian subsequently appointed in the State of Mississippi, whither she afterwards removed.

Another payment on account of another note was made to the same guardian. What became of the remaining notes and accounts is not made certain, but the evidence makes it probable that they were collected in Confederate money during the war. It is shown that the defendant administrator never received or had anything to do with them.

It may be that the deceased tutor was bound to account for these credits and that, if he collected them in Confederate money, such receipt would not have discharged him.

But the plaintiff's action respecting these "acts of the tutorship"

State vs Oliver.

comes too late and is clearly barred by the prescription pleaded. *Cochran vs. Violet*, 37 Ann. 223; *Bedell vs. Calder*, Id. 805.

We find nothing in the receipts above referred to or in the other receipts for sums paid plaintiff as one of the *heirs* of William and Esther Elzey, acknowledging the claim herein set up or otherwise interrupting or suspending this prescription which only began to run after plaintiff's majority and is only interrupted by acts after that date as held in the case first above quoted.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be now amended by reversing and annulling that part thereof which gave judgment in favor of plaintiff's principal demand, as to which it is now decreed that the same be rejected; and as to the reconventional demand, said judgment is affirmed. Costs of the lower court on the principal demand to be paid by plaintiff, and those of the reconventional demand by defendant, and costs of this appeal to be paid by plaintiff.

No. 9852.

THE STATE OF LOUISIANA VS. TOBE OLIVER.

When the accused has been once tried upon a valid indictment, and an improper verdict has been rendered by the jury, from which he has been relieved by the court, upon a motion for new trial and one in arrest of judgment, such former trial does not operate a bar to a further prosecution of accused upon the same indictment, and cannot sustain the plea of "twice in jeopardy."

Narrations of transactions in homicide trials are inadmissible as part of the *res gestæ*, unless they are admissions of the party charged. Comments and recitals of observers form no part of the *res gestæ*. Statements made by them are hearsay. They should be examined as to what they saw.

A PPEAL from the Second District Court for the Parish of Webster.
Drew, J.

M. J. Cunningham, Attorney General, and *J. A. Lowry*, District Attorney, for the State, Appellee.

D. W. Stewart and Watkins & Watkins for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. This case was before us at Monroe in June last. 38 Ann. 632.

The accused was indicted and tried under R. S., Sec. 791, on the charge of wilfully, feloniously and of malice aforethought, shooting Frank Key, with intent, then and there, to kill and murder him, etc.

39	470
48	1409
39	470
50	596
39	470
120	818

State vs. Oliver.

The jury found him guilty of "*shooting with attempt to kill.*"

On defendant's motion in arrest of judgment, assigning that the one found by the jury was an illegal verdict, the trial judge arrested judgment, and set it aside and remanded the accused to await a new trial.

Claiming that the effect of the arrest of judgment and setting the verdict aside was to terminate the prosecution under the indictment, the accused brought up the case, and we held the ruling of the trial judge correct, and remanded it for retrial.

I.

On the second trial, in the court below, the objection was urged that the accused cannot again be put upon trial under *same* indictment, because he has been once in jeopardy, as he was once arraigned thereunder and tried by a jury, and said jury agreed to a verdict, and he cannot be placed *twice* in jeopardy.

This motion and objection were, by the trial judge, overruled on the ground that the finding of the jury was equivalent to a *mistrial*, and because there "is no such crime denounced by the statute of the State" as the one of which he was found guilty.

In our former opinion we said: "Defendant moved for a new trial on several grounds, and also filed a motion in arrest of judgment, on the ground that the verdict is not responsive to the indictment and the variance is fatal, and *the accused should be finally discharged, as in effect acquitted.* The two motions were tried together, and judgment was rendered," etc.

The constitutional provision relied upon is "that no person shall be held to answer for a capital crime, unless on a presentment or indictment by a grand jury; * * * nor shall any person be *twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or when there is a mistrial, or a motion in arrest of judgment is sustained.*" Const., Art. 5.

All of its conditions have been fulfilled. The purport of our previous opinion is that the accused was *not, in effect, acquitted*, as was at that time contended. The former appeal was *only* entertained upon appellant's *theory*, that the effect of the judgment, on motion in arrest, was to *terminate the prosecution*. Otherwise the appeal would have been dismissed.

The judge's ruling was correct.

II.

Another bill was reserved by the accused to the admission of the declarations of Nancy Key to Allen Webb, as part of the *res gesta*.

The trial judge assigns the following reasons for admitting the evidence:

"The evidence shows that Allen Webb lived about one hundred or one hundred and fifty yards from the place of the shooting; heard the report of the gun, and the *outcry* of Nancy Key; and went immediately to the place in a run, making a very short space of time between the firing and the declaration, and what *any one* said at that time *was* a part of the *res gesta*."

The *particular* objection urged to the reception of the testimony offered on the part of the State, was, that Nancy Key was a third person—a mere *observer*—and not one of the participants in the transaction; and that her statements are hearsay.

This objection is supported by authority.

Dr. Wharton says: "It is agreed on all sides that narrations of a transaction are *inadmissible, unless admissions by the party charged, etc.*" Wharton, Crim. Law, sec. 262.

Again: "The distinguishing feature of declarations of this class is that they should be the *necessary* incident of the litigated act. * *

"Under the rule before us, evidence in homicide trials has been received of the exclamations of the defendant at the time of the attack, etc. * * * But the comments and criticisms of *observers* cannot be introduced as *res gesta*."

"Such persons must be called in court and examined as to what they saw. Their statements made at the time are hearsay. Sec. 263.

Roscoe's Crim. Ev., p. 23: "In this case it is *not* the relation of *third persons* unconnected with the fact which is received, but the declarations of the parties to the facts themselves, or of others connected with them in the transaction, which are admitted for the purpose of illustrating its peculiar character and circumstances."

Bishop announces the exception to the rule thus:

"But while the declarations and actions of persons, *neither on trial nor injured by defendant's acts*, may be admissible to do so, such persons *must be otherwise connected with the transactions than as mere lookers-on.*" 1 Bishop Crim. Ev. Sec. 1087; 38 Ann. 66, State vs. Frank Moore.

The defendant's objection to the declarations made by Nancy Key to Allen Webb, a witness for the State, should have been sustained and the evidence rejected. It may have exercised a prejudicial effect

Succession of Rhodes.

upon the minds of the jury and against the accused. He is entitled to a new trial.

It is therefore ordered, adjudged and decreed that the verdict of the jury be set aside, and the judgment and sentence thereon based be annulled, and the cause remanded for further proceedings according to law.

No. 9666.

SUCCESSION OF J. B. RHODES.

39	473
51	1170

In the absence of proof that the husband has invested his individual funds in the community, neither he, nor his heirs can claim that the conjugal partnership is indebted for the same.

An opposition which charges that a claim placed on the tableau was extinguished, is equivalent to a plea in compensation, which admits the debt and throws the burden of proof on the opponent.

When an account allows no interest on a claim and the account is not opposed to ask the same, the party in whose favor the *item* was tabulated cannot demand such interest, on appeal.

This Court will not pass on issues presented in argument only, and which were not formed by the pleadings below.

APPEAL from the Seventeenth District Court parish of East Baton Rouge. *Burgess, J.*

K. A. Cross, for Opponent and Appellees.

Read & Goodale and *H. N. Sherburne*, for the Administrator, Appellant.

The opinion of the Court was delivered by

BERMUDEZ, J. The widow of Rhodes opposes, as tutrix of their minor children, the amount presented by the administratrix.

The opponent avers that the amount allowed the two daughters, by a first marriage of her deceased husband, is not due, for the reason that the community existing during that marriage is indebted to his estate in \$13,917 invested therein, and which absorbs what residuary interest the deceased wife had therein.

The tutrix opposes, besides, *items* in favor of the clerk and the attorneys.

By the judgment appealed from, the amount allowed the children of the first marriage was reduced to \$1500, as also the *items* in favor of the clerk and attorneys, and the account, thus amended, was homologated.

Succession of Rhodes.

The children claim that the *item* tabulated to them ought to have remained intact, and interest allowed them in addition. The tutrix, however, contends, in her answer to the appeal, that the whole sum should have been stricken out, as *entirely extinguished* by the indebtedness of the first community to the separate estate of Rhodes.

It is clear that, while admitting impliedly that the allowance to the children of the first marriage was once due, the opponent forcibly insists that the debt was *extinguished*.

The appropriate technical word, *compensation*, was not used in the opposition; but it is undeniable that the ground of resistance to payment is that the debt was *compensated*. That plea, like *payment*, imposes the burden of proof on the party urging it.

Apparently, the theory on which this defense rests is that it is enough to show that the husband inherited certain sums, and that, from this circumstance, must be deduced the fact, that the community was *pro tanto* benefited, and that he has remained a creditor for as much of the conjugal partnership; but this is a fallacy.

The law demands substantial proof that the amounts were actually invested in the community by the husband and the record is barren of all evidence that he has done so.

The real estate acquired during the first community and which was inventoried, as part of its assets, does not appear, either on the face of the titles, or otherwise, to have been paid for out of his separate funds. The price paid ought to have been traced back to the inheritance. This was essential to constitute him a creditor of the community. 6 R. 508; 10 R. 18; 11 Ann. 514, 297; 13 Ann. 379; 26 Ann. 605; 30 Ann. 277; 35 Ann. 296, 570. The adverse opinion in the Falgout case 6 Ann. 174, is no authority and must be considered as overruled.

The opponent has advanced in argument what might have offered some seriousness in reference to the absence of a previous liquidation of the rights of the issue of the first marriage, as a condition precedent for recovery, but as those matters have not been put at issue by the pleadings they cannot be considered.

Interest cannot be allowed. The account did not propose to give any and it was not opposed by the children of the first marriage. They cannot be permitted to ask on appeal what they ought to have claimed below.

No error was shown in the finding of the district judge reducing the clerks and attorneys fees.

Machado vs. Bonet.

It is therefore ordered and decreed that the judgment appealed from, as far as it reduced the clerks and attorneys fees, be affirmed, and that in other respects it be reversed; and it is now ordered and decreed that the opposition of the tutrix to the item in favor of Ella and Sarah Rhodes on the amount and tableau of distribution be dismissed with costs, those of appeal to be paid equally by the parties.

No. 9848.

89	475
110	242

ELIZABETH MACHADO VS. VINCENT BONET, HER HUSBAND.

The rule of our jurisprudence, which denies the interference of courts in suits for separation between spouses, in cases in which there are mutual wrongs, will not apply to the case of a wife who may be shown to be of a quarrelsome disposition, but whose husband is shown to have been guilty of cruel and outrageous excesses towards her, including the frequent infliction of blows on her, and an attempt to take her life.

To condemn a woman to live under the authority of a brutal husband, whose excesses and cruelty render her life with him, absolutely unbearable, simply because such conduct has driven her to desperation, culminating in endless quarrels with him and in violent explosions, would be a denial of justice.

A PPEAL from the Civil District Court for the parish of Orleans.
Monroe, J.

E. & J. Staës and G. Duplantier for Plaintiff and Appellant.

A. E. Billings for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff appeals from a judgment rejecting her demand for a decree of separation from bed and board from her husband, and for the custody of one of the children born of the marriage. Her complaint contains charges of cruel treatment and other causes, including blows and an attempt to take her life, against the husband.

The defense consists mainly of counter-charges of faults and excesses on the part of the wife.

The testimony goes to some extent to prove mutual wrongs between the spouses, but they are not of the same nature, and we leave the record with the clear conviction that the faults proved against the wife are the natural consequences and the inevitable outgrowth of the systematic, continuous and insupportable persecution which for years she received at the hands of her brutal husband.

It is in proof that he daily ill-treated and grossly insulted her, by applying vile epithets to her, ordering her to leave his house, in the presence of their children, of the servants and of visitors who happened to be in the house; that he frequently struck her with his fist;

State vs. Tisdale.

that on two occasions he inflicted bodily harm on her person by means of things which he threw at her during his anger, and that on one occasion he shot at her with a pistol.

Her greatest wrongs, as shown by the record, consisted in retaliating vile epithets at him, and on one occasion during the pendency of a previous suit for separation in which she was non-suited owing to the withdrawal of her counsel, it appears that she broke and destroyed some furniture which officers of the law were about to seize and to remove from her premises at the instance of the husband.

Our examination of the evidence leaves no doubt on our minds as to her right to claim the protection of the law from the excesses of a man whose brutality has gone so far as to endanger her life. *Thomas vs. Taillieu*, 13 Ann. 127; *Dillon vs. Dillon*, 32 Ann. 643.

It is therefore ordered that the judgment appealed from be annulled, avoided and reversed, and it is now ordered, adjudged and decreed, that plaintiff do have and recover judgment against the defendant, her husband, decreeing a separation of bed and board between them, and granting to plaintiff the permanent custody of the daughter, Lena Bonet, issue of the marriage, and condemning the defendant to pay costs in both courts.

No. 9932.

THE STATE OF LOUISIANA VS. GEORGE C. AND LUCIUS E. TISDALE.

Under sections 1049 and 1052 and others of the Revised Statutes, which are similar to the Victoria Statute of England on the same subject, the common law requirements as to the framing of indictments have been relaxed; and it is sufficient to charge the crime in the words of the statute, without setting out the particular acts constituting the special offense charged in the indictment. *State vs. McGraw*, 37 Ann. 292.

APPEAL from the Twenty-seventh District Court, Parish of Richland. *Williams, J.*

M. J. Cunningham, Attorney General, and *P. H. Toler*, District Attorney, for the State, Appellant.

E. C. Montgomery for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. The indictment charges that accused "did feloniously procure to be falsely made a promissory note," (minutely describing the note), and feloniously did publish as true said promissory note,

State vs. Tisdale.

* * * knowing the same to be false, with intent to defraud Yale & Bowling."

Accused moved to quash the indictment "for the reason that no offense denounced by the laws of Louisiana is set forth therein, * * * said indictment fails to allege and specify wherein the note was falsely made, it not being alleged that defendants forged the signature to the note, or that they forged or altered any material part of said note, or that it purported to be a counterfeit or imitation of anything. That there is no allegation of an intent to defraud any person or body politic or corporate. That the charge against them is not set forth with the precision and clearness required by law to enable them to make their defense."

From a judgment sustaining this motion, quashing the indictment, and discharging accused, the State prosecutes this appeal.

In the absence of any reasons assigned by the judge *a quo* in support of his ruling, and of any argument or brief from counsel for accused, we are left to form our conclusions on the face of the indictment and motion to quash.

Section 833, Revised Statutes declares: "Whoever shall forge or counterfeit, or falsely make or alter, or shall procure to be falsely made, altered, forged or counterfeited * * any promissory note * * or shall alter or publish as true, any such false, altered, forged or counterfeited promissory note * * knowing the same to be false, altered, etc., with intent to injure or defraud any person * * on conviction shall be punished, etc."

In what particular the indictment herein, which follows the words of the statute, is defective, we are at a loss to perceive. The offense charged is distinctly denounced in the statute; the promissory note is described with needless particularity; the intention to defraud particular named persons is set forth; and we find nothing in the motion to quash left unanswered by the indictment itself, except the objection that it "fails to allege and specify wherein the note was falsely made, it not being alleged that defendant forged the signature to the note, or that they forged or altered any material part of the note, or that it purported to be a counterfeit or imitation of anything."

We had occasion, in a recent case, to consider objections of this kind urged to an indictment for forgery, and we then held that, under secs. 1049 and 1052 and others of our Revised Statutes, which are similar to the Victoria Statute of England on the same subject, the common law requirements as to the framing of indictments have been relaxed, and that it is sufficient to charge the crime in the words

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of the statute, without setting out the particular acts constituting the special offense charged in the indictment. *State vs. McGrau*, 37 Ann. 292.

The same rule applies in this case, and, as we then said, it was not necessary to "charge in what respect or particular the writing has been forged, i. e. whether the name was forged or a figure altered or inserted, or any other like act that constitutes forgery."

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that the case be remanded to be proceeded with according to law.

No. 9766.

HENRY SINGER VS. CARONDELET CANAL AND NAVIGATION COMPANY
AND BERTRAND SALOY.

The Carondelet Canal and Navigation Company have, and its predecessors had, a perfect right to use, appropriate and enjoy the property adjacent to Bayou St. John and Canal Carondelet, on either side, for the purpose of facilitating their operations in the improvement of navigation therein, as contemplated in their several charters.

Among their chartered rights are the construction and maintenance of roads on either side and collection of tolls thereon; to take and receive from each passing vessel toll, according to her tonnage; to prevent any person from using the same in any injuriously to them, or embarrassing to commerce.

No one can derive any adverse right of possession or ownership to any property adjacent to said bayou or canal from the State, by a title subsequent in date to the Navigation Company's charter; because the State, in such case, would be the common author.

Having the exclusive right, under its charter, to the use of the banks or shores of the Bayou St. John and Canal Carondelet, for its operation for the purpose of navigation, no one has the right to establish a ferry, for the conveyance of passengers, across the same without permission of the defendants; and when such permission is given by them, on the condition that it shall not impede navigation thereon, it may be recalled when ascertained to be inconvenient and a hindrance to vessels.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tasot, J.

J. Duvinéaud and Posey & Ker for Plaintiff and Appellee.

H. D. Ogden for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. The plaintiff claims to be the owner and proprietor of the establishment called "Over-the-Rhine," situated on the right bank or shore of Bayou St. John, opposite Spanish Fort, near its entrance into Lake Pontchartrain; and he also claims to be the owner,

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in possession, of the land upon which those improvements were erected, down to the water's edge.

He represents that, in order to afford his patrons facilities for visiting his place of refreshment and public resort, and thereby to make his business more profitable, he is lawfully using and running over and across said bayou, in front of his said establishment, a flat propeller by means of a small rope; which flat he and his predecessors have been thus using and propelling, legally, publicly and peaceably for a long time, with great profit and advantage to his and their said business.

He avers "that said Bayou St. John is a "*natural navigable stream*; free to the use of the inhabitants of the country, and not the *private* property of any individual, or set of individuals, and that, in using it, as aforesaid, he has never, at any time, or in any manner, interfered with the rights of any other person, or the public in general, to the enjoyment or use of said bayou or its banks."

He further shows that Bertrand Saloy, acting as the president of the Carondelet Canal and Navigation Company, has, without any warrant of law, or color of chartered right, undertaken to prevent him from running and using said flat; and has, by force and violence prevented him from so using and operating the same, to his great and irreparable injury and damage; and that he has illegally blocked up said bayou with logs, so as to prevent the crossing of said flat.

He further represents that said company, through its said president, has unlawfully appropriated to its own use, and is actually using a part of his land as a wood-yard, and has thereon erected one or two small buildings, dedicated to the uses of said company, without his consent or authority, and to his great injury and inconvenience.

He claims that by reason of defendant's illegal and tortious acts he has suffered \$2500 damages, for which he prays judgment.

He also prays judgment perpetuating his injunction against their continuance, and to compel defendants to remove the obstructions complained of as interfering with his ferry rights and privileges.

Defendant company excepted to the insufficiency of the averments of the petition to support the judgment prayed for: that the plaintiff disclosed no right in himself to establish a ferry, to be operated by means of a rope stretched across Bayou St. John; that his petition does not set out the description of the land he claims; that, at the time he claims to have acquired certain property from Otto Touché, there was a similar suit, then pending between Touché and themselves, involving his right to operate said ferry, and that judgment was rendered there-

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in shortly after, dismissing it in so far as they were concerned, and that said suit and judgment forms a complete bar against plaintiff's demand therefor.

These exceptions having been overruled, the defendant company answered as follows :

That by virtue of the several legislative charters granted to it and its predecessors in 1805, 1857 and 1858, it has and had full authority to take possession and control of Bayou St. John, and has had full, entire and complete management and control of navigation therein, since said charters were granted.

That it has power and authority to make rules and regulations for the government and control of same; to direct where vessels and other crafts shall land, and to prevent and remove any obstructions that may impede, injure or interfere with their navigation thereof.

That plaintiff is, and was without right or authority to stretch a rope across the bayou, and to use it as he has done; and that its said use is an obstruction to the navigation thereof, occasioning hindrances, delays and accidents to vessels and other water-craft.

That plaintiff is not the owner, and is not entitled to the use of the land to the water's edge, but that by its aforesaid charters it is entitled to, and is the owner of, the banks of said bayou, and twenty feet additional, specially granted it, on either side, for the construction and maintenance of public roads.

That for over forty years it has kept enclosed, by means of a fence running parallel with the bayou—and at a distance of sixty feet therefrom—the land between said fence and the bayou.

That, at their own expense, the company has erected and maintained a bulkhead in the edge of the water, and have filled the intervening space between it and the top of the banks, whereby a new and permanent bank of some fifteen feet in width has been formed and is now in use.

That since 1805, it and its predecessors have been in the peaceable, open and undisputed possession and enjoyment of said land, and they plead the prescription of ten and thirty years.

That plaintiffs' action and injunction were causeless and without the color of legal right, and \$500 is due them on the score of attorneys' fees.

Bertrand Saloy denies any individual liability, and joins in the company's answer and demands.

I.

In order to a proper understanding of the issues involved, it will be necessary that a brief history be first given of the Navigation Company and its chartered rights and privileges.

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In the latter part of the eighteenth century, Bayou St. John was quite a small stream. At the point of its confluence with Lake Pontchartrain there was formed a sand-bar, and the water was so shallow at times that a canoe could not pass its mouth.

During the administration of Baron Carondelet in 1790, the opening of a canal through Bayou St. John, from the lake to the city, was first undertaken; but it was not completed under the Spanish *regime*.

After the cession of Louisiana and the establishment of the Territory of Orleans, provision was made by the Legislature for its completion; and the "Orleans Navigation Company" was organized under an act for the purpose of improving the inland navigation of the territory, which was approved on July 3, 1805.

Power was conferred upon that corporation to "enter into and upon, all and singular, the land, and *lands covered with water*, where they shall deem it proper to carry the canals and navigation herein before particularly assigned, with or without the consent of the owners thereof; and to lay out such routes and tracks as shall be most practicable for *effecting navigable canals*," etc.

It further provided for the expropriation of private property adjacent to the proposed canals, "not to extend more than one hundred and eighty feet therefrom;" declaring that said corporation, and its successors, on paying the award therefor, "shall be immediately vested with a good and *indefeasible title to the said lands and tenements*," etc.

The corporation was authorized to have and recover from every passing vessel, inward or outward bound, one dollar per ton of such vessel's admeasured burthen, as soon as it should so improve the navigation of Bayou St. John as to admit, at low tides, vessels drawing three feet of water; and when it was further improved, so as to permit such vessels to pass from said bayou by the Canal Carondelet to the bayou terminating the same at the city, it should be entitled to receive from such vessels one additional dollar per ton, etc.

The act further declared that if any one should break, or throw down any embankment, or other work erected by said corporation; or should forcibly pass through any of said canals, such person, besides repairing all damage occasioned thereby, should forfeit and pay the sum of \$100, and in addition to toll.

The company was authorized to lay out and construct, from the bridge at the Bayou Settlement—now Spanish Fort—a road or highway on each side of the bayou; and, if same was constructed of shells, sand, or other hard material, and of at least twenty-five feet in width, it was entitled to charge toll, the rate of which was fixed.

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In 1831 suit was brought by the Attorney General to determine the constitutionality of the company's charter, and after full discussion and careful consideration its validity was maintained. 11 O. S. 309, State vs. Orleans Navigation Company.

This corporation continued operations under its charter until 1852, when suit was again instituted in behalf of the State, for the forfeiture and revocation of its charter, on the ground that it had become insolvent, and through neglect and mismanagement of its affairs, the navigation of the Bayou St. John and Canal Carondelet had become dangerous and hazardous.

This suit prevailed, and its charter was revoked and forfeited "for a violation of the conditions of the act of incorporation." 7 Ann. 679, State vs. Orleans Navigation Company.

During the pendency of that litigation the Legislature of 1852 enacted a statute authorizing, in the event of its successful termination, the liquidation of the company's affairs; the sale of "all its property, real and personal, in block, at public auction, to the highest bidder." There was made in it a condition that if the purchasers should organize themselves into a corporation, under the laws of the State, for a term of twenty-five years, for the purpose of carrying out and effecting the improvements originally contemplated, and the construction of a new basin, at the junction of Canal Carondelet and Bayou St. John, said corporation should be entitled to receive and exact all such tolls and revenues for the use of said canal, bayou and roads as the Orleans Navigation Company was entitled to under its charter.

Thereunder a sale was made on the 28th of June, 1852, to James Currie and others, of all the rights, privileges, franchises and property of the Orleans Navigation Company, to, in, or upon Bayou St. John and Canal Carondelet, together with all of its dependencies and accessories of any and every kind, especially including all those acquired by said company under various acts of Congress.

Subsequently there was duly organized the New Orleans Canal and Navigation Company, which acceded to all the rights of said purchasers, under the aforesaid legislative enactment; and they entered into immediate possession and control, and continued, uninterruptedly, in possession and control, and full enjoyment of their rights until 1857, when same were transferred to the Carondelet Canal and Navigation Company, defendant herein, which was incorporated by the Legislature of that year. It was, by the terms of its charter, expressly empowered to complete the work of improvement theretofore

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begun on Canal Carondelet and Bayou St. John, by its predecessors ; to take possession of same, and "to receive, possess, hold and enjoy all and singular, the rights, franchises, privileges, powers and authority. which were, at any time, granted to, received, possessed, enjoyed or exercised by the late Orleans Navigation Company," etc.

In 1877 the right of the defendant company was resisted on the ground that Bayou St. John is a *natural navigable* stream, emptying its waters into Lake Pontchartrain and connected with the Gulf of Mexico, and is, therefore, public, and free to all persons whomsoever, to navigate it at pleasure, with their vessels, and to moor them to its bank ; but the Court decided differently, and held that it was not a "*natural navigable* stream," but had been *rendered navigable* by the labor, skill and capital of the defendant company, and its predecessors. 29 Ann. 430, Carondelet Canal and Navigation Company vs. Parker.

In this manner, the defendant company traces—through the various charters, deeds and legislative enactments recited—its title and franchises to and upon the land, bayou, roads and canal, in controversy, back to the original incorporation of the Orleans Navigation Company in 1805.

There appears to be no broken link in the chain. All of its rights and titles descended to it directly from the Territorial and State governments. No part of the property ever passed under parochial or municipal control. The defendant company acquired, and is the owner of all the rights of its predecessors, whatever they were—the right of use or property—in the banks of Bayou St. John to the extent of 180 feet, on either side. If they did not acquire an absolute title to the land, at the date of the grant—because the fee was, at that date, in the United States government—the title vested in the corporation, by the acts of 1852 and 1857. If these be regarded as questionable, it is certainly true that the State could not thereafter dispose of any part of the territory traversed by the canal, bayou and roads, to another, and free it from the claims of the corporation, under its charter.

II.

The record shows that plaintiff acquired February 3, 1885, an apparent title, at sheriff's sale, under execution against one Otto Touché, to all his right, title and interest in and to fractional section ten, of township twelve, range eleven, south, containing four and sixty-seven one hundredths acres.

Otto Touché acquired from J. R. Bres on February 3, 1884.

Bres obtained a patent from the State on the 23d of November, 1882.

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This land was selected and reported to the Surveyor General of the State as swamp and overflowed land, on the 18th of April, 1850.

The fee simple was in the State in 1852, when the sale to Currie and associates was made, and when the New Orleans Canal and Navigation Company was organized.

The record further discloses that on the 9th of March, 1880, Otto Touché accepted a written lease from the defendant company, of a certain piece of ground, measuring 100 to 120 feet front on Bayou St. John, for the purpose of erecting a house thereon, to have a front of 100 feet and a depth of 18 feet. This lease was for a period of one year from the 1st of April, 1880, with the privilege of another year, and at the rate of \$25 per month.

There was an express stipulation in the lease that at the expiration thereof the buildings thus erected should *revert*, with the property of the lessors, without any reservation or additional consideration.

Soon after this lease was executed Bertrand Saloy, acting for the company, granted his lessee permission to make use of ferryboats in transferring persons across Bayou St. John by means of a rope stretched from bank to bank, upon the expressed condition that it should not hinder nor impede the navigation of that stream.

On the 6th of June, 1881, Touché wrote a letter to the defendant company in which he requested them to release him from his obligation to pay for the ferry privilege. He says: "Being a *lessee of yours*, please take into consideration that I have paid you \$5 per month for the privilege of the ferry, when boats of twice the size, charging fare, are only paying \$2 to \$2.50 per month."

On the 23d of August, 1884, the defendant company gave Otto Touché written notice that the privilege granted him to run a flat across the bayou, or any other craft upon its waters, was *withdrawn*.

He denies having received the letter, but a witness swears positively that he handed it to him, and we are inclined to believe his statement, as he is without interest in the suit.

This lease had not expired when Otto Touché acquired a title from Bres, February 3, 1884, and he could not in that manner *dispossess his lessor*, for whom he occupied as agent and lessee; and in direct violation of his contract, he could not acquire the ownership of the *buildings, and the improvements that reverted to the company at its expiration*.

The record further discloses that in September, 1884 - about six months subsequent to his reputed purchase from Bres, and within a few days after the company had revoked his ferry privilege - Otto

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Touché instituted a suit, quite similar to the instant one, against same defendants; and it was pending at the time the plaintiff, Singer, caused a seizure to be made of the property in question, and it was dismissed by a judgment of the court only a few days prior to his purchase. Under the circumstances, he could acquire no better or higher right than *his judgment debtor had, at date of seizure of the property, as his.*

It further appears from the evidence that Otto Touché has never yielded the *actual* possession of the property to Singer, who resides in the city; and Touché continues the control and management of the business as before, to *all appearances*, though he claims to represent Singer at a salary of \$100 per month.

The following quotations from his evidence illustrates the character of his continued occupancy of the premises:

"Question. Did you draw out of the receipts in the bar-room?

"Answer. Yes, sir.

"Q. Did you keep an account of those receipts?

"A. None, particularly.

"Q. Did you keep any account to show how much you have taken out of the receipts of Mr. Singer?

"A. No, sir.

"Q. You have no books or papers showing that?

"A. No, sir.

"Q. No papers of any kind, or accounts between you?

"A. None, particularly.

"Q. Do you know of Mr. Singer keeping any account of your transactions with him?

"A. I don't know that he does.

"Q. Did you ever render him any account of your transactions with him?

"A. No, sir; not particularly."

Mr. Singer, though present in court during the trial, did not offer his evidence, and favored us with no explanation of this unsatisfactory situation.

Immediately previous to the institution of this suit, Otto Touché made considerable repairs on the buildings, for which he claims to have expended quite a sum of money.

Whatever rights may have been transferred from Bres to Touché, or which subsequently passed to the plaintiff, are here presented in such *questionable* shape as to entitle them to small consideration.

III.

From the evidence we have gathered the following facts, which serve to show the manner in which the defendant company and its

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predecessors dealt with the franchise and properties with which same was connected during a series of years.

One witness states that he has known the lands in controversy for forty years. That in 1852 he worked for the company, and hauled shells and put them on the bayou road. He says that, at that time, the company had a blacksmith shop and wood-yard on the premises in question, and there was a fence running along the bayou, and of about the average distance of sixty feet from it. The company occupied the intervening space between the fence and another bayou, then and since. Says that he owns land in its immediate vicinity, and that it is low, swampy land. That the land where the establishment called "Over the Rhine," is situated, was, at one time, low and swampy; but that has been *raised by the company*. That its mean width, from the bayou to the swamp, is about 60 to 65 feet. Before this land was raised the water from the lake washed across it, at high tide—often being submerged thereby. This land was raised by dirt taken from the bed of the bayou by dredging. The work was done in 1845 or 1846, though it was not entirely filled in 1852.

The company once had a warehouse on the premises, but it was burned down in 1846. Others say that the wood yard, of which the plaintiff complains as a nuisance, is one that has been kept by the company for many years past, as a wooding-place for steamboats. Near it is a small cabin belonging to the company, and which is occupied by officers of the vessels leading through the canal.

Many years prior to the establishment of the improvements Over-the-Rhine, the defendant company had built a break-water in the edge of the water, in front of those premises, and had filled in the space between it and the bank with earth, whereby the bank was elevated, and extended out a distance of about fifteen feet. This was done about 1880; and it was established on or very near the line of the old break-water. The pilings were driven down in the edge of the water, and planks nailed to them, and the dirt was filled in between it and the bank, somewhat after the style of a levee.

There can be no doubt that the defendant company and its predecessors had a perfect and complete right to use, appropriate and enjoy the property adjacent to the Bayou St. John and Canal Carondelet, as they did, and that plaintiff has acquired no right, under his title, which can exclude defendants from the enjoyment of it.

IV.

With regard to the plaintiff's ferry privileges, it is sufficient to say that the only right of that kind, to which defendants ever consented,

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was by them *expressly withdrawn* long before he acquired any color of right in the premises.

The evidence shows, clearly and unmistakably, that the rope that was stretched across the bayou, whereby the flat was propelled from side to side, particularly under the loose management of Otto Touché, was a great hindrance and impediment to navigation on the bayou, and defendants had a perfect right to discontinue it. There was a good bridge across the bayou, only a little way from Touché's place of business, which furnished his customers ample facility of reaching his resort; and the company was under no obligation to increase them gratuitously.

Under the general law of the State, the police juries have the "exclusive privilege of establishing ferries and toll bridges within their respective limits;" and they are required to lease them out at public auction. R. S. secs. 2750, 2758.

But as the *locus* in question is within the territorial limits of the city of New Orleans, some consent should have been first obtained from her municipal authority, if, indeed, the same was subject to municipal control.

This identical question was under examination by our predecessors in a case cited above—11 O. S. 324, *State vs. Orleans Navigation Company*—in which they held:

"As a public highway, the *river* may be freely navigated, *up and down*, for the convenience and for hire, of persons and property.

"*Not so across*, at such points where ferries are established by law, nor within a certain distance above or below them.

"The freedom stipulated for by the ordinance is not so absolute as to be *inconsistent with submission to the ferriage laws*, securing to the citizens residing within or without the territory the convenience of finding at suitable places, at all times, and for a fixed compensation, the means of crossing."

The plaintiff is not only subordinated to the ferriage laws, but *they* are subordinated to defendant's chartered rights and franchises and exclusive privileges on Bayou St. John and Canal Carondelet, and cannot be permitted to evade the same, so as to establish a ferry or to maintain the one hitherto established, without their consent first obtained.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered, adjudged and decreed that the demands of plaintiff be rejected and his injunction dissolved, and that the demands of defendants for compensation for attorneys' fees be rejected as nonsuit, and that the costs of both courts be taxed against plaintiff and appellee.

Lawler & Huck vs. Cosgrove.

No. 9808.

LAWLER & HUCK VS. PETER COSGROVE.—J. B. CAMORS, THIRD
OPPONENT.

A *bona fide* sale, with the pact of redemption, ostensibly valid and duly recorded, passes title of ownership, and cannot be attacked collaterally by a creditor of the vendor, who must be relegated to a direct action.

Under the charge of simulation, such creditor cannot be permitted to show that the transaction ought to be avoided on other grounds.

Evidence adduced and received only as going to the effect must be restricted to the issue of simulation.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

J. O. Nizon, Jr., for Plaintiff and Appellee.

P. E. Théard & Sons for Third Opponent and Appellant :

1. A sale with the right of redemption is a sale with a resolutory condition, and not a contract of hypothecary or pignorative security. Duranton, Cours de droit. Vol. 16, Secs. 388, 389, 390; Lahaye's notes to Napoleon Code. Art. 1659; Dalloz on Sale. No. 825; 23 Ann. 661.
2. Such a sale does not merely serve to secure the purchaser to the extent of any just claim he may have against his vendor; but vests in him an immediate ownership, which is defeasible only by the happening of the condition, or, in other words, by the exercise of the faculty to redeem. 23 Ann. 661; 32 Ann. 784; 35 Ann. 856.
3. An act of sale, ostensibly valid, in due form of law, passed at a time not suspicious, for a valuable consideration, and accompanied by possession as owner, cannot be attacked collaterally, and property conveyed by it cannot be seized by a creditor of the vendor, without resort to a direct action *en déclaration de simulation*. 33 Ann. 1096.
4. It is only in cases of pure simulation that a direct seizure is permitted.
5. By a simulated act is meant one that has no consideration, no existence, no reality, a sham, a myth, without soul or substance. Hence, an act that has a consideration, however inadequate, or even different from that which is expressed in it, is not a simulation. 30 Ann. 966; Renshaw vs. Dowty, not yet reported.
6. An act of sale, with the right of redemption, even although the consideration be money loaned by the vendee, cannot be treated as a simulation by a creditor of the vendor and attacked collaterally. 1 Ann. 432; 28 Ann. 29; 30 Ann. 186; 38 Ann. 483.
7. Plaintiffs, after averring simply that a certain act of sale is a simulation, cannot contend that the same act is in reality a contract of hypothecary or pignorative security, and that property, apparently conveyed by it, may be seized by a creditor of the vendor and sold subject to the hypothecary rights of the ostensible vendee. An averment that an act is simulated is equivalent to saying that there is no contract at all.
8. If not inconsistent with an averment of simulation, the allegation should at least be specially made that an act, under which title is claimed, is a contract other than what it seems to be.
9. The true intentions of parties to a written act can be made to appear only by the stipulations of the act itself, by counter-letters or by other written evidence. 32 Ann. 784; 36 Ann. 100; 38 Ann. 154, 271; 23 Ann. 661. Therefore, parol evidence, which has been admitted under an issue of simulation, should not be considered in ascertaining whether the parties to an act meant to enter into a contract other than the one apparently entered into, unless, perchance, the said evidence has been admitted in a case

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where the party claiming the benefit of the said act had been put on his guard, by special averment, that the said act was not what it purported to be, but was another contract in disguise.

10. The evidence, both oral and written, establishes that the act under which Camors claims title is a sale with the right of redemption, and not a contract of pignorative or hypothecary security.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The third opponent claims the ownership of the real estate attached, for having acquired it *bona fide* and for a valuable consideration from defendant.

The defense is that the title set up is a *simulation*, no consideration having passed.

On that issue, the parties went to trial.

The lower court allowed evidence to show the nature of the transaction and considered it as a contract of suretyship, directing payment of opponent's claim out of the proceeds of sale in preference to all others.

From the judgment thus rendered the opponent appeals.

The opponent introduced in evidence an act purporting to be a sale by defendant to him of the property in question for \$2000, in settlement of which he appears to have paid cash \$800 and to have assumed payment of a note of \$1200 secured on the property.

The act contains a clause or pact reserving to the vendor the privilege of redemption on payment of \$2000, to be exercised within two years after the date of the act, (21st November, 1884). It is shown to have been registered in the conveyance office on the following day.

The evidence shows that the \$800 said to have been paid cash, were settled for in flour, delivered on the day of sale and that the assumed note was taken up at maturity.

Possession followed the sale; but, by contract, the purchaser leased the premises to the vendor for two years, at \$20 per month, which were paid.

The property is shown to be worth more than \$2000—so much so, that it would seem that there was some understanding between the parties as to a division or attribution of the surplus, in case of a sale of the property by the third opponent, within the delay allowed for redemption, to anyone whom the original owner would designate.

When the attaching creditors offered to prove the real nature of the transaction, the third opponent excepted on the ground that the contract being ostensibly valid and the act evidencing it having been duly and seasonably recorded and the plaintiffs having pleaded simulation

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only against it, they cannot attack it collaterally on any other ground and must be relegated to a *direct* action.

The objection was considered as going to the *effect* and was overruled. A bill was reserved which is insisted upon here.

The evidence was inadmissible for the purpose in view; but it could be received, to be restricted, however, under the pleadings.

The conclusions of the district judge, nevertheless, show that he gave it more *effect* than it was entitled to, as he does not recognize the third opponent as owner, but merely as a creditor having a claim for which the real estate stands as security and which is to be paid by preference out of the proceeds of sale over all other claims.

In other words, he ignores the transaction as a sale and treats it as one designed to secure a debt due the apparent purchaser.

It is settled, beyond the possibility of a doubt, that a *bona fide* sale of property for valuable consideration, coupled with the pact of redemption, transfers the ownership to the purchaser, under a condition suspensive as to the vendor, resolutory as to the vendee, and that the creditors of the former cannot, where the sale is duly recorded, treat the transaction as of a different nature, so as to subject the property to their claim without first attacking the sale *directly* and having it judicially annulled, or modified according to the true intent of the parties. Laurent, vol. 24, No. 388; Baudry Lacantinerie, vol. 2, Nos. 941, 942; vol. 3, Nos. 584, 1045; Duranton, vol. 16, § 388 *et seq.*; Moulon, vol. 3, No. 630, p. 255; Marcadé, vol. 6, p. 301; Calderwood, 23 Ann. 661; Guidry, 29 Ann. 4; Theurer, 28 Ann. 29; Bevers, 30 Ann. 186; Brown, Ib. 966; Levy, 32 Ann. 784; Willis, 33 Ann. 1026; Jackson, 35 Ann. 856; McCan, 38 Ann. 483; Ford vs. Douglass, 5 How. 143. Whatever may have been said in Palmer vs. Mangham, 31 Ann. 356, to the contrary must be deemed as overruled.

The evidence introduced by plaintiffs, as far as it may tend to show anything beyond *simulation*, ought not to have been considered; but, as it shows that a consideration passed and confirms the pretensions of the third opponent to the ownership of the property subject to the pact à *rémeré*, it ought to have been given *that effect*.

We are at a loss to conceive how the contract could be treated as one of suretyship in the absence of any evidence of any indebtedness of the vendors; nay, in the presence of proof, that the third opponent was *not at all a creditor*.

As it is possible that the privilege of redemption was exercised within the delay allowed, which expired on the 21st of November, 1886, since the case was decided below, (June) we cannot render a judgment

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recognizing the third opponent as absolute owner, for this would be doing perhaps a vain thing.

We will simply remand the case.

It is therefore ordered and decreed, that the judgment appealed from be reversed and that the case be remanded to the lower court for further proceedings according to law, and that plaintiffs pay costs of appeal, those of the lower court to abide the result of the suit.

No. 9807.

MRS. ELIZABETH MACK, WIFE, VS. ALEXANDER STUART HANDY,
HUSBAND.

A demand for divorce, on the charge of adultery, may be cumulated with a demand for a separation from bed and board.

The simple confession, by one of the spouses, of adultery, is, of itself, insufficient to authorize the dissolution of the marriage. Additional facts must be shown to justify the decree.

Possession by the accused party, of suspicious mixtures, which were taken by physicians and druggists to have been remedies for some venereal disease, is circumstantial evidence, that may be considered in connection with other facts that are proven in the case; but not sufficient to establish his guilt.

Proof of intemperance *since* the filing of the suit may be administered, not to prove a substantive cause, but to show a continuing habit.

Proof of gambling is admissible in support of the charges of squandering money and debauchery.

What are habitual intemperance and excesses which render it *insupportable* for a complaining wife to longer continue marital relations with her husband, is a question for the court, and *not* the party, to decide.

Habitual intemperance is the constant indulgence in such stimulants as wine, whisky, or brandy, whereby intoxication is produced.

It is not their ordinary *use* whereby drunkenness *may* be occasionally produced; but the *abuse* of them, so long continued that the habit becomes fixed and confirmed.

The evident object of the separation of husband and wife from bed and board was to afford the offending party ample time and opportunity for reformation; and to the party complaining, to understand the situation and determine the propriety of making a reconciliation.

The patience and forbearance of the wife during her long endurance of the cruel treatment of her husband, while entertaining hope of his reformation, should not be mistaken for condonation or reconciliation. It serves rather to strengthen than to weaken her cause of action.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Nicholls and Carroll for Plaintiff and Appellee.

1. Where a plaintiff, in a suit for divorce, declares upon a double set of allegations, the first of which sets, if proved, would entitle her to a divorce, and the other (without the

39	491
45	224
45	1366
39	491
49	244
39	491
110	426
39	491
117	730

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- first) would entitle her to a separation from bed and board, prays for an absolute divorce, "and for all such other and further relief and decrees in the premises as to law, justice, right and equity will comport, and the nature of the case and the evidence will authorize, and for general relief," the court can grant either an absolute divorce or a separation from bed and board, as the law and the evidence will justify. The less is included in the greater. 10 Ann. 664. *Ledoux vs. Boyd*.
2. Under an allegation by plaintiff, that the defendant was habitually intemperate, that his habits were fixed and continuing, plaintiff had the right to show the continuance of the habit beyond the date of filing the petition and up to the day of trial, the object being not to make use of the particular facts shown, as substantive acts for a cause of action, but in aid and corroboration of the allegation of the character of the habit.
 3. Where a plaintiff, in her allegations, declares that she is unwilling, on account of the indecency of certain facts, to specify them particularly in the petition, but offers to do so if required, and the defendant suffering a judgment by default to be taken, objects to evidence of particular facts on account of generality of averment, and it is shown by commissions taken out and proceedings had, that the defendant was fully advised of the particular facts which would be proved, and the court and the plaintiff's counsel offer to grant all time which might be asked, and the defendant asks for no time, and calls for no bill or specification of particulars, the testimony is properly allowed to be introduced. 6 M. 649; 4 N. S. 277; 7 N. S. 354; 17 L. 238; 5 Ann. 531, 673; 9 Ann. 119, 254; 10 Ann. 528; 12 Ann. 795; 37 Ann. 800.
 4. The admissions of a husband are not sufficient *per se* to authorize a divorce or separation, but they are admissible in evidence, and when they are free from suspicion of collusion and corroborated, they are evidence of the highest kind. *Matchin vs. Matchin*. 6 Barr. 332, 337; *Bishop on Marriage and Divorce*, Vol. 2, § 242, and note, § 313, *et seq.*: admissions do not require to be made under oath, nor must they, to be admissible, have been made prior to the filing of the suit.
 5. A defendant cannot introduce his own letters in evidence, particularly when it is shown that they were written with direct reference to being used in his own behalf in the suit.
 6. There is no necessity for direct evidence of adultery. It may be proved by circumstantial evidence, of the weight and force of which the court is to judge. There is no necessity for proving the particular time, or place, or person with whom committed; it is the fact of adultery, not the particulars thereof, which are important. *Bishop*, §§ 610 *et seq.*, §§ 614, 632, 633, 634.
 7. Special facts may be introduced to prove adultery, and also may be used to evidence in themselves acts properly characterized as outrages and cruel treatment.
 8. Where a defendant in a divorce suit sets up "condonation," he must prove it. Condonation is forgiveness under "a condition." Even if condonation were shown, the condonation would cease if the condition were shown to have been violated. The condition is future good conduct and future conjugal kindness. *Bishop*, Vol. 2, §§ 33, 34 and 53 *et seq.*
 9. Acts which, in a husband, might be held as a condonation, are not so held in a wife. *Bishop*, Vol. 2, §§ 44, 49, 51, 52 and notes.
 10. Submission must not be confounded with condonation—"the forbearance of a wife and her patience in bearing with the cruel treatment of her husband, in the fond hope of his reform, and of his being restored to her as a kind husband, and to her children as an affectionate father, until at last she sees that all hope is lost, must not be confounded with, or construed as, condonation, or reconciliation, as contemplated in our laws and expounded in our jurisprudence." 34 Ann. 306, 614; 23 Ann. 422; 36 Ann. 679; *Bishop*, Vol. 2, §§ 51 and 52 and notes.
 11. There is no condonation where the wife has been kept from acting by threats of taking away her children to another State, and from repugnance to the exposure of family matters and the scandal of a divorce suit.

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12. There is no necessity that the acts violative of the condition of a condonation should be *ejusdem generis* of the act condoned; the violation of the condition *sets the whole matter at large*. If the act alleged to have been condoned was a good cause for a divorce, it can be used again as a cause of action for a divorce, although the subsequent acts violative of the condition would, in themselves and by themselves, have been only cause for separation from bed and board. Dalloz and Verge, under Art. 273, C. N., Nos. 10 and 11. Reg. 6, Juin, 1853, D. P. 53, 1. 244; Bishop, §§ 53, 54, 35, 56, 57, 58, 59, 60, *et seq.*
13. The law, in making "habitual" intemperance a cause for separation, necessarily presupposes the continuance of marital relations for an undefined period. The precise time when these habits become of such a character as to be insupportable must, of course, rest with the powers of endurance of the wife and the facts of the case. She has to determine when she can no longer stand the situation. Bishop, §§ 51, 52.
14. The evidence in this shows not only habitual intemperance on the part of the defendant for years back, but an almost constant intoxication during the whole of his last stay in New Orleans, and shows that he left home on that last day (since which time the parties have not met) in a beastly state of intoxication.
15. Negative testimony amounts to nothing as against positive, overwhelming affirmative, testimony of intemperate habits; partial "rests" to recover from attacks of sickness resulting from drink, or even partial rests without sickness, amount to nothing. A man whose business causes him to be absent from his wife for several months, and who might conduct himself properly when absent from her, but who should select as the precise periods for continued intemperance the only times when himself and his wife are thrown together, could scarcely point to his conduct when away from her as an offset to his bad conduct when with her. So far as husband and wife are concerned, the periods of their being together would be the determining periods for his good or bad conduct. It is submitted that the evidence in this case establishes affirmatively, however, continued habits of intemperance long before, up to and down to, the very trial of this case, of character such as to justify the prayer of plaintiff's petition.

C. McRae Selph for Defendant and Appellant:

The prayer of the petition determines the cause of action, and where it is for a divorce from the bonds of matrimony, the allegations of the petition must be of a legal character to support that prayer, and such as to authorize the introduction of proof to support the allegations.

The charges (allegations) to support the two classes of divorce, viz: from bed and board, and from bonds of matrimony, are not only distinct and unconnected charges, but lead to distinct issues and decrees, and it is not proper to join both proceedings in one action. Bishop, vol. 2, §§ 327, 329.

If the prayer is for an absolute divorce, the further prayer, "for all such other and further relief and decrees in the premises as to law, justice, right and equity will comport, and the nature of the case and the evidence will authorize, and for general relief," is not such a prayer as will authorize the court to decree a separation from bed and board when the special relief prayed for is for a divorce from the bonds of matrimony.

Evidence which would support an action for "separation from bed and board," is improperly admitted in an action for a divorce from the bonds of matrimony.

Evidence of actions and conduct of the husband after the filing of a petition for a divorce, is inadmissible.

Allegations of adultery must be in direct terms. Their forms must, to be adequate, be accompanied by such further description of time, place and circumstances, and the like, as shall apprise the defendant of the particular transaction to which he is to respond. Bishop, vol. 2, §§ 329, 604.

If defendant answers, without excepting to the vagueness of the allegations, it is no waiver

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of his right to object to the evidence. The failure to ask for a bill of particulars of the adultery will not supply the defect of a mere general allegation. Bishop. vol. 2, §§ 606, 607.

Reconciliation extinguishes the cause of action. But if a subsequent cause arises, the party can make use of the first in corroboration only. Civil Code, 152, 153. And reconciliation is presumed when husband and wife live and cohabit together.

The subsequent causes must be of the same nature as the first, to enable the plaintiff to make use of the first.

"The mere acknowledgement of the truth of the facts alleged, made by either party, even in an authentic act, can never be deemed sufficient foundation for a decree of separation from bed and board, *a fortiori*, of a divorce." 16 L. 26.

The proof of "habitual intemperance" must be sufficient to warrant the court, not the plaintiff, in concluding that the "nature" of the "habitual intemperance is such as to render their living together insupportable."

The opinion of the Court was delivered by

WATKINS, J. Plaintiff sues her husband to obtain against him judgment of divorce, and in the alternative a separation from bed and board.

Her petition is elaborate, and the charges and specifications are quite numerous.

They are to the effect that for several years past defendant has been guilty of "habitual intemperance" and "excesses, cruel treatment and outrages towards her; that he has cursed, abused and insulted her without cause, in public and private; and that such habitual intemperance, ill-treatment and excesses are of such a nature as to render their living together insupportable."

It also charges that defendant has not supported her and her children properly and decently; but that he has spent his means in riotous living, dissipation and debauchery in the company of disreputable associates and lewd and abandoned women.

That his general conduct, habits and manners are of such character that she is, and has been, in constant fear of herself and little children sustaining great bodily harm at his hands.

She specially charges that he has been guilty of repeated adulteries.

The defendant pleads the general issue; no cause of action,—because petition shows that whatever causes she may have had have been condoned and extinguished by *reconciliation*; and finally that plaintiff has been improperly influenced to institute this suit, because he desired to remove to Canton, Miss., where he could better support and take care of them.

I.

In the lower court plaintiff's demand for a divorce was rejected, but the demand for separation from bed and board was sustained; and the

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defendant alone appeals. But, in this Court, the plaintiff has answered the appeal and prayed for an amendment of that decree, to the end that she have judgment of divorce. In this manner all the issues raised in the lower court are presented here for decision.

On the trial defendant excepted to the ruling of the judge *a quo* permitting the introduction of evidence in support of the charge of adultery, on the ground that the allegations of plaintiff's petition were too vague and indefinite to admit of proof under them.

An examination of the petition will show that this vagueness and generality of averments, in respect to this charge, was intentional and was actuated by a pure and proper motive, to avoid the recital of *painful and disgusting details*.

The petition clearly intimates to the defendant and the court, her entire willingness to spread them upon the record, if deemed necessary or desirable.

Before the case came on for trial, and prior to issue being joined, the plaintiff propounded interrogatories to Dr. Priestly, of Canton, Miss., and a well known druggist of this city, in which the character of the evidence she would rely upon, was clearly indicated; and, contradictorily with him, obtained a commission to obtain their answers. In addition, the judge *a quo* in passing upon his objections to the evidence, stated that if he was taken by surprise, he would allow him ample time to procure evidence in rebuttal; but defendant failed to avail himself of the privilege.

We fail to see in what respect the defendant has had injustice done him.

II.

Defendant further objects to any evidence being introduced for the purpose of establishing cruel treatment, habitual intemperance and other charges in support of a decree of separation from bed and board.

1st. Because it is not specifically claimed in the prayer of the petition.

2d. For the reason that a divorce and separation from bed and board cannot be demanded on one and the same suit.

Our predecessors decided both objections in the negative. 10 Ann. 663, Ledoux vs. Her Husband.

In 7 La. 282, Soovi vs. Ignogoso, the Court held that "a suit for a separation from bed and board, within the terms and meaning of the law, is an action of divorce. * * *

"The action of separation from bed and board, in all cases, leads to a divorce *a vinculo matrimonii*."

The Code expressly provides that "in the cases excepted above, a

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judgment of divorce may be granted in *same* decree, which pronounces the separation from bed and board." R. C. C. 139.

One of the exceptions referred to is adultery.

The objections were properly overruled.

III.

The defendant further excepted to the introduction in evidence of certain admissions of his as proof of adultery.

It has been held that in such suit as this "the law requires more than a *simple confession* of one of the parties to dissolve the bonds of matrimony between them; *facts* must be shown, and *such* facts as will authorize a court of justice to declare that the interference of the law is absolutely necessary." 16 La. 27, Harmon vs. McLeland.

Courts may, without impropriety, entertain such proof, in corroboration of other proven facts, from which adultery may be inferred, but not as substantive evidence.

Such proof is insufficient of itself to convict the defendant.

IV.

Possession by the defendant of suspicious mixtures, which were taken, by druggists and physicians, to have been a remedy in use for some venereal disease, is circumstantial proof insufficient to make out a case against him. There is a possibility that it may have been prepared and in use for a different purpose or disease. It is not certain that it was his, or in use at any time by him, though the indications point that way. But these are circumstances that are to be and have been considered, in connection with others, in deciding the points.

The soiled linen may be referred to some other cause or trouble, such as piles, tumors, boils, etc. True it is, that no specific act or fact has been proven with that degree of certainty that the law requires. And there is in the evidence nothing in time, place or circumstance to connect those suspicious indications with the defendant's confessions. In fact, his statement, taken as a whole, does not admit *criminal conversation* with any one.

From the evidence it appears that the suspicious indications appeared in 1877 and 1878, and were continued in 1879 and 1880, and again in 1882, from time to time during those several years. But during all these years the plaintiff and defendant resided together and lived as man and wife. In November, 1879, a son was born of their marriage, and in August, 1881, a daughter. They are shown to be perfectly healthy, bright and intelligent children.

It seems quite impossible that defendant could have led the dissolute life attributed to him during these years, and that he should have

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been so frequently under treatment for venereal ailments, without contributing it to mother or children.

In this particular the judgment rejecting plaintiff's demand was correct.

V.

Objection was urged by defendant to the introduction of proof of intemperance *since* the filing of the suit. The judge *a quo* permitted it; not to show a *substantive cause*, but a "*continuing habit*." That was correct.

He urged further objection to proof of his gambling, on the ground that there was no allegation justifying it; but the court below permitted it to be introduced in support of the charges of "squandering money and debauchery." In this, his ruling was correct also.

A careful reading of the evidence in this large transcript, satisfies us that the defendant has been addicted to dissipation and drunkenness during a series of eight or ten years.

The proof shows that he was a traveling salesman, professionally, and that the theatre for his operations was the State of Mississippi. His parents resided at Canton, Miss., and died there. He has brothers who still reside and are engaged in business in that town.

He married the plaintiff in this city in 1874, and for several years thereafter he represented as drummer several responsible houses. His business qualifications appear to be fair, and of such a character as to have enabled him, with prudence and economy, to have supported and maintained his wife comfortably; but from the evidence it may be fairly assumed that he spent the most of his means in gambling, dissipation and riotous living.

One of his brothers states that he was known to have been a "drinking man" before his marriage. A sister testifies to his being frequently drunk since his marriage, and that, at such times, he would abuse and mistreat the plaintiff.

Other witnesses who, from the close and intimate relations they held with his family, must have been very intimately acquainted with his habits, state that defendant very frequently came home late at night and very drunk, and on such occasions was boisterous, abusive and often obscene in the presence of his wife and family.

Two witnesses detail numerous acts of defendant's cruelty and unkindness to the plaintiff; and on some occasions when she was sick, and on one or two occasions soon after her confinement.

The phrase "habitual intemperance" scarcely requires an interpretation; it is easily understood. It means the custom or habit of getting

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drunk. The *constant* indulgence in such stimulants as wine, brandy and whisky, whereby intoxication is produced. Not the *ordinary use*, but the *habitual abuse* of them.

The *habit* should be *actual* and *confirmed*. It may be intermittent. It need not be continuous, or even of daily occurrence.

Defendant has been habitually intemperate for a great many years.

It seems to have been his habit, on all occasions whilst in this city, and at his home, and with his family. On one occasion he had an attack of *delirium tremens*. He frequently staid out all night, without advising his family of his whereabouts; but when he did return, he gave undoubted evidences of drunkenness and debauchery.

It is quite impossible to give, in detail, even the salient facts adduced on the trial in the court below, in support of the grave and serious charges against defendant. Suffice it to say that, to our minds, they are clear, cogent and conclusive. They were to the judge *a quo*, and we concur in his conclusions.

The plaintiff is a lady of taste, refinement and culture, and accustomed to the amenities of good society.

The very idea of coercing her to continue her *marital* relations with the defendant, under the circumstances detailed, is shocking to our sense of justice and morality. We feel no hesitancy in deciding that the habitual intemperance and excesses of defendant, and his ill-treatment of the plaintiff, were such as to render their longer living together as man and wife insupportable to her.

And this is said with due regard for the time-honored rule that courts should not lend their aid to effect the separation of spouses, especially when there is issue of their marriage, except in *extreme* cases. But in a case like this the dictates of good morals, good breeding and Christian charity require that the tie that binds should be severed. The separation will not be necessarily irrevocable. When a year shall have elapsed, and the plaintiff and defendant have had time and opportunity for reflection, he may have changed his career and become a sober and orderly citizen, and she may feel willing to resume marital relations with the father of her children, condone all past offenses, and unite her efforts with his renewed exertions to achieve the happiness both had so nearly lost.

VI.

The evidence does not establish such *reconciliation* as the Code contemplates, as extinguishing the cause of action.

The plaintiff was possessed of no means or home of her own.
Her mother had none.

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The defendant relied solely upon his own exertions to earn a livelihood for himself and family.

She had no alternative but to remain in *his* home and *endure*, as best she could, through all those years, his habitual intemperance and excesses, for the sake of their little children.

This heroic endeavor serves rather to *strengthen* than weaken her cause of action.

The language of this Court in *Terrell vs. Bowman*, 34 Ann. 306, is strictly applicable. "The forbearance of a wife and her patience in bearing with the cruel treatment of her husband in the fond hope of his reform and of his being restored to her as a kind husband, and to her children as an affectionate father, until at last she sees that all hope is lost, must not be confounded with or construed as condonation or reconciliation as contemplated in our laws and expounded in our jurisprudence."

Judgment affirmed.

No. 9956.

THE STATE EX REL. J. M. RAYMOND VS. A. VOORHIES, JUDGE OF
CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

A State court can entertain jurisdiction of a suit *in personam* against the master and owners of a vessel, coupled with a sequestration, to enforce a money claim secured by lien, by a State statute and not created by the maritime law.

There can be no more objection to the *mesne* process, the purpose of which is to secure the property to respond to the personal judgment, when rendered, than there can be to subject it to execution after judgment.

A decision holding that a proceeding is *in personam* against one who is the master of a vessel, does not determine that the suit has that character against the *owners*, where the owners are not before the court on an application for a prohibition.

A PPLICATION for Certiorari.

A. Bernau for the Relator.

S. S. Carlisle for the Respondent.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The relator charges that in a suit brought before the Civil District Court for the Parish of Orleans, under Section 2705 of the Revised Statutes, the district judge has exceeded the bounds of his jurisdiction, and that he should be prohibited from all cognizance of the cause, which is one of which a court of admiralty alone has jurisdiction.

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The district judge returns that his court has jurisdiction.

The section requires any vessel inward or outward bound, to or from the port of New Orleans, to employ as a pilot a duly licensed branch pilot, when such officer tenders his services.

It declares that such vessel, her *captain* and *owners*, in case of refusal, shall forfeit the sum of one hundred dollars, with privilege on said vessel, to be recovered before any court of competent jurisdiction, in the name of the Charity Hospital, for the benefit of that institution.

The suit was brought before the district court by the Charity Hospital, the beneficiary, against J. M. Raymond, *master* and *owners* of steamship Anglian, and the petition concludes with a prayer for a *personal* judgment and a sequestration of the vessel.

An exception filed to the jurisdiction of the district court having been overruled, the present proceeding was instituted to prevent that court from taking further cognizance of the suit.

The Constitution of the United States grants to Federal courts judicial powers in all cases of admiralty and maritime jurisdiction. Art. 3, sec. 2.

The judiciary act of September 24, 1789, vests in the District Courts of the United States jurisdiction in all such cases, exclusive of State courts, "saving to suitors, in all cases, the right to a common law remedy where the common law is competent to give it."

That act is held to confer an exclusive jurisdiction by proceedings *in rem*, as well in cases where a right to that process is given either by the general maritime law or by State statutes; so that no State court can issue process in the nature of admiralty procedure to enforce a lien given by the statute of a State against a vessel in maritime subject. This exclusive jurisdiction is, however, confined to the enforcement of remedies in maritime causes by proceeding *in rem* against the vessel, or the thing itself.

Suitors, under the saving clause, may proceed, nevertheless, *in personam* in the State court and, in such proceedings, may *attach* the interest of the owners in the vessel as in other contracts or cases not maritime, for the reason that the vessel is dealt with as the property of the defendants and not as an actor, as in the case of a proceeding *in rem*, to enforce a maritime contract or lien.

The fact that the subject of a suit is one within the admiralty and maritime jurisdiction does not prevent a court of common law from entertaining jurisdiction, provided it be not attempted to be enforced by the admiralty proceeding *in rem*.

Process *in rem* is the method of enforcing a *jus in re*, or proprietary

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right in the thing itself, conferred by the maritime law or by statute in subjects of a maritime nature, so that a ship, without regard to the personal liability of the owner, may be condemned for a forfeiture incurred by the master. It is distinct from and cannot always be joined with powers to enforce a personal liability of the owner.

The proceedings *in personam*, though conclusive as between the parties so far as the property is concerned, are not *in rem* and do not bind third persons. They affect the title of the defendant only; while a proceeding *in rem* binds all parties.

In *personal* actions, jurisdiction can be, and is, exercised *concurrently* by courts of admiralty and State courts, when the latter are competent to afford the remedy, and the claim is not conferred by maritime law.

Applying those principles to the cases under consideration, it is manifest that the District Court was competent.

The proceeding is not one *in rem*, that is, one against the vessel by name, as an actor independent of the personal liability of the owners.

It is true that the vessel was seized by *mesne* process, but that seizure is not equivalent to a process *in rem*. It is only a subsidiary remedy to secure the property, for a debt said to be due personally by its captain and owners, and for which *they are* sued personally. The sequestration executed has the same effect as an attachment, in jurisdictions where a creditor is authorized to employ such process to create a lien upon the property of his debtor as a security to respond to his judgment.

In the next place, the proceeding is *in personam*, to enforce a claim secured by a lien, not created by the maritime law. The plaintiffs complain of John M. Raymond, *individually* and as master, as also of the *owners* of the vessel, all liable under the statute, and ask that they be cited to answer, and, after due proceedings, condemned *in solido* to pay the sum sued for, with lien and privilege on the vessel.

A cardinal principle in matters of this description, is that the presumption is that a cause is not within the jurisdiction of the United States, unless the contrary appears. This is so for the reason that process not delegated by the States to the Federal Government, are considered as retained by the States, to be exercised as attributes of their respective sovereignty. In support of the principles announced, and which are indisputable, we have not deemed it necessary to quote from each particular adjudication recognizing them. We think that reference to the main ones will suffice. See *Taylor vs. Carryl*, 20 How. 583; *The Belfast*, 7 Wall., 624; *Lion vs. Coleman*, 11 Wall., 185; *St. Bt. Co. vs. Chase*, 16 Wall., 522; *The Moses Taylor*, 4 Wall. 411;

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Warring vs. Clarke, 5 How. 441; People's Ferry, vs. Beers, 20 How. 393; The John Jay, 17 How. 399; The Emily Souder, 17 Wall. 666; Hine vs. Trevor, 4 Wall. 555; The Plymouth, 3 Wall. 20; Ex-parte Phoenix Ins. Co., 118 U. S. 610; Pennywit vs. Eaton, 15 Wall. 382; see, also, 6. R. 192; 7 L. 445; 19 Ann. 384; 23 Ann. 410; 26 Ann. 25; Kent, vol. 1, 419-421.

In the recent case of Johnson vs. Chicago and Pacific Elevator Co. 119 U. S. 388-401, which was action for tort, after a review of the authorities, the Court said:

"There being no lien on the tug by the maritime law, the State could create such a lien therefor, as it deemed expedient, and *could enact* reasonable rules for its enforcement, not amounting to a regulation of commerce. Liens under State statutes, enforceable by attachment in suits *in personam*, are of every day occurrence, and may even extend to liens on vessels, when the proceedings to enforce them do not amount to admiralty proceedings *in rem*, or otherwise conflict with the Constitution of the United States.

"There is no more valid objection to the attachment proceeding to enforce a lien, in a suit *in personam*, by holding the vessel by *mesne* process, to be subjected to execution, on the personal judgment, when recovered, than there is in subjecting her to seizure on execution. Both are incidents of a common law remedy, which a court of common law is competent to give."

We, therefore, conclude that, as the suit is *in personam*, and not *in rem*, to enforce a claim secured by a lien, not created by the maritime law, not exclusively cognizable by an admiralty court, and which a State court, having common law jurisdiction, is competent to give, the district judge is not amenable to the charge of transgression of the bounds of his jurisdiction.

Application refused.

ON APPLICATION FOR A REHEARING.

The opinion does not purport to say that the proceeding is *in personam* against the owners.

It simply holds that the proceeding is such against John M. Raymond, who is the *only* party before us complaining of it.

The Court could not decide any such thing as against the *owners*, for the reason that Raymond disclaims any power to represent them, below or here. He, therefore, champions none of their rights, and they do not appear to complain.

Rehearing refused.

Healey vs. Dillon.

No. 9809.

J. J. HEALEY VS. LUKE DILLON.

Plaintiff, as the alleged sexton of certain cemeteries, seeks to enjoin the defendant from claiming the same employment, on the ground of the illegality of the attempt to remove him under his alleged employment.

In the case entitled *Healey vs. Rev. P. F. Allen*, No. 9740 on the docket of this Court, it was held that they could not resist his removal by the writ of injunction: for the same reasons he cannot, by the same means, prevent the appointment of his successor.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

J. Timony and *A. J. Murphy* for Plaintiff and Appellant.

J. J. Finney, W. H. Rogers and *J. A. Gilmore* for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J, Plaintiff sets up a contract with Rev. P. F. Allen, pastor of St. Patrick's Church, in this city, appointing him sexton of three cemeteries for a term of twenty-five years to be computed from October, 1876, and he complains that, in violation of his said contract, the defendant, Dillon, pretends to have been appointed sexton of the same cemeteries.

Hence he brought this suit, in which he prays for an injunction to restrain the said defendant from disturbing him in his possession and control of the cemeteries aforesaid.

He prosecutes this appeal from a judgment confirming the appointment of Dillon as sexton, and rejecting his (plaintiff's) demand.

That judgment was rendered on May 21, 1886.

Now, it appears from the records of this Court that a judgment was rendered here on the 29th of November, 1886, in the suit entitled *J. J. Healey vs. Rev. P. F. Allen et al.*, No. 9740 (not yet reported) in which the issue involved the proper construction of the very contract which is the subject matter of the present controversy.

It was there held that Healey could not maintain an injunction to restrain Father Allen from discharging him as sexton; for the reason that the contract there sued on was one of employment for personal services, for the enforcement of which the employee could not in law resort to the remedy of injunction. The practical operation of that judgment was to leave the removal of Healey as sexton judicially undisturbed, and as a consequence thereof to continue in possession of the cemeteries the party who had been appointed as his successor.

Hall et al. vs. Curtis.

As it was there settled that Healey could not, by injunction, escape the legal effect of his discharge or removal by Father Allen, it follows that he stands on no better ground in his present attempt to disturb his successor in his possession of the cemeteries, under an appointment from competent authority, by the remedy of injunction.

Hence we conclude that plaintiff has been deprived of no legal rights by the judgment appealed from.

Judgment affirmed.

No. 9957.

ROBERT HALL ET AL. VS. MRS. H. M. CURTIS.

In an action to recover property real and personal with rents and revenues, and damages for injury and waste, the whole amounting to only \$1710, the addition of a roving claim for \$500 additional damages for illegal possession, without any specification of the nature thereof, will be treated as fictitious and not entitled to consideration as part of the amount in dispute giving this Court jurisdiction.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

J. S. & J. T. Whitaker for Plaintiffs and Appellants.

E. K. Skinner for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. A motion is made to dismiss this appeal for lack of jurisdiction thereof, because the amount in dispute does not exceed two thousand dollars.

We think the appeal has no place in our Court.

The action is to recover :

1st. Two lots of ground valued at.....	\$1,000
2d. Rents and revenues thereof, valued at	350
3d. Certain personal property or its value, valued at.....	300
4th. Injury and waste of improvements, valued at.....	150

the whole amounting to.....\$1,710

To this is added a roving allegation that " by said fraudulent and illegal possession of said property * * petitioners have been damaged in the full sum of five hundred dollars."

Inasmuch as this allegation is supported by no specification of the nature of the pretended damage, and as every reasonable cause of in-

State ex rel. Hug et al. vs. Recorder.

strongly suggests the serious difficulty in the way of executing Mackesy's judgment, on the ground that a writ of execution will not issue against a succession, and for the reason that Mackesy holds no moneyed judgment which he can execute against Anne Kraemer, so as to reach the property on which he has acquired legal rights.

But these are matters with which we have no concern in the proceeding, and under the restricted issue involving alone the question of the validity of the title tendered to McCloskey.

Under our system of laws there is no right without a remedy, and whenever Mackesy adopts the proper remedy, which does exist, he will find the courts ready to sustain him.

We therefore hold that the judgment which condemns the adjudicatee to accept a title which has no existence in law or in fact is erroneous.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that the rule taken against George McCloskey to compel him to accept title to the property described in said rule be discharged and dismissed at appellee's costs in both courts.

No. 9958.

THE STATE EX REL. J. HUG ET AL. VS. R. C. DAVEY, RECORDER.

A suspensive appeal suspends the execution of the judgment complained of, but does not divest the court of jurisdiction over a controversy involving, not the identical, but a similar matter.

In such a case prohibition does not lie against the court.

APPPLICATION for Prohibition.

Belden & Armbruster for the Relator.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a prohibition. The relators aver that they were prosecuted before the defendant on the 30th of March, 1887, for violation of ordinance 4798, A. S., prohibiting private markets within six squares of a public market, and that the recorder has no jurisdiction over the prosecutions, for the reason that they have taken suspensive appeals from judgments in similar prosecutions, which are pending before this Court under No. 9935 of its docket.

39	507
104	4

State ex rel. MacKenzie.

The statement of the ground of complaint carries its refutation.

The appeals have suspended the execution of the judgments and cannot divest the recorder of jurisdiction over subsequent similar prosecutions.

Furthermore, the appeals to which reference is made have been decided, the judgments affirmed, and the rehearing asked refused.

Application refused.

No. 9959.

THE STATE EX REL. M. M. S. MACKENZIE.

In a proceeding involving a question of jurisdiction *ratione materiae*, a party will not be allowed to cumulate several judgments so as to create an appealable amount, which is not disclosed by any one of the judgments in question.

In a contest between two parties for priority of execution on the same property, against the same defendant, the value of the property seized is not the test of jurisdiction, if neither party claims any privilege thereon.

APPPLICATION for Certiorari and Mandamus.

Taylor & Stewart, for the Relator.

The opinion of the Court was delivered by

POCHÉ, J. Relator complains of the refusal of the respondent judges to entertain an appeal, which he brought before them from the District Court, and which they dismissed for want of jurisdiction *ratione materiae*.

The facts are that relator, as plaintiff in eight judgments, rendered in his favor against the same defendant, in a justice of the peace court, and each, therefore, in a sum less than one hundred dollars, caused execution to issue in each and all of his judgments against the same defendant, under which the constable seized certain property of the defendant of the value of several hundred dollars.

Subsequently, in execution of a judgment rendered by the same justice of the peace court, in favor of another party, against the same defendant, and also in a sum less than one hundred dollars, the same constable levied on the same property, which he had already seized under Relator's execution, and was proceeding to advertise and to make a sale, under the latter, in advance of the previous seizure. Whereupon Relator sued out an injunction from the District Court, to restrain the constable from proceeding, as he proposed, to execute the

State ex rel. MacKenzie.

writ last issued against the common defendant and debtor, on the ground that his intended course was illegal, and was a result of a scheme to injure Relator and to destroy his rights in the premises. On an exception, among others, that the District Court had no jurisdiction, his injunction proceeding was dismissed, and his appeal to the Circuit Court of Appeals was from that judgment. As the lower limit of the jurisdiction of that court is one hundred dollars, the question involved is whether it had jurisdiction over the controversy. Assimilating his proceeding to the revocatory action, relator first contends that the matter in dispute exceeds one hundred dollars, because the sum total of his eight judgments, added together, exceeded four hundred dollars, exclusive of interests and costs. But he cannot thus cumulate the different amounts of distinct and separate judgments so as to create an appealable interest not disclosed in any one of the judgments in question. This principle was quite recently reaffirmed by this Court in the case of *Marshall vs. Holmes*, decided on the 7th of March last past, and not yet reported.

But relator also contends that the test of jurisdiction is in the value of the property seized, which is shown to exceed the sum of five hundred dollars. That argument is also erroneous.

The real matter in dispute is the alleged misconduct of the constable, whose course threatens relator with a loss equal to the amount of the last judgment rendered against the common debtor.

The crucial question involved in the controversy hinges upon the right of the plaintiff in that case to execute a judgment in a sum less than one hundred dollars on property which had already been seized at the instance of this relator. Neither party claims any privilege on the property of their common debtor in the hands of the constable; and the contest is reduced to a simple struggle for the first proceeds realized from the sale of the property.

In their brief, relator's counsel say: "We do not claim a privilege—that is, a right to be paid by preference out of the proceeds of the sale of the property because we enjoin its sale." That feature of their case removes it beyond the domain of the two decisions on which they rest this ground of their contention. *Wood et al. vs. Rocchi*, 32 Ann. 1120; *Meyer, Weiss & Co. vs. Logan*, 33 Ann. 1055.

The true test of jurisdiction in the premises is the amount of the judgment, the execution of which is enjoined—and that is admitted by relator himself to be less than one hundred dollars. *Loeb vs. Arent*, 33 Ann. 1085; *Endom vs. Ludeling*, 34 Ann. 1024.

 Seixas, syndic, vs. King.

Hence, we conclude that the respondent judges correctly held that the case was not within the jurisdiction of their court.

It is therefore ordered that the writs herein applied for be denied, at relator's costs.

No. 9851.

J. M. SEIXAS, SYNDIC, vs. PATRICK KING, JR.

39 510
50 1288

A court of this State vested with general equity powers, having jurisdiction of the person of a defendant, is competent to decree a conveyance by him of land in another State and to enforce the decree by process against him.

In an action by a syndic, based on charges of simulation and fraud, to annul transactions made by the insolvent, anterior and posterior to the *cessio bonorum*, the transferee (though the latter's wife) has an interest at stake and is a necessary party.

In the absence of such party, an exception of no cause of action filed, the defendant brought into court will not be considered.

A suit will not be dismissed for want of a necessary party, when it would serve no useful purpose to do so. The Court will remand.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Bayne & Denègre for Plaintiff and Appellant:

An insolvent, being about to make a surrender to his creditors, cannot make a transfer of property to his wife without consideration. Such transfer is absolutely null and void, both from the incapacity of the parties and because it is a mere simulation. C. C. 1784; 1 Ann. 301; 2 Ann. 484; 15 Ann. 491; 23 Ann. 442; 30 Ann. 225; 3 Martin, 695, 708; 38 Ann. 385.

If such a transfer could be operative, the property would still be community property and would be subject to debts due by the community under a surrender made by the husband to its creditors would pass to them. C. C. 2402, sec. 1791, Revised Statutes; 2 La. 360; 33 Ann. 478; 34 Ann. 1029; 18 Howard, 159; 117 W. S. 208.

Property surrendered by an insolvent and accepted by the court for the benefit of creditors, passes under the control and jurisdiction of the court, and no adverse rights can be acquired from the insolvent in or upon said property after said cession and acceptance. 20 Howard, 594; 24 Howard, 450; 36 Ann. 75; 105 U. S. 72; 2 La. 360.

This is true of all of the property of the insolvent, whether real or personal, and whether situated within the State of Louisiana or any other State. Cases cited.

The Civil District Court of the Parish of Orleans, the court which accepted the cession of property and the court which has jurisdiction of all the parties, who are citizens of New Orleans, has jurisdiction to set aside alleged transfers of property made while it was under administration, and which had passed by the cession to the creditors of the insolvent. 20 How. 549; 36 Ann. 75.

The court has jurisdiction; all of the parties reside in New Orleans; the transactions between the parties were made here; the property claimed by the syndic had passed to him as the representative of the creditors of Carrière, and was under administration in the Civil District Court when the alleged transfer was made to defendant. 3 Ann. 295; 8 Marten, 134; 7 Marten, N. S. 409; 33 Ann. 1161; 12 Rob. 80; 3 Marten, N. S. 652; 4 Allen Rep. 520; 7 Allen Rep. 57.

Seixas, syndic, vs. King.

The courts of Louisiana are courts of equity as well as law, and exercise the usual powers of courts of equity. C. C. 21; 1 Ann. 139; 2 Ann. 87.

Mrs. Carrière, the wife of Emile Carrière, who made surrender of all of his property and the property of the community, and which property is now under administration of this court, is not a necessary party. The husband represented the community, and the syndic now represents it and its property.

J. O. Nixon, Jr., for Defendant and Appellant:

1. A Louisiana State court has no jurisdiction to try and determine a cause where the question to be decided is as to the title to immovable property situated in another State. *Mussina vs. Alling*, 11 Ann. 568, particularly pp. 571, 572.
2. It has been held, where a money judgment can be rendered against a defendant, the court may inquire into the validity of the title to lands in other States, in order to know whether such judgment for money should be rendered or not. This is doubtfully and guardedly held in *McDowell vs. Read*, 3 Ann. 391. (See comments upon this case in *Mussina vs. Alling*, 11 Ann. 168, above cited.) But it has never been held that a Louisiana court can decide a cause where the sole issue is as to ownership of land in another State and where no money judgment is asked.
3. Where a suit is brought to annul title to immovable property as fraudulent or simulated, and there are intervening titles between that of the judgment debtor and that of the defendant, all of the intervening titles must be annulled before the plaintiff can recover; and all the holders of intervening titles must be made parties to a suit to annul.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The object of this suit is the annulment of apparent transfers of real estate situated in Mississippi, now in the possession of defendant who is domiciled in New Orleans.

The claim is based on charges of simulation and fraud.

It is claimed that Emile Carrière, a member of the firm of Carrière & Sons, did, on the 27th of June, 1884, transfer to his wife the property in question; that on the 18th of July following, he and his firm made a *cessio bonorum* and that subsequently, viz: on March 12, 1885, he and his wife transferred the real estate to the defendant King, by acts which are simulated, fraudulent and injurious.

Exceptions of *no cause of action*, *want of jurisdiction* and of *proper parties* having been sustained and the suit dismissed, plaintiff appealed.

I.

Of those exceptions, that to the jurisdiction, demands to be first considered, for it is only, on the assumption that the court is competent, that the other exceptions can be considered.

That defense rests on the fact that the property in question lies in the State of Mississippi. It is pressed that, as the court has no *extra territorial* jurisdiction, it is incompetent to pass upon the validity or invalidity of the title of defendant to the property.

It is an important feature of this case that the defendant is not a citizen of Mississippi, but of Louisiana, residing in New Orleans.

Seixas, syndic, vs. King.

Hence, we conclude that the respondent judges correctly held that the case was not within the jurisdiction of their court.

It is therefore ordered that the writs herein applied for be denied, at relator's costs.

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39 510
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Seixas, syndic. vs. King.

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Exceptions of *no cause of action*, *want of jurisdiction* and of *proper parties* having been sustained and the suit dismissed, plaintiff appealed.

I.

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That defense rests on the fact that the property in question lies in the State of Mississippi. It is pressed that, as the court has no *extra territorial* jurisdiction, it is incompetent to pass upon the validity or invalidity of the title of defendant to the property.

It is an important feature of this case that the defendant is not a citizen of Mississippi, but of Louisiana, residing in New Orleans.

Seixas, syndic, vs. King.

However true it may be that a State court cannot, in law or in equity, reach or control the title to lands or the possession of lands, situated within a different State, by any direct action or process against the land itself and cannot decree away the title thereto, or authorize a commissioner to convey the same; yet, it is settled that, if a court of general equity jurisdiction obtain jurisdiction of the *person* of the owner of such lands, in the course of an equity proceeding involving a proper case for coercion of the title by a direct action of the court, as in case of trust or fraud or even contract, if the lands were within its jurisdiction, then such court may compel a conveyance by order or decree acting directly on the person of such owner, and may enforce the same with all the powers incident to a court of chancery, in case of disobedience. Rorer on Inter-State Laws, p. 211, 2112; McElrath vs. P. & S. R. R. Co., 55 Penn. St., 189, and other authorities in note.

In the case of *Muller vs. Dows*, the U. S. Supreme Court, 94 U. S. 444 *et seq.*, has emphatically announced that it is undoubtedly a recognized doctrine that a court of equity, sitting in a State and having jurisdiction of the person, may decree a conveyance of land in another State and may enforce the decree by process against the defendant. True it cannot send its process into that other State, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of trustees, when they are the complainants.

The court referred approvingly to the ruling in the above mentioned case of *McElrath*, 55 Penn. St. 289.

The inconvenience which would result from the want of jurisdiction in such cases cannot be tolerated. *Lyman vs. Lyman*, 2 Paine C. C. 46; Wells on Jurisdiction, p. 112, No. 116.

When such a decree of a court of one State, compelling the conveyance of land situated in another State, comes in question in the courts of the State where the land is situated, it will be entitled to full faith and credit in these latter courts as to what be the real or true equities of the parties thereto, if jurisdiction was obtained of the defendant, by the court rendering the decree. *Burnby vs. Stevenson*, 24 Ohio St. 474; Rorer on Interstate Laws., 212-13.

The ruling in *Mussena vs. Alling*, 11 Ann. 368, is not in an analogous case, and has no bearing here.

II.

It is clear that this action has for its purpose to have this Court to declare that *Mrs. Carrière* has never acquired title to the real estate in

State vs. Labatut.

controversy, and that the transfer which she has ostensibly made of it to the defendant is a nullity; in other words, to strip her of all title to the property, and possibly to subject her thereby to some action by the defendant.

In suits to annul transfers of property, whether on account of simulation or fraud, or both, it is established that, as well the transferor as the transferee, are necessary parties.

Lawrence vs. Bowman, 6 R. 21. It is likewise settled that, to annul succession sales, all the vendees must be made parties. Hyde vs. Craddick, 10 R. 387.

Mrs. Carrière may have valid defenses to urge in order to be quieted in her title and protected against all actions of the defendant against her. She must therefore be made a party and be heard.

III.

In relation to the plea of no *cause of action*, we cannot now consider it in the absence of Mrs. Carrière.

Our abstention is based on the consideration that, if we were to give it attention and to overrule it, Mrs. Carrière would find herself in presence of a ruling not binding on her as an adjudication, and would have a right to set up the same defense, with possible success.

IV.

We therefore conclude that the exception to the jurisdiction is not well taken; that the exception to the want of proper parties is well founded, and that the exception of no cause of action is reserved for future consideration.

It would serve no useful purpose to dismiss the suit.

It is therefore ordered and decreed that the judgment appealed from be reversed; that the exception to the jurisdiction be overruled; that the exception for want of proper parties be sustained, so far only as to allow the plaintiff to amend and make Mrs. Carrière a party defendant; that the exception of no cause of action be reserved for future consideration; that this case be remanded to the lower court for further proceedings according to law, the costs of appeal to be paid by the defendant and appellee, those of the lower court to abide the final judgment in the case.

No. 9960.

THE STATE OF LOUISIANA VS. L. G. LABATUT.

A particular is not repealed by a general law, unless they are so repugnant that they can not stand together under any circumstances

39	513
45	31
45	794
39	518
47	628
39	513
48	1096
39	513
50	633
51	856

 State vs. Labatut.

A grant of power conferred by the Legislature in the charter of a municipal corporation to pass and enforce ordinances to suppress and punish the sale of adulterated drinks, is not recalled by a subsequent general statute providing for the prosecution of the same offense throughout the State. Hence, an ordinance of the city of New Orleans, adopted under a power to punish the sale of adulterated drinks, and which punishes the adulteration of milk for sale, is not abrogated by Act No. 82 of 1882, which defines and punishes the adulteration of drugs, food and drinks.

A PPEAL from the Second Recorder's Court of New Orleans.
Burthe, J.

M. J. Cunningham, Attorney General, and *F. C. Zacharie*, for the State, Appellee.

M. Voorhies, for Defendant, Appellant.

The opinion of the Court was delivered by

POCHE, J. Defendant appeals from the sentence of the Recorder's Court of the Second District of the city of New Orleans, condemning him to a fine of \$25 or, in default of payment, to imprisonment of thirty days, for the violation of a city ordinance against the selling of adulterated milk.

His ground of resistance is the alleged illegality and unconstitutionality of the ordinance, and it presents the point that the same offense is made a misdemeanor under a State law, namely, Act No. 82 of the Legislature of 1882, and that the effect of the statute and of the ordinance co-existing is violative of that provision of Article 5 of the State Constitution, which forbids that any person be twice put in jeopardy of life or liberty for the same offense.

As stated, this prosecution is exclusively for the violation of the city ordinance. It was adopted on the 24th of June, 1879, under the charter of the city of New Orleans of 1870, which contained ample delegation of power to make and enforce all regulations on the subject matter, and at a time when there was no statute of the State either defining or punishing the same offense.

It follows, therefore, that up to the passage of Act No. 82 of 1882, no possible doubt could have been entertained as to either the legality or constitutionality of the ordinance, which contained the only existing provision on the subject, in full accord with ample legislative authority in the premises.

Now, in the new charter of the city of New Orleans, which is Act No. 20 of 1882, approved on the 23d of June of that year, the previous grant of legislative authority to the municipal council to make definite regulations on this subject was not only confirmed, but it was

State vs. Labatut.

extended and more specially emphasized. Under that charter, the Council is vested with full power, and charged with "the duty to pass such ordinances and to see to their faithful execution, as may be necessary and proper, * * * to prevent the sale of adulterated or decayed food, and punish the same; to punish the sale of adulterated drinks." * * *

It is clear, therefore, that instead of being in the least impaired by the effect of the charter of 1882, the ordinance under discussion received additional force and vitality therefrom.

Now, it is true, that the same offense is provided for in act No. 82, approved on the 5th of July, 1882, which is entitled an act "to define and punish adulteration of drugs, food and drink," * * * and which proposes to punish all offenders by a fine of fifty dollars for the first offense, and of one hundred dollars for each subsequent offense.

The question presented by the case is, therefore, to consider the effect of Act 82, on the powers delegated to the city under Act No. 20 of 1882, and incidentally on the city ordinances of June 24, 1879.

It must be noted, in the first place, that Act 82 of 1882, contains no repealing clause; in the second place, that it is a general statute; and in the third place, that Act No. 20 of 1882, known as the charter of the city of New Orleans is a particular or special law. Under the jurisprudence firmly established in this State, a general law thus characterized does not repeal a particular law unless they be so repugnant that they cannot stand together under any circumstances. *De Armas'* case 10 M. 172; *State vs. Kitty*, 12 Ann. 805; *Bendonu vs. Barbin*, 13 Ann. 458; *St. Martin vs. New Orleans*, 14 Ann. 113; *State vs. Natal*, et. al., 39 Ann., not yet reported.

The legislative intent as gathered from the general tenor, the subject matter, and the mischief to be remedied by the two enactments respectively, is the safest test of the effect of the new, upon the old, law.

The leading object of the statute is to protect and promote public health throughout the State, and the manifest purpose of delegation of power in the charter of 1882, is to reach the same object in the city of New Orleans through the direct action of the Council.

It will be conceded without the necessity of an argument to support the proposition, that the sale of milk generally, in a large city is by far in excess than in any other locality of the State, and that, therefore, the probabilities of adulterating milk are proportionally greater there than in any other locality in the State; from which it follows that precautions against the evil must be more guarded and more closely exercised in a large city than in any other community.

State vs. Labatut.

These considerations were, beyond a doubt, the motives which prompted the Legislature to confer to the City Council the ample powers which are contained and detailed in section 7 of Act 20 of 1882, on the subject of adulterated food and drinks, and which so completely sanction and so absolutely legalize the provisions of the ordinance of June 24, 1879.

Having thus and so clearly and so wisely delegated to the municipal authorities of the city of New Orleans the express power to legislate upon a subject so peculiarly within the province of a municipal government, the law makers of Louisiana are surely not amenable to the violent presumption that, at the same session of the Legislature, nay one week later, they would deliberately destroy their labors in that direction by an enactment which recalls the recently delegated authority. We feel confident that they had no such intention, and hence we hold that the legal existence and the binding force of the ordinance of June 24, 1879, which was clearly authorized by the charter of 1870, under which it was adopted, and legally reinforced under the charter of 1882, has not been recalled, annulled, or in the least impaired by the passage of Act 82 of 1882, and that therefore the recorder's court is vested with power to enforce the same by fine or imprisonment. Under these views we are not called to further define the effect of the statute of 1882; or to decide whether it applies to the city of New Orleans. That question can properly come up only in a prosecution under that act.

That consideration is also an answer to defendant's argument that the co-existence of a statute of the State and of a city ordinance both defining and punishing the same offense exposes offenders to be twice put in jeopardy for the same offense.

Thus far he has been prosecuted but once, and solely for the violation of the city ordinance. If he should hereafter be prosecuted in the State court for violation of the statute, his plea of *autrefois convict*, coupled with the allegation of the illegality of the statute as applied within the limits of the city of New Orleans, will properly present the question which will then be decided.

His right to relief at our hands in the instant case turned upon the alleged nullity of the city ordinance, and our conclusion that the ordinance is yet in full force, is a complete disposition of the controversy as presented to us in its present shape.

The judgment appealed from is therefore affirmed with costs.

Gerrish vs. Pope.

No. 9849.

MRS. C. C. GERRISH VS. JOHN H. POPE.

In a proceeding by rule to enforce the provisions of a judgment rendered in a partition proceeding, and to compel the completion of an adjudication of property which entered into the partition proceeding and judgment, which judgment has become final, this judgment cannot be changed, altered or amended by the judgment on the rule. It constitutes *res adjudicata*.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

W. S. Benedict for Plaintiff and Appellee.

Chas. S. Rice for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. On the 3d of May, 1882, the plaintiff as the universal legatee of Mrs. Renette W. Pope, the deceased wife of John H. Pope, defendant, instituted an action of partition against the latter.

She alleged in substance that the defendant claimed certain rights in the real estate bequeathed to her by the will of the deceased. She prayed for a partition of the estate, and that the rights of all parties therein be fixed by the court and that the parties be referred to a notary to complete the partition.

About the same time the defendant Pope also filed a suit for a partition. He averred in substance that the deceased has bequeathed him her interest in a drug store, known as Pope's Drug Store, then in his possession on Magazine street in this city.

He further averred that there was a certain square of ground situated in Bloomingdale, Sixth District of New Orleans, designated as square 14, which had been bequeathed to the plaintiff, the title to which, though it stood in the name of his deceased wife, had been paid for by the community, to the amount of \$2500, and had been improved at the expense of the community to the extent of \$4250.

He further represented that there were community debts to the amount of about \$3000, among them one of \$2000, secured by a mortgage on the drug store.

He prayed to be recognized as a creditor of the community for \$4250 and for judgment against the plaintiff for one-half that sum, that the real estate be sold to pay said sum as well as all other debts of the community, and the surplus, if any, to be divided between himself and the plaintiff.

By agreement, these two partition suits were consolidated—the peti-

Gerrish vs. Pope.

tion in the suit brought by the defendant Pope to serve as the answer to the one instituted by the plaintiff.

After the pleadings were thus made up, the following agreement was entered into between the parties, to wit:

"It is agreed between the parties as follows: The defendant shall put back into the premises, in square bounded by Magazine, State, Webster and Laurel streets, the furniture removed by him therefrom (or account for such portion as cannot be returned.)

"The plaintiff and her husband shall have privilege of renting said premises and contents from the civil sheriff, at the rate of ten dollars per month, for the one undivided half interest thereof, pending claim of defendant for interest therein.

"The plaintiff and her husband do hereby relinquish any and all claim against the property known as the drug store, No. 708 Magazine street, between First and Second streets, known as Pope's Drug Store, and contents, including movables and immovables. All other questions in controversy left open."

There was a protracted contest, resulting in a judgment on the 16th of June, 1884.

This judgment reads as follows:

"For the reasons orally assigned, it is ordered, adjudged and decreed that there be judgment in favor of the plaintiff, Mrs. Caroline C. Gerrish, and against the defendant, John H. Pope, decreeing said plaintiff to be the true and lawful owner of the premises in Bloomingdale, described in the petition, subject to the rights against said property acquired and now held by the community of acquets and gains lately existing between the defendant, John H. Pope, and his deceased wife, Renette W. Pope, growing out of the improvements made by said community on said property.

"It is further ordered, adjudged and decreed that there be judgment in favor of the plaintiff, Mrs. Caroline C. Gerrish, and against defendant, John H. Pope, decreeing a partition of the succession of the late Renette W. Pope; that, in order to determine the rights of the late community of acquets and gains against the property described in the petition, it is ordered, adjudged and decreed that the said property be sold by the civil sheriff of the parish of Orleans, at public auction, after the usual delays and advertisements, for cash; that the said property be appraised, by V. I. Lambert and Chas. Parent, in block, including improvements—said appraisements to serve as the basis of the sale; that the said appraisers also appraise said property separate from the improvements, the last appraisement to serve as a basis for

Gerrish vs. Pope.

distribution; that the value of the improvements be recognized as belonging to the community of acquets and gains lately existing between John H. Pope and his deceased wife, Renette W. Pope, and the said community is declared to be a creditor of the said property described in the petition for the value of said improvements; that the said community is declared to be a creditor of the said property in the sum of (\$2250) two thousand two hundred and fifty dollars, money advanced for the purchase price.

"It is further ordered, adjudged and decreed that the plaintiff, Mrs. Caroline C. Gerrish, be recognized as the owner of one-half of the said community of acquets and gains, after the payment of all debts and liabilities.

"It is further ordered, adjudged and decreed that the defendant, John H. Pope, account to the community of acquets and gains for the value of the furniture and other effects described in Document X, p. 228, hitherto attached and made part hereof.

"It is further ordered, adjudged and decreed that out of the proceeds of the property described in the petition coming to the community of acquets and gains, the community debts to be paid, to wit:

"The sum of \$2000, with interest, now secured by a mortgage on the property known as Pope's drug store; the sum of \$86.50 to T. W. Bothick: \$32.68 to E. J. Hart & Co.; Dr. J. C. Bickham, \$88; I. L. Lyons & Co., \$96.68; R. Finlay & Co., \$148.19; De Lanzac & Cahn, \$194.83; Dr. John Carter, \$20; that the parties litigant be referred to W. J. Castell, Esq., notary public, to make a distribution of the partition sale, and that the costs be divided equally between the parties."

From this judgment neither party appealed, and the time for an appeal passed and the judgment became irrevocable.

An appraisalment was made in conformity to the judgment—that is, the land and the improvements thereon were separately appraised, each at \$4000, making a total of \$8000; and the property was adjudicated to the plaintiff for \$7500.

On the 4th of May, 1855, Pope took a rule on the plaintiff to show cause why she should not comply with the adjudication, and a judgment was rendered on the rule directing a notary named "to make a partition of the succession as directed by the judgment rendered."

On 18th of December following, the notary filed his report, showing that he had prepared an act or projet for the partition and distribution—that Pope had signed the same, but that Mrs. Gerrish had filed objections thereto, which he made a part of his report; which objections need not here be specifically set forth.

Gerrish vs. Pope.

On January, 1886, Pope took another rule on the plaintiff to show cause why she should not comply with the adjudication, and sign and execute the act of distribution prepared by the notary, and in default thereof why the property should not be sold *à la folle enchère*.

The plaintiff answered this rule by setting out at length the objections she had made to the act for partition and distribution prepared by the notary and which she had refused to sign.

During the progress of the trial the plaintiff, Mrs. Gerrish, defendant in the rule, offered evidence to support the averments of her answer, when she was met by the objection substantially, that the matters sought to be proved were all concluded by the judgment rendered in the partition suit in June, 1884, and that the judgment constituted *res adjudicata*. This objection was overruled and the evidence admitted and judgment on the rule rendered as follows:

“For the reasons dictated to the stenographer and now on file—

“It is ordered, adjudged and decreed that the exception of *res adjudicata*, filed by the defendant to the opposition of Mrs. C. C. Gerrish to the *proces verbal* of distribution filed by the notary, December 18, 1885, be overruled; and it is further ordered, adjudged and decreed that the opposition of Mrs. C. C. Gerrish to the *proces verbal* be maintained, and that the notary be directed to amend the *proces verbal* by charging the defendant, John H. Pope, with all debts due by the Pope drug store, at the decease of Renette W. Pope, that is to say, on the 2d of April, 1882, and particularly with the debt of \$2000, with interest, secured by mortgage on said property; the sum of \$32.68, due by the drug store to E. J. Hart & Co.; \$66.68 due by drug store to I. L. Lyons & Co.; \$148.19 to R. Finlay & Co.; the sum of \$194.83, due by the drug store to De Lanzac & Cahn.

“It is further ordered that the notary amend his *proces verbal* by charging to Mrs. C. C. Gerrish, plaintiff herein, any debts due by the separate estate of Renette W. Pope; and that the *proces verbal* herein be referred to Boussiere Rouen, Esq., notary public, in place of J. J. Woulfe, no longer a notary; and that said Boussiere Rouen, Esq., be commanded to complete the *proces verbal*, now before the court, in accordance with the amendments directed by this judgment.”

This is the judgment that is before us for review, and this long recital we have deemed essential to a clear understanding and determination of the issue raised by this plea of *res adjudicata*. This recital of itself plainly tends to the conclusion that the judge *a quo* in ruling on this point was in error.

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This appears more clearly when we compare the judgment rendered in the particular suit with that rendered on the rule referred to, together with the pleadings in the two proceedings.

The matters adjudicated upon in the first judgment of 16th of June, 1884, are substantially these :

1. Recognizing Mrs. Gerrish, plaintiff, the owner of Bloomingdale property known as square 14.

2. Decreeing that the value of the improvements thereon belonged to the community, and declaring the community creditor therefor, and also a creditor for \$2250, for money advanced by the community to pay the price of the property.

3. Ordering the sale of this Bloomingdale property after separate appraisements of the land and of the improvements.

4. Recognizing Mrs. Gerrish as the owner of one-half the community after payment of its debts.

5. Requiring Pope to account to the community for certain furniture he had disposed of.

6. That out of the proceeds of the community property described in the petition the community debts be paid. The debts being mentioned as the \$2000 mortgage on the drug store, and many others for smaller amounts.

7. Referring the parties to a notary who was directed to make a distribution of the proceeds of the partition sale.

The judgment rendered on the rule on the 26th of November, 1884.

This judgment decreed substantially :

1. That the plea of *res adjudicata* be overruled.

2. That the opposition of Mrs. Gerrish to the act of partition and distribution prepared by the notary (termed a *proces verbal* in the judgment) be maintained.

3. That Pope be charged with all the debts due by the Pope's Drug Store. (The debts being mentioned and being the same as were ordered in the piece judgment to be paid out of the proceeds of sale of the community property.)

4. That the *proces verbal* of the notary be amended by charging Mrs. Gerrish with the debts due by the separate estate of the testatrix, (Mrs. Pope.)

5. By naming a notary and requiring him to complete the *proces verbal* in accordance with this judgment.

It will plainly appear from this comparison of the two judgments that they differ in several essential particulars. In fact, it is obvious that the court *a qua* instead of dismissing the rule or rendering a judg-

Gerrish vs. Pope.

ment thereon to enforce the provisions of the judgment in the partition suit, for which purpose the rule was instituted, rendered an entirely new judgment of partition.

For instance, as shown, the debts due by the drug store, which were enumerated in both judgments, and in the first were required to be paid out of the community property, in the last judgment on the rule were charged to the defendant Pope, or to the drug store.

This judgment also maintained the opposition of the plaintiff to the process verbal or act of partition prepared by the notary, which opposition, it appears, is in striking conflict with the judgment of partition.

It would moreover appear from the reasons assigned for judgment which are in the record, that the judge regarded this proceeding by rule as an act of partition; in fact, he so terms, and in his entire opinion he makes no mention of any rule.

The judgment rendered in the original partition suit on the 11th of June, 1884, settled all matters of controversy between the parties relating to the partition and the settlement of the community, between Pope and the plaintiff, the legal representative of his deceased wife. It was *res adjudicata*, and this plea should have been maintained as to all matters pertaining to or embraced in said judgment or in the pleadings pertaining thereto.

It further appears that the plaintiff, Mrs. Gerrish, paid only \$500 of the \$7500, the price at which the property was adjudicated to her. She has shown no reason why the same should not be completed.

We have likewise examined critically the act of partition prepared by the notary to carry out the judgment of the 11th of June, 1884, and we discover no reason why she should not sign it, since it conforms to the terms of the judgment.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed, and the rule in the case be and the same is now made absolute, and that Mrs. C. C. Gerrish, plaintiff herein and defendant in the rule, be and she is hereby decreed to complete the adjudication of the property described in the pleadings as square 14, and designated as the Bloomingdale property, by paying the balance of the price bid for the same, and that she execute the provisions of the judgment rendered on the 11th of June, 1884, relative to the partition of the property and distribution of the funds, and sign the act of partition and distribution prepared under said judgment, reported and filed on the 18th of December, 1885, and that Mrs. Gerrish pay the costs of both courts.

Davis vs. Citizens' Bank et al.

No. 9925.

S. W. DAVIS VS. CITIZENS' BANK OF LOUISIANA AND SHERIFF.

S. W. DAVIS VS. ADAMS & COCKBURN AND SHERIFF.

CITIZENS' BANK OF LOUISIANA VS. THOMAS B. RHODES.—S. W. DAVIS,
THIRD OPPONENT.ADAMS & COCKBURN VS. RHODES, SWEET & CO.—S. W. DAVIS, THIRD
OPPONENT.

THOMAS B. RHODES VS. CHAS. E. BLACK, S. W. DAVIS ET AL.

(Five Consolidated Cases.)

If, prior to a judicial sale, in enforcement of a first mortgage and vendor's privilege ranking all others on the property, an agreement is made between the seizing creditor and debtor, that the former will bid off the property if not run up above the amount of his debt; and that, in such case, he will resell to the debtor, or any one named by him, at an agreed price, within a delay fixed, such an agreement is lawful and does not prevent the title under such sale from actually passing to the purchaser, subject to the right of redemption, and it extinguishes all mortgages on the property: and judicial mortgages will not reattach to the property unless it is returned to the ownership of the debtor.

When, in such case, the property is resold to a third person named by the debtor, for a price actually paid by such purchaser, the fact that, in a contemporaneous writing, it had been agreed between this purchaser and the original owner that the former would resell to the latter or any person designated by him, on terms and conditions therein stipulated, does not prevent the purchaser from becoming the real owner, subject only to the right of redemption on the terms agreed. Therefore, judicial mortgages against the original owner did not attach to the property in the ownership of such purchaser.

When, subsequently, the original owner ceded his right of redemption to another, and the purchaser, with the consent of such former owner, sells the property outright to the person so designated, for a price partly paid in cash and the balance in a note secured by mortgage, without reserve of any right of redemption expressed in the deed or in any writing whatever, neither the original owner nor his creditors can attack such title or mortgage except on grounds of fraud, which are not established in this case.

A PPEAL from the Eighth District Court for the Parish of East Carroll. *Delony, J.*

J. M. Kennedy and *W. G. Wyly* for S. W. Davis and C. E. Black.

Farrar & Kruttschnitt on the same side.

Henry C. Miller for the Citizens' Bank.

J. W. Montgomery for Adams & Cockburn.

The opinion of the Court was delivered by

FENNER, J. The Citizens' Bank and Adams & Cockburn, being judgment creditors of Thomas B. Rhodes, issued writs of *fi. fa.*, and seized thereunder the Airlie plantation with the movable effects thereon.

39	523
44	523
39	523
108	87
39	523
115	799

39	523
122	656

Davis vs. Citizens' Bank et al.

The first two suits above enumerated are injunction proceedings against said seizures of Airlie plantation by S. W. Davis, who claims to be the owner thereof.

The two following cases present issues raised on third oppositions, filed by S. W. Davis, who claims to be the lessor of Rhodes and, as such, to have a lien and preference on the movables seized, over the seizing creditors.

In the meantime, Charles E. Black, a mortgage creditor of S. W. Davis, had seized "Airlie" under executory process, and the last named case is an injunction proceeding against that seizure taken out by T. B. Rhodes, who denies Davis' ownership of the plantation and his right to mortgage, and claims that he, Rhodes, is and has always been the owner.

The leading question involved is the ownership of "Airlee," and that hinges on the construction and effect to be given to various contracts and agreements touching the title to said plantation.

T. B. Rhodes bought the "Airlee" plantation in 1869, on terms of part cash and balance in notes secured by mortgage and vendor's lien.

W. W. Carson, a non-resident of the State, became the owner of these notes.

In 1874, Carson obtained judgment by confession against Rhodes on one of these notes, with stay of execution until December 1st of that year. Carson wanted his money and did not want the plantation.

Rhodes wanted the plantation, but had no money. On the contrary, he was insolvent. He not only owed the large debt to Carson, but he also owed Adams & Cockburn \$3303, besides interest, on which judgment was recovered in 1875, and recorded as a judicial mortgage on Airlee; he owed the Citizens' Bank \$12,000, besides interest, on which judgment was afterwards recovered in 1877 and recorded; and he owed Graham, Black & Co. \$4894, with what other debts we know not.

Both parties were satisfied, and the result makes it certain that, if the plantation was sold under Carson's judgment, it would not bring the amount of his claim and that he could only save himself by buying in the property, which he was exceedingly averse to doing. Still he was unwilling to extend his debt without, at least, partial payment of which he was in need.

Rhodes, on the contrary, set great value on the plantation and believed that, if he could effect any arrangement by which he could retain the management of the plantation, he could make it yield a revenue sufficient to pay off, not only Carson's debt, but his other creditors.

Under these circumstances, it was agreed between the parties that

Davis vs. Citizens' Bank et al.

Carson should issue execution on his judgment; that if there were no other bidder at the cash offering he would not bid; and that, at the second offering on twelve months' credit, he would bid off the property, if it were not run up above his debt. He further agreed that he would sell the place back to Rhodes or to any person whom Rhodes might designate, at any time within thirty days after the sale, provided he, Carson, were paid \$3000 in cash, and the balance in annual installments of \$4000, properly secured, up to the amount of his entire debt.

Accordingly, execution was issued; the place was seized and Rhodes was appointed sheriff's keeper; the cash offering failed for want of bidders; there were no bidders at the credit offering; and the place was adjudicated to Carson at the price of one thousand dollars.

The thirty days allowed to Rhodes, within which he had the right to claim a resale under the terms of the agreement, expired without the exercise of this right; but some days later, viz: on June 24, 1876, Rhodes presented Charles E. Black as a purchaser, and Carson executed a conveyance of the property to Black for the price of \$16,867.87, of which \$3000 was paid in cash, and the balance on terms conforming to the agreement, secured by mortgage and vendor's lien. Rhodes intervened in the act and declared "that he does hereby assent to all the clauses of this deed, and hereby releases unto said Black all and any right he may have in and to said land."

Prior to the execution of this conveyance, a written agreement had been entered into between Black and Rhodes, too lengthy to be copied here, but the substance of which was that Black should buy from Carson, on the terms stipulated; that Rhodes should take charge of and manage the place, without salary, making all contracts, rent notes, etc., in favor of Black; that Black was to receive the whole of the revenues, which were guaranteed not to fall beneath a sum fixed, under penalty of termination of Rhodes' rights; and that "when the revenues realized by said Black from said plantation shall have equalled the aforesaid sum of \$16,687.67, with interest, together with the sum of \$4984 now due by said Rhodes to Graham, Black & Co., with interest, and any other amount that said Rhodes may become indebted to said Black or said Graham, Black & Co., then the said Black shall sell, transfer and convey unto said Rhodes or any one he may designate, all of said plantation, etc.; said Black to convey only such title as he shall acquire from said Carson"—and further binding himself not to sell, encumber or mortgage the property to the prejudice of this agreement. Under this contract Rhodes proceeded to operate the plantation.

On January 15, 1878, Rhodes, having become indebted to S. W. Davis,

Davis vs. Citizens' Bank et al.

executed a sale of all his rights under the contract with Black to Davis, authorizing him to pay and discharge the claim of Black and to demand the conveyance of the property, if he should desire so to do. A counter-letter was executed, however, explaining that the sale or act of subrogation just mentioned was intended as a security for a loan of \$2500, then made, and for a past due indebtedness of \$5600, owing by Rhodes to Davis. This counter-letter was not recorded and was not communicated to Black.

In February, 1880, Davis, armed with the transfer and subrogation from Rhodes, negotiated and obtained from Black a sale of the plantation at a price fixed at \$28,812, which represented the entire amount expended by Black, of which sum it was stated that \$10,445 had been repaid to him out of the revenues of the plantation; the further sum of \$13,281 was paid in cash by Davis, and, for the balance of \$5086 Davis gave his note secured by mortgage and vendor's lien on the property.

Rhodes intervened in the act to take cognizance of it, and to declare that Black had fully acquitted all his obligations under his contract with Rhodes.

There is no counter-letter or written agreement of any kind between Rhodes and Davis affecting in any manner the latter's title, and we do not see how Rhodes can dispute it. There is evidence to show that at the time of Black's sale to Davis, it was contemplated that John Chaffe & Sons should buy the place from Davis and give to Rhodes a right of redemption on terms similar to those which had been made by Black; and such an act had been prepared by the notary. But it was never executed. Chaffe & Sons testify that they had never agreed to enter into such a contract; and, though Rhodes swears that Davis had bound himself to procure such a contract from Chaffe & Sons, and that this was the condition upon which he received the title, his testimony is unsupported and his charge of such fraud against Davis is silenced by his subsequent conduct by which, in various ways, he recognized Davis' ownership.

Adams & Cockburn and the Citizens' Bank allege and contend that "the shifting of Rhodes' title, first to Carson and then to Black, was a mere paper transaction and a simulation, intended to defeat Rhodes' creditors; that there was no actual seizure under Carson's execution, and that his purchase purported to be for only \$1000; that the sheriff's sale divested Rhodes of neither ownership nor possession; that Carson's debt was not paid or settled thereby; that no money was paid by him for the property, nor was his execution or debt

actually credited with his bid, but, on the contrary, he still held the notes which he was pretending to collect of Rhodes, which were afterwards paid for Rhodes by Black; that this shifting of title and apparent change of ownership was part and parcel of an agreement and prearranged scheme for the purpose of baffling Rhodes' creditors; that Carson never went into possession under his title, nor did Black; that Rhodes remained in possession as owner, made and shipped his crops and generally acted as owner; that it was never intended that Black should become the owner, and that his nominal title was simply a form of security for his debt and for advances to Rhodes, and that mode of security was adopted for the purpose of defrauding Rhodes' creditors; that Davis, when he took the title from Black, well knew its defects and fraud, and, by his purchase, endeavored to further said fraud."

We fail utterly to discover any facts proven or principle of law to sustain these pretensions.

There is no dispute that Carson held a claim amounting to \$16,867, secured by special mortgage and vendor's privilege upon the plantation, which ranked all other creditors of Rhodes. Hence, such creditors had no possible claim on this property until this debt was paid; and a judicial sale for its enforcement conveyed the property free from their claims.

Although some persons entertained a higher idea of its value, there is no proof that there was any one willing to pay more than Carson's debt for the property. At all events, the property, after all legal advertisements, was twice exposed at public sale, first for cash and then on credit; and if these creditors or any other person had bid the amount of Carson's claim, the property would have been adjudicated to them. But neither they nor other bidder appeared at these sales.

There was no *consilium fraudis*, because there was no occasion or motive for fraud; there was no *eventus damni*, because the public sale affords legal proof that the property would not command a price sufficient to leave any surplus for these creditors.

The whole transaction was perfectly legitimate. Carson did no more than he had the legal right to do in executing his judgment and in bidding in the property. He had an equal right to make the contract with Rhodes to reconvey, on compliance with the terms and conditions stipulated.

The adjudication undoubtedly conveyed the ownership to Carson, subject to his obligation to reconvey on compliance with those conditions within the delay stipulated. Rhodes was in possession as sher-

Davis vs. Citizens' Bank et al.

iff's keeper, and his possession continued in that capacity until terminated by delivery to the purchaser. The sale to Black rendered the delivery to Carson unnecessary, and, after that sale, the continued possession of Rhodes was the possession of Black, under the terms of the contract between them. Therefore, the possession of Rhodes loses all significance as an *indicium* of simulation.

It is perfectly clear that the sale to Carson divested Rhodes' ownership and ousted all inferior mortgages on the property. Judicial mortgages, prior or subsequent, against Rhodes, could never afterward attach to the property, unless it returned to the ownership of Rhodes.

It is contended that such return was operated by the transfer from Carson to Black, and the agreement between Rhodes and Black; that the real ownership was thereby transferred to Rhodes, and that Black held the title merely as a figurative or hypothecary security for debts due to him, and advances made by him for Rhodes' account.

We have, heretofore, recited at length the terms of the contract between Rhodes and Black, without finding in it a single feature supporting such a construction of it.

It is the plainest possible case of a perfect and complete sale from Carson to Black, containing all the essential elements of the thing sold, the price and the consent; and the contract between Rhodes and Black merely engrafts upon it a right of redemption in favor of the former on the terms stated.

There is no feature of simulation about the transaction; no dispute that Black actually paid the cash part of the price, and was bound to pay the balance irrespective of the results of his contract with Rhodes for the working of the plantation.

Treating this as a *vente à réméré*, from which it differs because the right of redemption is stipulated, not in favor of the vendor, but of a third person, it is clear that the ownership passed from Carson to Black, and, quoting our language in a recent case, "from the moment of the execution of the act, the vendee becomes the master of the property, his title subject to be divested only by the exercise of the right to redeem, and unless that right is exercised within the term stipulated, he remains absolute owner of the property." *Jackson vs. Lemle*, 35 Ann. 856; *Levy vs. Ward*, 32 Ann. 784; *Duranton, Cours de Droit*, vol. 16; Secs. 388, 389, 390; *Dalloz, Vente*, No. 825; 2 *Troplong*, Nos. 692, *et seq.*

Rhodes has never exercised his right of redemption. He ceded that right to Davis. He was a party to the act by which Black conveyed the property to Davis in absolute ownership and for a valuable con-

sideration. He has no counter-letter or written evidence of any kind contradicting or limiting the title conveyed to Davis and confirmed by him.

He cannot dispute his own declarations in this authentic act. The alleged fraud, as we have heretofore stated, is not proved, his oral testimony being contradicted by other witnesses and by his own subsequent conduct and writings.

He pretends that there was an agreement to which Davis, Chaffe & Sons and himself were parties, and of which Black was cognizant, that simultaneously with the conveyance from Black to Davis, another conveyance was to be executed from Davis to Chaffe & Sons with a right of redemption reserved to Rhodes.

Black swears that he never knew of any such agreement. The various members of the firm of Chaffe & Sons swear they never made any such agreement. Davis died before Rhodes' examination as a witness was completed, and, therefore, had no opportunity of contradicting it. If it were true, as stated by Rhodes, that Davis had practiced the fraud charged, it is inconceivable that he should not at once have denounced it and demanded the cancellation of the transaction. But he complained of it to nobody, and took no steps to cancel it. On the contrary, he recognized Davis' ownership in every way, took rent notes of the tenants in Davis' name, represented Davis as the owner in written applications to merchants for advances, and to Shattuck & Hoffman whom he desired to purchase the plantation from Davis on terms securing him a new right of redemption.

It is undoubtedly true that Davis was willing to sell to John Chaffe & Sons on the terms proposed in the contract prepared, but they refused to accept such a sale. We are satisfied that Davis continued willing to sell, on the same terms, to any other responsible purchaser whom Rhodes could find, and Rhodes tried to find such purchaser, but in vain. He has never found any. The attempt of Rhodes and his creditors to disregard Davis' title, under these circumstances, cannot be countenanced.

These views dispose of the claims of the Citizens' Bank and of Adams & Cockburn to subject Airlie plantation to their judgments against Rhodes, and of the claim of Rhodes to annul Davis' title, and to defeat Black's mortgage.

The interventions of Davis, claiming a lessor's privilege on the movables of Rhodes on the plantation seized, are overruled for the reasons given in the case of Davis vs. Rhodes, decided this day.

State ex rel. Johnson et al. vs. Tax Collector et al.

Although, in some respects, the judgment appealed from is not erroneous, yet, for convenience, we shall reverse it and give such judgment as should have been rendered.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and it is now ordered, adjudged and decreed :

1st. That in suits Nos. 215 and 216 of the district court there be judgments in favor of plaintiff, S. W. Davis against the defendants, the Citizens' Bank of Louisiana and John D. Adams, perpetuating the injunctions therein issued, said defendants to pay costs in both courts.

2d. That in cases Nos. 217 and 218 of the district court there be judgment against the defendant, overruling and rejecting his third oppositions therein, at his cost in both courts.

3d. That in case No. 227 of the district court there be judgment in favor of defendants and against the plaintiff, rejecting the latter's demand, at his cost in both courts.

No. 9884.

THE STATE EX REL. BRADISH JOHNSON ET AL. VS. STATE TAX COLLECTOR ET AL., OF THE PARISH OF PLAQUEMINES.

It is permissible for a number of taxpayers, claiming to have a common interest in the enforcement of an ordinance of the police jury, enacted from motives of public policy, for the reduction of tax assessments, to unite in one suit, seeking like relief, from same injury and upon the same grounds.

Section 24 of Act 96, of 1882, does not create a board of equalization in the sense of Article 203 of the Constitution, but delegates to the board of revisors created by Section 24 of that act, amongst others, the power to correct assessments illegally or wrongfully made, in the *listing* or *valuation* thereof; and the power to equalize assessments of all properties of *like* character and *relative* value within their parish.

For this purpose said board is empowered to summon and examine witnesses with regard to the value and character of the properties assessed; and upon the evidence to determine the correctness of the listing and valuation thereof.

The police jury, acting as a board of reviewers, cannot, by ordinance, reduce the *percentage* of the assessment for the year, by wards, or otherwise. They can levy such a certain *percentum* on the *total assessment* as, in their view, may be necessary to defray the parochial expenses; but they cannot reduce to the standard of parochial necessities.

Such revision, correction, arbitration or equalization as the board of reviewers may make of assessments, are subject to review by the courts, and their action is final, unless set aside or changed, as provided by law.

A PPEAL from the Twenty-fourth District Court for the Parish of Plaquemines. *Livaudais, J.*

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39 530
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39 530
d117 77

Zacharie & Howard for Relators and Appellants :

1. The clause of Sec. 24, Act 96 of 1882, speaking of police juries, and providing "they shall also equalize the assessments of all properties of like character and relative value within their respective parishes in accordance with Article 203 of the Constitution," introduces the new feature of a Board of Equalization in our tax laws, which, though anticipated in our Constitution, has never been before carried into effect by the General Assembly.
2. In the absence of statutory provisions for its jurisdiction, and exercise and effect of its decisions, in our own statute we must look for its interpretation, in these respects, to the systems of other States having tax systems similar to our own, from which we have borrowed the new feature 16 L. 394 ; 30 Gratt. 477.
3. The powers of a mere board of review can only be exercised for correction of errors in individual assessments, after the return of the sworn list of the taxpayer and on due application made, and when refused, an appeal to the courts can only be had on proof of the exhaustion of those preliminary remedies ; a resort to those remedies is an indispensable condition precedent to relief in the courts to correct errors of assessments.
4. Boards of review increase or diminish individual assessments ; are obliged to hear evidence thereon ; can add omitted property to the lists ; and arbitrate between the individual taxpayer and the assessor ; their decisions are not final ; they deal with the taxpayer in his individual capacity.
5. Boards of equalization act from motives of public policy, deal with the taxpayers *en masse*, and are especially designed to carry out the principle of uniformity and equality in taxation, by comparison "of relative value of property in the different portions of the State." Constitution, Art. 203. The powers of review and equalization are distinct, and the rules governing their exercise are also separate and distinct, although in some States, as in our own, both functions are exercised by a single board. Burroughs on Taxation, § 101.
6. Boards of equalization, unlike boards of review, cannot add omitted valuations to the tax list ; their powers are limited to equalizing ; "their action is on classes of property, not upon the property of individuals, thus securing equality of value of all property belonging to the same class." Deady on Taxation, Vol. I, p. 496 ; 50 Iowa 678 ; 42 Iowa 623 ; Welty on Assessments, § 153, 154 ; 56 Cal. 195 ; Cooley on Taxation, 421 ; 7 Minn. 207 ; 4 Mich. 579 ; 21 Barb. 611 ; 43 Ill. 456 ; 49 Ill. 517 ; 72 Ill. 241 ; 3 Col. 608 ; Deady, Vol. I, 496 ; 30 Gratt. 477. "This is the general construction given to the laws relating to equalization boards in other States." 30 Gratt. 477. It is a distinct power from correcting assessments.
7. Boards of equalization differ from boards of review further in their mode of action. They can act with or without application of any one ; they need not take evidence or hear testimony ; they may act *ex proprio motu*. 127 Mass. 505 ; 2 Gray 298 ; 120 Mass. 130 ; 22 N. Y. 604 ; Deady, Vol I, p. 496 ; 43 Conn. 309. They may adopt their own means in reaching their conclusions. 16 Mich. 12.
8. Their action, unlike that of the board of review, need not be upon any individual assessment or assessments, and they need not make separate individual entries on each valuation. They need not foot up the valuations on the rolls. 22 Minn. 356. They can effect the equalization by adopting a committee's report ; they can equalize by the adoption of a percentage of reduction or increase, and need not go through the arithmetical computation and make the actual arithmetical changes in figures necessary. 15 Mich. 154 ; Cooley on Taxation, 422 ; Burroughs on Taxation, § 238 ; Deady, p. 603 ; 29 Me. 196 ; 1 Mich. N. P. 16 ; 48 N. Y. 93 ; 20 Vt. 643 ; 58 N. H. 580.
9. Unlike those of boards of review, the decisions of boards of equalization are final. Welty 158 ; Cooley on Taxation 291.

State ex rel Johnson et al. vs. Tax Collector et al.

10. To enforce by mandamus the carrying into effect of an equalization made by a police jury, individual taxpayers affected thereby may join in an action; 51 Ill. 132; *Burroughs on Taxation*; 54 Ill. 243; 56 Penn. St. 338; 34 Conn. 105; 24 Ohio St. 216; 9 Iowa 570; *Dillon. Mun. Corp.* §§ 731, 732, *et seq.*, all cases where joint injunctions were sustained on the ground of privity of interest, and the common relief sought in similar cases of excessive taxation.
11. When such equalizations are made it is the duty of the assessor, as the party making the rolls and signing them, to make the manual correction; 34 Ann. 373; *Desty*, Vol. I. p. 610; 44 Cal. 616; *Id.* 613; and he may be mandamused thereto: *Desty*, 526; 65 N. Y. 238; 44 Cal. 616; 30 Ann. 261.
12. A police jury acting as a board of equalization is not confined to any particular form in which to express their decision; where the law prescribes no particular form for a municipal corporation or body in which to exercise its functions, it may do so in any of the usual forms, resolutions, ordinances, etc. *Dillon*, Vol. I. p. 362. § 246; 2d Edit. *Abbot on Corps.*, p. 457; 36 Ann. 643.
13. The principle of *inclusio unius exclusio alterius* does not apply to an article of the Constitution, except one positively prohibitory, as abridging the power of a legislature. *Cooley Cons. Lims.* (87, 172)

M. J. Cunningham, Attorney General, and *Jas. C. Moise* for Defendants and Appellees:

1. Boards of reviewers do not act by ordinance; they, as well as boards of equalization, are assessors (47 Cal. 646; 37 N. Y. 428); as such they must examine the lists submitted to them, form their judgment as to the value of each piece of property listed, arbitrate between the assessors and taxpayers, and enter such corrections and changes as they wish to make upon the lists, and return same to the assessor, from which he makes out his roll. Secs. 32, 24, 23, 27; Acts 96 of '82 and 98 of '86.
They are a body of limited powers, and must act strictly according to law, and may be compelled to do so by the State as well as by the taxpayer.
 2. They are not boards of equalization, but such incidental powers of equalization as they may have must be exercised in accordance with Art. 203 of the Constitution, with reference to the relative values of property in different portions of the State. But even as a board of equalization their powers are strictly construed, and any unauthorized action is void. *Desty's* citations, p. 497, Nos. 10, 11, 12 and 15; 43 Ill. 456; 49 Ill. 517; 50 Ill. 424; 53 Ill. 477. They have no power to raise or lower the assessment of the entire district constituting their territorial jurisdiction in the aggregate. *Cooley* 291; 51 Iowa 107; *Desty on Tax*, pp. 496, 497; 11 Neb. 65.
 3. An unauthorized rule of valuation adopted by them goes to the groundwork of the assessment, and vitiates the tax based upon it. 43 Wis. 55; 37 Id. 75, 48; 42 Id. 502; 5 Mich. 154; 57 Wis. 5.
 4. They must assess property only according to its cash valuation (Art. 203), and not according to parochial needs, which will be considered by the police jury when regulating the rate of taxation to be subsequently levied.
 5. Adjudications in other States will not govern here unless based upon laws similar to our own.
 6. In this State the tax "list" and tax "roll" are separate and distinct things. Acts 96 of 1882 and 96 of 1886; Secs. 6, 8, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 32.
 7. The proceedings with reference to the assessment of taxes are based upon the former. They are the records of the judicial acts of those officers entrusted by law with the solemn duty of assessing the tax.
- The proceedings with reference to the enforcement of tax collections are based upon the rolls. They are the tax collectors' warrant or authority to collect. Sec. 32.

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8. The assessor cannot be compelled, by mandamus, to alter the roll after it has been filed. He no longer has control over it. *Desty*, Sec. 112, p. 577; 18 Pick 575; 49 N. Y. 655; Secs. 19 and 32 of Revenue Acts.
9. Nor can he be compelled by mandamus to obey an ordinance of the police jury containing instructions with reference to assessments.
10. A suit with such declared object is really a suit to test the correctness of the assessment and must be brought in the manner prescribed by law. The statutory remedy is exclusive.
11. The owners of different pieces of property have no privity of interest as to entitle them to bring such action jointly.
12. A judgment in such a suit could only affect the assessment of the party plaintiff. Sec. 36, Rev. Acts.
13. A taxpayer, who makes no return of list nor complaint to the board of reviewers, that the valuation of his property is excessive, is presumed by his silence to consent to the tax imposed. If a party does not have his assessment corrected and perfected when he has power to do so, he is assumed to admit its correctness. 46 Mich. 530; S. C. 9 N. W. Rep. 838; 100 U. S. 547; 40 N. J. Laws 268; 4 Nev. 251; Want of knowledge no excuse; 57 Iowa 80; 17 Id. 389.

The opinion of the Court was delivered by

WATKINS, J. This is a mandamus proceeding, commenced in the district court by one hundred and twenty taxpayers, of the parish of Plaquemines, to compel the tax assessor to correct and amend the assessment rolls in conformity to an ordinance of the police jury; and to compel the tax collector to collect the taxes—State and parish—with the tax rolls thus amended.

The preliminary order was granted on the 6th of December, 1886.

On the 13th of July previous, the police jury convened, as a board of reviewers, and the tax assessor presented to them the assessment lists he had prepared, and those, also, of the taxpayers contesting their assessments; but no formal action was taken thereon, at that time.

After a partial reading of the assessment lists, it appears that a conference was held by the police jury with several planters of the parish, the immediate result of which was the adoption of the following ordinance, viz:

"*Resolved*, That the said assessor be directed to reduce the assessment of 1886, on the real estate of the first, second, third, fourth, sixth, seventh and eighth wards *ten* per cent from the assessment of 1885, and of the fifth and tenth wards *thirty* per cent, and the ninth ward *twenty* per cent."

I.

The respondents insist that there is a misjoinder of parties; that their petition shows that relators are the owners of separate and distinct pieces of property, and have, therefore, no privity or mutuality of interest, and not entitled to join in one suit. Relators' contention

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is that the police jury acted in their capacity of a *board of equalization*, in adopting their said ordinance, and sought thereby to equalize the assessments of property, in the different wards of the parish, by directing the assessor to reduce the *percentage* of valuation, according to the ratio of the depreciation of the property in value. That they did not act in the capacity of a *board of reviewers*, to hear and determine contested assessments, upon the application of individual taxpayers; to arbitrate *individual* assessments between the citizen and the assessor; nor to correct illegal and wrongful listings and valuations of assessed properties.

That in enacting said ordinance the police jury acted *only* from motives of *public policy*, and not in the interest of individual taxpayers, hence all the tax-paying inhabitants of the parish have a common interest in its enforcement, and any number of them may be joined in one suit for that purpose, seeking *same* relief, against *same* injury, and upon the *same* grounds.

That, for the attainment of the object aimed at, a multiplicity of suits is wholly unnecessary.

It has been frequently held—and we think correctly—that taxpaying inhabitants, whose interests aggregate an appealable sum, may unite for the purpose of *resisting* a municipal ordinance, and upon like principles they may unite for the purpose of *enforcing* an ordinance of the police jury. 27 Ann. 319; 33 Ann. 567, 81; 101 U. S. 699; Dillon's Municip. Corporation, Sec. 731.

II.

Reliance is placed on the provisions of Section 24 of Act 96 of 1882, as supporting relator's theory.

The preceding section declares that the police juries of the several parishes are "constituted boards of *reviewers* for their respective parishes." Sec. 23.

The provisions of Sec. 24 are: "That the *said board of reviewers* shall meet on the first Monday in July of each and every year, * * * and the several assessors * * * shall lay before the *said board* all of the lists of property, with the estimated cash valuation extended, as listed and valued by the said assessors, * * * together with the lists and valuations made under oath as aforesaid, of those property owners who believe the assessor's valuation to be in excess of, and beyond the *actual cash value* of, the personal or real property thereon enumerated; and the *said board* shall proceed at once to arbitrate upon said lists of property and cash valuation; and their decision shall be final, unless *set aside in accordance with Article 203 of the Constitution*.

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"The *said board of reviewers* shall then proceed to examine all the aforesaid lists of real and personal property submitted to them by said assessors; and should *they* find any property to have been illegally or wrongfully assessed in the listing or valuation thereof, it shall be *their* duty to correct the same; and *they shall also equalize the assessments of all properties of like character and relative value* within their respective parishes, in accordance with Article 203 of the Constitution."

This board is styled in the act creating it, a *board of reviewers*, and not a *board of equalization*.

It is clothed with power to arbitrate upon the *lists* of property, with the cash value thereof extended by the assessor, and those presented by the taxpayers who believe the assessor's valuation excessive—and their decision is final, "*unless set aside* in accordance with Article 203 of the Constitution."

It is also clothed with the further power to examine *all* assessments that are submitted to them by the assessors, and to correct all illegal and wrongful assessments, and to *equalize* the assessments of all properties of *like character and relative value*.

For either purpose, this board has the power of summoning witnesses and the right to interrogate them, in order to possess themselves of the necessary information with regard to the character and value of all the properties that have been listed, and included in the assessments that have been submitted to them.

Upon the evidence, they are specially empowered to pass, and to decide and to determine the correctness of the listing and the valuation.

The statute, in terms, declares that, in respect to the determination of this board on questions pertaining to the correction of the lists and the equalization of assessments—as set out in the *second paragraph* of the quoted section—"after having passed upon and determined the correctness of *any list*, and the valuation thereof, the *same shall be final, unless set aside or changed* in the manner prescribed by law."

From these consecutive and continuous provisions of the statute relied upon by the relators, we can easily discover the manifest intention of the Legislature to create a board or tribunal possessed of *quasi* judicial powers. *Railroad Company vs. Sheriff*, 38 Ann. 760.

This board—though to a limited extent possessing powers of a board of equalization—must *only* act upon *assessments*; such assessments as are submitted to them for examination by the assessor.

The equalization contemplated is that to be made of the assessments of "*all properties of like character and of relative value*" in the parish.

In order for this board to determine the "*like character*" of the prop-

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erty assessed, the lists must be examined by them, and the properties thereon described be classified.

In order that the board should accurately determine the "relative value" of the properties assessed, the estimations of value made by the assessor, and those made by the taxpayers, must be taken, and the testimony of witnesses administered by them.

These facts once ascertained, the duty devolves upon the board to complete the equalization of *all* the properties that have been assessed.

This may be done by placing upon one schedule *arable* lands that are above overflow. In another, those of an inferior grade and subject to overflow. In another, swamp lands. In another, timbered lands. In another, *urban* property—of different grades.

When the real estate has been carefully graded and classified, an approximate valuation may then be made for each. All properties assessed may be arranged in one or the other schedule, as the board shall determine, after having heard the evidence.

In this or similar manner the value of all properties assessed may be equalized, so that each may bear its *just* proportion of taxes. If some such an equalization were made no assessment would exceed "its actual cash value," which is the constitutional basis of all taxation. Const. Art. 203.

III.

Evidently the one provided by the act under discussion is not the system of equalization contemplated by Article 203 of the Constitution.

It declares: "In order to arrive at this equality and uniformity, the General Assembly shall, at its first session, after the adoption of this Constitution, provide a system of equality and uniformity in assessments, based upon the *relative* value of property in the *different portions of the State*."

The framers of that instrument obviously intended the creation of a State Board of Equalization, though it appears that no such act was passed by the Legislature, as contemplated.

The provisions of that article (203) were clearly not intended to be self-enforcing. Instead, we have the statute we are considering. But the powers conferred can only be exercised in the *precise* manner therein indicated.

The police jury, in passing and promulgating the ordinance sought to be enforced, clearly exceeded their powers, as a board of reviewers. They failed to exercise their *quasi* judicial powers, in the manner indicated, or in any *similar* manner.

The ordinance shows, upon its face, that they did not make a complete examination of the lists of property assessed, and which had been placed before them by the assessor. They did not, therefore, pretend to equalize *those assessments*. They did *not* take the proper mode of ascertaining the *relative* value, or like character of the properties assessed. They did not predicate the ordinance upon "*the actual cash value*" of the property assessed, but upon the *alleged necessities of the parish*, for the then current fiscal year.

On this feature of the case we will quote from the evidence of Mr. James Wilkinson, who is district attorney. He says: "The police jury met, and the tax assessor laid his lists on the desk before the police jury, and began reading out the list of property of the parish; and also read out the cases in which oppositions had been filed.

"I don't remember the persons who opposed at that time.

"No action was taken, at that time, on any reduction whatever. It was the purpose of the police jury to read the entire list, and take action afterward on the oppositions.

"After reading through the list, as far as the fourth ward or fifth ward, several of the large sugar planters, including Messrs. Dymond and Warmoth, and the police jury, had a conference. * * The sheriff was called, and a *statement of what the parish could be run for, during the year 1886, was approximated by them, and an agreement reached as to what it would be best to reduce the total assessment of the parish roll.*

"They then proceeded to pass an ordinance reducing the assessment, by *wards*. Thinking—as was stated in the police jury—my opinion was asked as to this reduction, a statement was made, by the members of the police jury, that it would take them too long to make the reduction, separately, and *therefore* they passed the ordinance, instructing the assessor to make these reductions, as stated in the minutes of the police jury."

This course of proceeding was in direct violation of the statute.

The Constitution provides that "the valuation put upon property for the purposes of *State* taxation shall be taken as the *proper valuation for the purposes of local taxation, in every subdivision of the State.*" Art. 203.

The police jury reversed the order of things, and attempted to make the necessities of the *parish* the basis for the assessment of *State* taxes.

It is the province of the General Assembly to determine the amount of revenue required, and not that of the police jury. But it is their province—while acting in their capacity of *police jury*—to make the

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levy of such a *percentum* on the total *assessment*, as may subserve the necessities of the parish. They cannot reduce the assessment—the State assessment—so as to meet those necessities.

IV.

In *Shattuck & Hoffman, vs. City of New Orleans, et al.*, 39 Ann., not yet reported, this court said: "The right of the tax-payer to appear before the standing committee of the City Council and be heard concerning the description of property listed, and the valuation of same, *as assessed*; and the report of the standing committee on assessment of the City Council, are proceedings preparatory, and prerequisite to the tax-payers right of action to test the correctness of the assessment in the courts of justice."

The same rule must be applied to the revision and correction of assessments in the country parishes by boards of reviewers.

It matters not whether *such revision* consists in an arbitration by the board upon the lists of property furnished by the assessor, and those of the taxpayers resisting the assessment as made, or in their making correction of assessments, that are illegal and erroneous in the *listing or valuation*, or in equalizing assessments of properties of "*like character and of relative value*."

All those powers are expressly conferred upon the police jury as a board of reviewers. Their action, in either case and in any event, is the proper subject of review in the courts. The concluding clause of the section of the statute conferring those powers on board of reviewers provides that "after having passed upon any list and the valuation thereof, the same *shall become final, unless set aside or changed, as provided by law*."

We have been entertained and instructed by the elaborate and well-digested briefs of counsel for relators and respondents; but have chosen to rest our conclusions upon an examination and careful analysis of the statute on which relator's claims are predicated.

We are of the opinion that the ordinance of the police jury drawn in question here, as authority for the peremptory mandamus requested to the State tax collector and assessor, is illegal, null and void, and that the writ was properly denied by the judge *a quo*.

Judgment affirmed.

No. 9964.

THE STATE OF LOUISIANA VS. A. FERNANDEZ.

Act 18 of 1886, commonly known as the *Sunday Law*, operates uniformly throughout the State, and cannot be construed so as to authorize to be done, in one place, on Sundays, that which it forbids to be done, on that day, in *all other* places.

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Whoever claims an immunity from the operation of a general law, must prove it with certainty. Exemption laws must be strictly construed. In such cases, *doubt is fatal*.

Grocery stores, required to be closed on those days, outside of a public market, cannot be allowed to be opened, as stands, on those days in such markets, in the absence of express legislation authorizing the same.

The exemptions from the operation of the law, enumerated in Section 3 of the act, cannot be extended so as to include cases not within legislative contemplation.

APPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

Blanc & Butler for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant was prosecuted for violating the provisions of Act 18 of 1886, commonly known as the "*Sunday Law*."

The information charges that, on Sunday, the 27th day of February, 1887, he did unlawfully open a certain establishment and place of business called a *grocery*, which, by law, is required to be closed at twelve o'clock on Saturday nights, and to remain closed continuously for twenty-four hours; and that, being the proprietor of such establishment, he then and there did unlawfully give, trade, barter, exchange and sell certain portions of the stock and certain articles of merchandise kept in such establishment and place of public business, contrary to the form of the statute, etc.

On a first prosecution the accused pleaded guilty and was fined \$25, but on the present prosecution for a *second* violation he pleaded by demurrer.

He there averred the acts charged, averring, however, that keeping a grocery and selling groceries in a public market, wherein the like was kept and sold, of time immemorial, is no offense under the law.

On issue joined by the State, the case was tried. The court, for elaborate reasons forcibly expressed, overruled the plea and imposed a fine of \$305 on the accused, who excepted to the ruling and appealed from the sentence.

So that, the question presented here is simply: Whether a grocery establishment can or not be legally opened on Sundays, in a public market in which such establishments, for time immemorial and on all days, have been, up to the adoption of the law, habitually kept?

In order to ascertain the legislative intent, it is essential to analyze as well the sections as the title of the statute. (Act 18, p. 28, of 1886.)

An attentive consideration of these satisfies the mind that they are all substantially expressed in the title, which reads as follows:

"An Act requiring all stores, shops, *groceries*, saloons, and all places of public business, which are or may be conducted under any law of the State of Louisiana, or under any parochial or municipal law or ordinance, except those herein exempted, to be closed on Sundays; and forbidding all giving, trading, bartering and selling on Sunday by the proprietors or employes of such establishments, declaring it a misdemeanor to violate the provisions of this act and to fix penalties for all violations of the same; and to repeal all laws or parts of laws contrary to or inconsistent therewith."

The defense, however, is, that as Section 3 declares that the provisions of the act shall not apply to *public markets*, and as the grocery establishment in question was opened in a *public market*, in which such establishments have, at all times, been kept, the opening of a grocery stand in such place of public business, on Sundays, is not only not prohibited, but impliedly allowed and authorized.

The defense is untenable.

It is apparent that, but for the saving clause under which the accused seeks shelter, he could not pretend to be exempt from the operation of the law, for the obvious reason that, had he opened his grocery elsewhere than in a public market, he would assuredly be amenable to the statute.

Equality of rights, privileges and capacities unquestionably should be the aim of the law. If special privileges are granted, or special burdens or restrictions imposed, in any case, it must be presumed that the Legislature designed to depart as little as possible from this fundamental maxim of government.

The State has no favors to bestow, and intends to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so. As a rule of construction, it is to be presumed that they were probably not contemplated. Cooley on Const. Lim., No. 493 (pp. 493-4), 4th ed.

When the General Assembly, for reasons not disclosed, deemed proper, in the exercise of the police power possessed by the State, to require, under penalties, the closing on Sundays of places of public business, the object in contemplation was the shutting up, on Sundays, of *all* stores and places of business, not exempt, irrespective of locality, by a uniform legislation, operating throughout the State.

The Legislature would not, and did not, design to require such closing on Sundays in one or more places and permit the opening of similar stores and establishments at other places, on the same day. Such legislation would have been unjust, odious, despotic and oppressive.

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If it be true, as alleged by the defendant, that groceries have always been kept, on Sundays, in the public markets of the State, it is equally so that such establishments have also been kept at all other places.

It cannot be inferred, however, from that circumstance that, although the State has required generally the shutting up of all such places, she has, by implication, exempted from the closing, and therefore authorized the opening, of grocery establishments kept in *public* markets.

The argument, it would seem, rather militates the other way; for no reason is adduced why the closing should not be uniform, or why certain places should be shut while others remain open, simultaneously, on Sundays.

The principle is established beyond question, that whoever claims an exemption or immunity from the operation of a general law, must prove it with certainty, as exemption laws must be construed strictly. In such cases, doubt is fatal.

It was incumbent, therefore, on the defendant to have established, from the letter or spirit of the law, that although the shutting of a grocery outside of a public market on a Sunday be commanded as a general thing, the opening of it in that place, on such day, is formally sanctioned by law; but he has failed to do so.

Had it entered the legislative intent to allow the opening of a grocery stand or establishment on a Sunday, in a public market, when such opening is forbidden elsewhere on that day, it would have said so; but it has remained perfectly dumb on the subject.

It is not competent for the judicial power to engraft unauthorized and unjustifiable exceptions on exceptions considerably made by the law-giver.

However liberally construed be the exemptions enumerated in Section 3 of the act, they cannot be legitimately stretched so as to extend the immunity to grocery establishments in public markets.

Ruling differently would be doing violence to the tenor and purport of the law and to throw a door wide open, in *public* markets, to all business clearly prohibited beyond their limits.

We have deemed it unnecessary to enter into any discussion of the meaning of the words "*public markets*," as we considered that whatever the signification be, it cannot be invoked to justify the attitude of defendant, that what is required to be done generally throughout the State, regardless of locality, is not exigible within the precincts of a public market.

We, therefore, conclude that the law does not authorize the opening, on Sundays in public markets, of grocery establishments which are *all*

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required uniformly to be closed elsewhere on such days, and we consider that the demurrer set up by the accused was properly overruled.

Judgment affirmed.

ON REHEARING.

The Court has been charged with misunderstanding and misapplying the law, and so, with having inflicted disastrous damage on the city of New Orleans. It has been pressed to recant its opinion and decree, and decide that a "*public market*" is a "*public market*."

The Court did not misconceive the law. It would not suppose in the Legislature the design to make odious and unconstitutional discriminations between citizens belonging to the *same class*. It could not impute to the General Assembly the intention to allow to be done, under the roof, or *within* the limits of a public market, that which it absolutely prohibits, under pains and penalties, one line *beyond* that roof or those limits. It could not conceive that it was the legislative will to discriminate between the public markets in *New Orleans* and other markets at *different places in the State*.

The Court had no concern with what constitutes a public market. It has none now. It had to decide, under the demurrer and the replication, whether the defendant was or not amenable to the accusation against him.

It concluded that the defendant was keeping on a Sunday, *within* the market, that which he could not keep, and was bound to close *out* of it--a place of public business, at which he dealt in grocery articles; in other words, a grocery stand or stall; and that the fact constituted the offense and justified the infliction of the penalty.

There is some pretense that the defendant is not required to pay a license for keeping a grocery stand in the public market. Whether the license be actually levied by State or city, in the sense of requiring payment of it, is immaterial. The law imposes, or may impose the license, and the statute under consideration requires the closing on Sundays of all places of public business, even plantation stores, which are, or may be licensed, under the law of the State, or under a parochial or municipal ordinance.

If, then, the Legislature has required the closing on Sundays of all places of public business, which are or may be licensed, and if such places of business within public markets are, or may be licensed, the conclusion is irresistible, that the defendant is not shielded from the operation of the prohibitory and penal provisions of the law, and his case falls within their purview and ban.

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When, therefore, the Legislature removed or exempted public markets from the operation of the law, keeping in view the equality of rights of the citizens—they meant such public markets, *within* the limits of which goods were not sold, or places kept open, which are forbidden from being sold or are required to be closed, *beyond* their boundaries.

If the ruling has operated harshly, as is represented, it is a consequence which must have entered into the legislative consideration before the Legislature solemnly expressed their behest, and which this Court is powerless to avert.

If the "*Sunday law*" be harsh but constitutional, it must be enforced. *Dura lex, sed lex.*

This Court has deliberately held that the "*Sunday law*" violated no constitutional prohibition on the power of the General Assembly, and is obligatory. The courts have to enforce its commands.

This Court cannot be asked to blow hot and cold in the same breath, and it cannot do so.

It is, therefore, ordered that our previous decree herein remain undisturbed.

Fenner, J., dissents.

CONCURRING OPINION.

POCHÉ, J. The object of the "*Sunday law*," as expressed in its title, is to require "all stores, shops, groceries, saloons, and all places of public business, which are or may be conducted under any law of the State of Louisiana, or under any parochial or municipal law or ordinance, * * to be closed on Sundays."

It is undeniable that, under its provisions, all dealers in groceries must close their establishments on Sundays, but the city of New Orleans, intervening herein for the protection of its market lessees, contends that dealers in groceries in the public markets are not reached by the law, but that they are protected by Section 3 of the act, which provides that the law shall not apply to public and private markets.

Nothing in the language of the act, or in the spirit of the legislation, suggests the slightest legislative intention to make such a discrimination, and it is difficult to conceive of any reason which could justify a distinction between the act of selling groceries in a store, house, or shop, and selling the same kind of goods in the public market of a city or town.

In the case of the State *ex rel.* Walker vs. Judge, recently decided by this Court (Southern Reporter, Vol. I, p. 437), which involved the alleged unconstitutionality of the Sunday law, the point was made by relator's counsel, who argued that the law was not uniform or equal in its prohibitions, and particularly in its exemptions, on the ground, among others, that grocery stores were required to close on Sunday while dealers in groceries in the public markets were allowed to carry on their business on the same day. To that contention this Court answered: "The objection has not the slightest force. The law is not unequal in any constitutional sense. No person in the State is permitted to purchase any of the prohibited callings on Sunday. * * * It is enough to say that the law does not expressly grant such privilege, and it will be time enough to determine whether, under a proper construction of the law, it exists, when a case directly involving the question is presented." That case is now before the Court, and having sustained the law as constitutional, because, under a proper construction, it was not amenable to the charge that it permitted certain persons to pursue some of the prohibited callings on Sunday, we are now asked by the defense to allow the selling of groceries in the public markets on Sunday, under the very law which avowedly prohibits that very act, in all other places, all over the State. Could we consistently make such a ruling?

We sustained the law simply because it was the legislative will, not violative of any restriction in the Constitution, and we have no more reason, by construction, to limit or restrict its intended effect, so as to avert any resulting inconveniences, than we had to declare its nullity as a whole. No reason can be invoked to authorize, under the law, the selling of groceries in the public markets of New Orleans, which would not, at the same time, justify the selling of the same kind of goods in stores where the same are universally sold in the city, as well as in all other localities in the State.

Guided by respectable authority, this Court rested the action of the Legislature in adopting a Sunday law, on the following considerations, deriving their efficacy from the exercise of the police power; "It is claimed that, from physical causes, men require respite from intellectual and physical labor in the proportion of one day's rest in seven, and that a law which enjoins this is not only for the aggregate good of society, but for the benefit of all the members. It is said that the labor of six days, with this relaxation, is more productive in the long run than the uninterrupted labor of the week. It is said, besides, that this law affords, indirectly, protection against oppression to

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employees—women, apprentices and servants—and that, but for the law, men would keep open stores and shops because their neighbors did so, and that, by competition, a sort of compulsion exists to violate the laws of health.”

Hence, there is no force in the argument based on the great inconvenience to the people of this city, who would, by the unexceptional enforcement of the law, be deprived of the privilege of purchasing certain grocery articles on Sunday, which articles had been from time immemorial sold in the public markets of New Orleans. The sale of such articles in grocery stores, especially in the proverbial “corner grocery,” certainly antedates that custom, and yet the Legislature did not hesitate to destroy that “greater convenience.” And no reason is apparent, from the language of the act, or in the argument of defendant’s counsel, to indicate the slightest legislative intent to spare the other or *lesser* convenience. A Sunday law does not deal with conveniences; it is avowedly an invasion on all conveniences on Sunday. It seeks, with an iron hand, to enforce obedience to a principle by means of a rule which is unbending, except when confronted by necessity.

Hence, to be constitutional, it must make or countenance no discrimination between persons pursuing the same calling, and, therefore, it cannot be construed, as contended for, as making a distinction when there exists no difference.

It would, indeed, be too violent a presumption to suppose that under the guidance of the considerations which underlie all Sunday laws, our legislators could have conceived the opinion that dealers in groceries under a market shed did not need as much rest as vendors of groceries in stores; or that, unlike the latter, the market grocery dealers could not have made their business as productive in the long run, with the labor of six days, as “with the uninterrupted labor of the week,” or that, in the absence of a Sunday law, the employees of the market grocer would have been less exposed to the oppression of their employers than those of the grocer in the store.

No more is our law-maker amenable to the charge of contemplating the convenience of the poorer classes in New Orleans by means of a permission to buy certain articles of groceries in the markets on Sundays, at the same time (and by means of the same law) that he peremptorily ordered the closing on Sunday of “all plantation stores,” which are the only market within the reach of more than three hundred thousand laborers in the cotton, rice and sugar fields of

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Louisiana, who yield to no other class in this city in the need of relaxation of the rule for conveniences on Sunday.

There is no more force in the argument that our construction of the Sunday law will cause great losses to the city of New Orleans in her market revenues. This Court never shrinks from the legitimate responsibility of its own acts. But it is easily conceived that such a responsibility cannot rest on the shoulders of the judiciary, who is powerless to avert the evil resulting from bad laws, as long as the same cannot be annulled as unconstitutional.

The remedy must be sought at the hands of the law-making power which alone has the authority to repeal obnoxious or unwise legislation.

For these reasons, and for those contained in the opinion prepared by the Chief Justice, I concur in the decree herein rendered.

DISSENTING OPINION.

FENNER, J. The accused appeals from a conviction of the offense of violating Act No. 18 of 1886, known as the Sunday Law, by selling in a public market of the city of New Orleans, articles of human food known as groceries.

The ordinances of the city of New Orleans establishing and regulating its public markets, have, from a remote period, and do still, authorize the selling therein of all articles of human food, including such groceries. Jewell's Digest, pp. 268 and 269.

The article of the ordinance now in force provides "that all kinds of meats, fowl, game, fish, vegetables, and *all other articles of human food* may be bought and sold at the public markets, etc."

The 1st section of Act 18 provides that "all stores, shops, saloons and all places of public business, etc., are hereby required to be closed at twelve o'clock on Saturday nights, and remain closed continuously for twenty-four hours, etc."

Section 3 declares "that the provisions of this Act shall not apply to * * public and private markets, etc."

I quite agree with the learned judge *a quo* that, in interpreting this exemption, we are to search for and give effect to the probable and reasonable intent of the legislature, in employing the terms "public and private markets."

If it should happen that in some particular town or city of the State the local municipal ordinances authorized the sale of dry goods, woodenware and all other articles of commerce in the public market. I

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should not consider that such traffic was within the exemption contemplated by the legislature.

We are to infer that, in exempting public markets, the legislature meant public markets as commonly and customarily organized and covering the kind of traffic ordinarily authorized and conducted in such markets.

We have seen that, at the time of the passage of this law and long before its passage, the public markets of this city, the most prominent and generally known of all in the State, were established for the purchase and sale of "all articles of human food."

We are not advised whether or not public markets as organized in other towns and cities embrace like privileges; but I think we may say that generally, at least in cities, they do, and that anyone would expect to find in them such articles as butter, lard, cheese, bread, rice, meal, salt meats and other like articles of daily consumption for human food, and that a market where such things could not be procured would illy serve the convenience of the people for which they are established.

We are referred to two *dicta* by this Court on the subject which confirms this view. In one case the Court defines a public market to be "a place to which the public have free admission for the purpose of purchasing provisions." *Heirs of David vs. N. O.*, 16 Ann. 407.

In another, Chief Justice Merrick said, a market "is a place to which all persons have a right to resort daily, to supply themselves with such provisions and necessaries as are there vended."

The learned counsel for defendant also quotes the language of the Supreme Court of Ohio, viz: "A municipal market constitutes 1st., any place for the sale of provisions and articles of daily consumption; 2d., convenient fixtures; 3d., a system of police regulations, fixing the market hours, making provisions for lighting, watching, cleaning, etc.; 4th., proper officers to preserve proper order and enforce obedience to the rules." *Cincinnati vs. Buckingham*, 10 Ohio, 257.

These expressions indicate, as I think, the legal and popular idea of the ordinary, modern, municipal market, to which, undoubtedly, the legislature referred.

I can discover no reason or authority to confine the term to the narrower meaning of a place for the sale of fresh meats, fresh fish, game, poultry, vegetables and fruit exclusively, as adopted by the judge *a quo* and contended for by the State, on the ground that such articles must be procured on the day upon which they are used.

Many vegetables and fruits, such as potatoes, cabbages, onions, beans, apples, oranges, lemons, bananas, etc., are quite as free from

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any necessity of being procured on the day of use, as are lard, butter, cheese, etc., which fall under the denomination of groceries.

We are to remember, too, that the wants of all classes of people are to be considered. The poor man, who receives his wages on Saturday night, has not always been able to provide his Sunday dinner in advance. When he goes to market on Sunday morning, his scanty purse may not afford the luxury of fresh meat, fresh fish and game. Shall he be deprived of his rasher of bacon or cut of cheese? The careless housekeeper may have forgotten to replenish her store of butter, or lard, or meal, or rice, or salt and pepper? Shall her Sunday dinner be, therefore, spoiled?

I feel safe in holding that the public markets, as established in New Orleans for the sale of all articles of human food, are not exceptional and fall clearly within the exemption intended and expressed by the legislature. I have not found, or been referred to, any definition of a public market by any lexicographer or other authority, placing a more restricted meaning on the term than I have now given it; and, on the contrary, they generally assign to it a more extensive significance. Bouvier's Law Dic. *Verbo*, Market; Webster's Dic. *Id.*; Richardson's Dic. *Id.*; Worcester's Dic. *Id.*

They all agree that it is a place for the sale of "provisions."

Not only have the people a direct interest in having this exemption sustained; but the city of New Orleans has a like interest, and has appeared, at our bar, through her law officer, in support of it.

It directly affects the city's revenues which are, to a considerable amount, derived from the leases of these markets, which have been executed upon the faith of their *status* as recognized by law, and the consideration thereof would be sensibly impaired by the change in that *status* for which the State now contends.

I discover no force in the argument that, because the exemption applies equally to "*public and private markets*," therefore only the traffic authorized in private markets should be considered as authorized in public markets. A private market is one thing, a public market is another. Each is separately regulated by law, and must stand on its own footing. The exemption extended to both neither enlarges nor diminishes the privileges of either.

It is claimed, however, that the construction now given to the law would render it, to that extent, unconstitutional, because, in permit-

ting persons occupying stalls in the market to sell groceries on Sunday, while denying the like privilege to other dealers in groceries, it would violate the right of the latter to that equality of rights and privileges which is secured by the constitutional provisions, guaranteeing to all citizens the "equal protection of the laws." But it is well settled that these provisions do not prevent the Legislature from determining whether "a particular rule shall extend to all its citizens only," and that "all that can be required in such cases is that the laws shall be general in their application to the class or locality to which they apply." Cooley Constitutional Lim. 4 Ed. pp. 488-9. The occupant of a stall in a public market, who, for the public convenience, is allowed to sell those special kinds of groceries used for human food, within certain limited hours of each day (viz: under present ordinances, between the hours of 6 and 10 a. m.) and subject to all other market regulations and police control, certainly belongs to a very different class from the ordinary private dealer in groceries, who occupies and controls his own store, who sells there, or may sell, not only articles of human food, but many other articles ordinarily embraced in the grocers' stock in trade, who opens and closes at his pleasure, and whose business is subject to no peculiar police control and regulation. If they belonged to the same class, with much greater force might the market vendor complain that his constitutional rights were violated because he was compelled to close his establishment every day at 10 o'clock a. m., while other grocers were at liberty to keep open all day.

They belong to totally different classes. No law forbids any grocer from renting a stall in the public market, if any be vacant, and acquiring the same privileges accorded to that class of citizens. There is no discrimination between citizens, but only between different classes of citizens, classes equally open to all, and the discrimination is based upon obvious considerations of public policy and convenience, which amply support and justify it.

For all the foregoing reasons I think the Court has placed too narrow a construction on the law, one not contemplated by the Legislature, hostile to the interests of the city and to the convenience of the people, and calculated, if enforced, to make the law odious by subverting the very public convenience which the exemption was obviously intended to subserve.

No. 9894.

ERNST & CO. VS. NEW ORLEANS WATERWORKS COMPANY.

An injunction can lawfully issue to prevent a water-works company from cutting off its water supply where the consumer has offered to pay in advance the proper amount for the use of such water during the year, and the company claims a higher rate than is truly due and exigible.

Under the terms of its charter, the company is bound to supply water at the rate charged by the city of New Orleans previous to the date of said charter, which was fifteen cents for a thousand gallons to large consumers.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

J. O. Nixon, Jr., for Plaintiffs and Appellees.

J. R. Beckwith for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to prevent the defendant company from turning off its water supply from plaintiffs' rice mills as long as the rates therefor are paid in advance and to compel the company to continue such supply with that reserve of right.

The defendant company charges that the case presented is not one in which an injunction can issue and that it is entitled to more than the amount which plaintiffs offer to pay.

From a judgment in favor of plaintiffs with certain qualifications of rights in favor of each party, the defendants appeal.

This case cannot be distinguished on the questions of law presented, from those of Isaac Levy against the same company. 38 Ann. 25 and 29, in which this Court held that:

1. The codal provisions of our practice touching injunctions, are broader and more comprehensive than the rules of the chancery courts and include causes for injunction that would not be sanctioned in a court of equity, and that an injunction could issue to prevent the water-works company from cutting off its water supply on a proper showing.

2. The act of incorporation of the defendant company forbids it to charge more for water than was paid to the city at the date of its incorporation, March 31, 1877, and the charge then made by the city was fifteen cents for a thousand gallons to large consumers, and that a rice miller in New Orleans is entitled to the use of the water conveyed through the pipes and conduits of the water-works company on paying in advance for his supply at that rate.

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Davie vs. Levy & Sons.

In computing the quantity of water to be used, the district judge considered that the number of gallons equal the quantity of coal consumed and allowed fifteen cents for each thousand gallons, adding a reasonable amount for water employed for the cleaning of the boilers, etc., and decreed accordingly, reserving to the company the right to claim more than the amounts to be paid in advance, should more water be used than had been computed, and to the plaintiffs the right to claim the difference between that amount and the quantity of water used, were it eventually less than that computed.

The district court perpetuated the injunction.

We have no reason to disturb our previous views and the finding of the district court.

Judgment affirmed.

No. 9822.

WASHINGTON DAVIE VS. M. LEVY & SONS.

If the *interference* of the employer in the work, or any of its details, results in the doing of anything, as a part of the work, from which damage ensues to another, the employer is liable.

If one permits the establishment of a public nuisance upon property *under his control*, though incidental to a work otherwise lawful, he will be liable.

When an obstruction or defect, caused or created in a public street, is purely *collateral* to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the *employer is not liable*.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

W. S. Benedict and Branch K. Miller for Plaintiff and Appellee.

Braughn, Buck, Dinkelspiel & Hart for Defendants and Appellees.

The opinion of the Court was delivered by

WATKINS, J. This is an action for the recovery of \$15,000 damages from defendants, on the grounds stated in the petition of plaintiff, viz:

Plaintiff was a member of a fire company composing, along with the members of other companies, the Firemen's Charitable Association, which, at the time of the occurrence of the facts stated in this petition, was under a contract with the city of New Orleans to extinguish fires. That the duty of extinguishing fires under said contract was actually performed by the members of plaintiff's fire company, who were also members of the Firemen's Charitable Association.

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Davie vs. Levy & Sons.

That plaintiff, while on his way to a fire, riding upon the truck of his company, along a public street, in accordance with his duty, to aid as a member of said two organizations, in the extinguishment of the said fire, on a dark night, about 11 o'clock, was knocked off of the truck by a "coal run;" which was a sort of bridge built across the said street at about an average height of eight feet from the level of the street, leading from the coal yard, owned and operated by defendants, across said street and to the water's edge of the Mississippi river, on a street fronting which said coal yard was situated. Plaintiff charges that said "coal run" was erected by defendants without authority, and was a public nuisance established by defendants. An ordinance of the city is pleaded, permitting fire engines to proceed to fires, at such rate of speed as the drivers thereof may deem necessary.

This suit is for damages caused by his being knocked off of the truck by said "coal run," under the circumstances detailed in the petition.

The defence is: 1st. Contributory negligence, consisting of plaintiff's riding upon the said truck on his way to the fire; 2d. That said truck could have passed under said run without damage to plaintiff, if carefully driven; 3d. That the driver of the truck was warned not to pass under said "coal run;" 4th. That defendants had employed a competent contractor to put into said coal yard, from a flatboat lying opposite in the river, a quantity of coal; that for this purpose said contractor erected said "coal run;" that defendants reserved no control over said contractor; that said contractor alone was responsible to plaintiff.

I.

As the court below sustained defendants' last ground of defense, and rejected the plaintiff's demands, we will examine it first.

We find in the record the lucid and elaborate opinion of one of our learned brother of the district bench, who seems to have attended most carefully to all the facts of the case, and we have made the following extracts therefrom, viz:

There was on North Peters street "a coal-run, or bridge, which had been put, and was used (temporarily) as a passage for coal wheelers, who were engaged (not at the moment, but during the day) in discharging a boat-load of coal from a barge in the river, to the yard of the defendants, which faced the street at that point.

"The coal barge in question, as well as I can gather from the testimony, was distant from defendant's yard between seventy-five and one hundred feet, of which about thirty was made up of the street proper

or roadway, and the balance, of the banquette next the coal yard on one side, and the levee on the other.

"Upon each side of the roadway was a trestle—the one nearest the river being about seven and a half, or eight feet high; and the other nearest the yard, on the edge of the banquette, being about ten feet, or more, high.

"From the coal barge, across the levee, and ascending over these trestles was a continuous line of staging, or planking, across which the coal was wheeled, *over defendants' fence and into their yard.*

"This 'run,' as it is called, had been put up the day before the accident, and had been used the whole of that day. A baker's wagon had, however, come in contact with it, as at first constructed, with some damage to the top * * and it had been raised, where it spanned the street, some five or six inches; after which vehicles of various kinds passed under it without difficulty.

* * * * *

Again: "The evidence shows that for many years past the coal dealers of this city, who have their yards on the levee, have had the coal, they buy in barges in the river, discharged into their yards by contract; and that there are men, whose business it is to take such contracts, and who engage to furnish the labor, the implements and the material necessary to the work, and to transfer the coal, from the barge to the yard, at rates varying from three to four cents per barrel.

"It is further shown that defendants made such a contract with Pendleton Harris, and that Harris agreed to transfer about 9000 barrels of coal, from a barge which defendants had bought—and which was then lying in the river in front of their yard—into their yard at the agreed price of 3½ cents per barrel; Harris to furnish everything necessary to the work, and to receive his pay, when it should be completed.

"That Harris has been in the business, as a contractor, for about nine year, and is regarded as a competent and reliable man; and that it is a common and every-day occurrence for him, and other contractors, to build these runs, from the levee to the different yards, in order to carry the coal up, and make a pile of it, rather than spread it out over, perhaps, more space, that the yard would afford.

"One of the defendants testifies that he told Harris, when the contract was made, that he (Harris) must so deposit the coal in the yard, as to leave room for two carts to turn round and get on the scales; and that this was *part of the contract*, as originally made.

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"Harris, upon the other hand, testifies that, *after a portion of the coal had been discharged*, Marks Levy called his attention to the fact that he was *crowding their scales*; and told him *then* that he must leave the required space; that he (Harris) replied that he could only do so by putting up a run; and that Levy said * * that he must have the room for his carts to turn around, and get on the scales.

"There are several witnesses, employed by Harris as coal wheelers, who corroborate Harris; and even go much further.

"They testify that *Levy distinctly ordered* Harris to put up the run: pointed out the trestles, and told Harris to use them; and actually assisted in putting in a block to aid in the construction of the run.

"I am unable, however, to attach to this testimony the weight (that) is claimed for it.

"To put the coal in the yard *properly* was as much a part of Harris' contract, as to put it in at all; and he was equitably bound to furnish the appliances to put it in properly, as to furnish the wheel barrows and shovels, by means of which it was taken from the barge.

"It would be absurd to say that it would have been a *proper delivery* of the coal for him to have so *obstructed* the yard with it, as to prevent defendants' carts from reaching the scales, or entering, or turning around in the yard; and, more especially, as the evidence goes to show that it is an *understood part of such contracts* that the dealer shall designate in what part of his yard the coal is to be deposited. Nor can there be any dispute that such was the case in this instance.

"Whether Levy told Harris *before* the work began, or *after* it, that the space must be left, his right to insist upon this requirement, as part of the contract, was never, for a moment, questioned.

"There was then no reason why Levy should give any special instructions as to the manner in which the coal should be discharged; it was a matter that did not concern him, and in which he had absolutely *no right to interfere*; and Harris, who is a much more intelligent man than the laborers who worked for him, testifies positively and repeatedly that the order to put up the run consisted *merely in the fact that Levy required him to leave room for his carts around the scales*, and that in order to do so he was obliged to resort to the run; and that when he told Levy that he would have to put up the run, *Levy replied that he did not care how he put the coal in, so that it was done.*"

* * * * *

We have taken occasion to verify this statement of facts by making a careful examination of and a comparison with the record, and feel perfectly satisfied that it is substantially accurate.

II.

This defence is resisted by the plaintiff on the theory that: 1st. "If the *interference of the employer* in the work, or any of its details, results in the doing of anything as a part of the work, from which damage ensues to another, the employer is clearly liable, since he who *directs*, or in any manner participates in a *tort*, is liable as principal therein."

2d. "If one permits the establishment of a public nuisance *upon land or property under his control*, though incidental to a work otherwise lawful, he will be liable for any damage caused by it, though such public nuisance be actually erected by an independent contractor."

These two propositions are supported by the cited authorities; but the difficulties in plaintiff's way are rather those of *fact* than of *law*.

In our opinion, the evidence does not show that defendants *interfered* with the contractor "in the work or any of its details."

It does not show that defendants *permitted* the establishment of a public nuisance at all; or if at all, "*upon land or property under their control*."

The interfering "run" whereby the accident happened to the plaintiff, was erected upon cribs or movable piers that stood on either side of a *public street* or highway, which was spanned or bridged overhead, at a height of eight to ten feet with plank or scantling. The coal was wheeled from the coal barge in wheelbarrows over this trestle, and poured or *dumped off* into defendants' coal yard in a pile or heap.

The claim of the plaintiff is "that he was knocked off of the truck by a 'coal-run,' which was a sort of a *bridge built across the said street*."

Again: "Plaintiff charges that said 'coal-run' was *erected by defendants* without authority, and was a public nuisance established by defendants."

The case of *Robins vs. Chicago City*, 4 Wallace, 679, is precisely in point and in exact parallel with the one at bar.

The Court say:

"When the obstruction or defect caused or created *in the street*, is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the *employer is not liable*; but where the obstruction or defect which occasioned the injury, results *directly* from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and *authorizes him to do those acts* is equally liable to the injured party." Citing 23 Pickering, 24; 17 N. Y. 104; 16 Wallace, 567, *Water Company vs. Ware*.

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A similar principle has been recognized by this Court in the case of *Sweeny vs. Murphy*, 32 Ann. 628, in which it was held, that "the master and owner of a ship, having contracted with a competent stevedore to load her and not having contracted or directed, in any manner, the laborers employed in the loading, are not responsible for injuries resulting from the negligence of said laborers." 29 Ann. 791, *Catherine Riley vs. State Line Steamship Company*.

We therefore conclude with the district judge who tried this case that, if damage results from the *manner* in which a contractor chooses to execute a perfectly valid contract, without the proprietors' *interference or direction*, the latter is not responsible therefor.

If, in the performance of the contract by the contractor, in the manner that has been pursued ordinarily by persons of that occupation, damage result, it will be considered collateral only to the contract, and not an incident of it for which the proprietor is responsible.

Judgment affirmed.

 No. 9855.

SUCCESSION OF MRS. CHARLOTTE PIFFET.—ON CLAIM FOR THE MARITAL FOURTH.

In a contest over the claim of a survivor for the marital portion out of the succession of the surviving husband or wife, the plea of prematurity is not good if the judicial demand for the portion is made after the presentation of a final account of administration by the executor, although circumstances subsequently occurring may prevent an absolute decree fixing the precise amount of the marital portion.

If the survivor is in necessitous circumstances independently of the legacies which the deceased has left him, he is not debarred of his right to claim the marital portion, but in such a case he is bound to include in this portion what has been left to him as a legacy by the deceased. C. C. Art. 2382.

The indebtedness which the survivor owed to the deceased, and from which he has been released and discharged by the will, is not a legacy within the meaning of Art. 2382, to be deducted from the portion accruing to the survivor.

The right to claim and receive the marital portion is transmissible by inheritance, if the surviving spouse, who had made judicial demand therefor, dies before rendition of judgment on his demand.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

J. Ad. Rozier and Jos. P. Horner for Plaintiffs and Appellees:

I.

The surviving husband or wife takes the marital fourth as heir; the jurisprudence denominates it an inheritance. *Dunbar Heirs*, 5 Ann. 159; *Connor vs. Connor*, 10 Ann. 651-450; *Gee vs. Thompson*, 11 Ann. 657; *Foster vs. Ferguson, Tutor*, 1 Ann. 922. The

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wording of the Art. 2382, C. C., he or she has a right to take out of the succession of the deceased the fourth of it, in full property, an absolute ownership regulating descent, not an action of creditor against succession. 27 Ann. 594; 7 N. S. 342.

II.

The heir who accepts is considered as having succeeded to the deceased from the moment of his death, 947 C. C., and he transmits the succession to his own heirs, C. C. 944, and is authorized to institute all the actions which the deceased had a right to institute, and to prosecute those already commenced. 945, C. C. "Sans être tenu de fournir d'autres preuves que les preuves que l'on pourrait exiger du défunt." Laurent, vol. 9, §§ 215, 216. The son and grandson of John Baptiste Piffet, Sr. (who was surviving husband, now deceased), succeed to all the rights of the latter. 943 C. C. They have been recognized as heirs, and as such put in possession.

III.

Homestead law must not be confounded with the marital fourth. The latter is not a charity or bounty. The status of the surviving husband or wife is that of heir. Art. 2382 C. C. The phraseology of the Spanish laws, from which this right comes to us directly, is "*heredar, herencia*." Gutierrez, vol. 11, pp. 638-39. Gomes, "*tunc succedit cum liberis communibus, in quarta parte bonorum uxoris*." Melançon, 6 La. 115; Succession of Fortier, 3 Ann. 104.

IV.

The régime of separation of property and exclusion of community are not exclusive of the right to the marital portion; no antagonism. The Article 2382 C. C. is a law of descent. The proper spheres of each are marked; both harmonize.

V.

This claim is not premature. The universal legatees, who are also legatees under a particular title, have caused themselves to be put in possession of their respective legacies under particular title. Where heirs have received a special amount of money or property, which they detain without any such settlement, no previous liquidation necessary; an estoppel. *Durian vs. Doiran*, 9 Rob. 101; 7 Ann. 283; 8 Ann. 488; *Harrell vs. Harrell*, 17 La. 379. Besides, the executors caused the residuum of the properties to be sold for the very purpose of effecting this settlement, and thus the estate is converted into cash, on deposit in bank. The succession is rich, debts paid, final tableau of distribution filed, wherein the executor asks to turn over to the heirs the property and assets, and specially prays to be discharged from this trust as executor. The succession is thus actually liquidated; the marital portion can be claimed by way of opposition. Succession of Leppleman, 30 Ann. 468. Nearly all the heirs are absentees. 2 N. S. 447; 13 La. 298; 6 Ann. 152; Conf. Laws, § 1513; 3 Pickens, 128.

VI.

The remission clause in the will is not to be considered as a donation, or something to be taken on account, or to be taken in deduction of the marital fourth. 2130 C. C. and *Marcadé*, Vol. 4, Nos. 414, 598. Besides, the evidence shows that the deceased husband was not indebted to the *de cuius*.

VII.

Inventory not conclusive as to value of merchandise. There is error in valuing it at more than \$2000. *Suc. Deane*, 33 Ann. 867; 12 Ann. 760; 1 Ann. 220.

VIII.

The evidence shows clearly that the deceased husband was left in necessitous circumstances. C. C. 2382.

T. Gilmore & Sons for Defendants and Appellants:

1. Where the parties were married under the régime of separation of property and exclusion of community, and each renounced all right upon the property of the other, the

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- survivor cannot claim the marital portion; such claim would be in derogation of the marriage contract, which is the law of their union as to property and must be observed. C. C. 2325; Boileux Com. on Arts. 1536 to 1539, French Code; Marcadé, Art. 1536, Vol. 6, p. 12; Tropiong Cont. de Mar., Vol. 3, p. 761; Pothier Communauté, No. 464; Laurent, Vol. 23, p. 443.
2. Article 2382 C. C., which provides that "when the wife has brought no dowry, or what she has brought is inconsiderable with respect to the condition of the husband, if either die rich, leaving the survivor in necessitous circumstances, the latter has a right to take out of the succession of the deceased what is called the marital portion," does not apply to the case of husband and wife who, at the time of marriage, stipulate for separation of property and exclusion of community, and are in opulent circumstances. Succession of Leppelman, 30 Ann. 468, and authorities there cited; see also, *Armstrong vs. Stecher*, 3 Ann. 713.
 3. A husband, who having arrived at the age of 85 years, being free from debt, a legatee of his deceased wife of a usufruct worth \$2500 or \$3000 a year, of merchandise worth \$5389.69, and is liberated from the payment of his debt to the wife, is not left by the death of his wife in necessitous circumstances within the meaning of Article 2382 C. C.
 4. The husband, dying before the succession of the wife is liquidated and before his claim to the marital portion is established, does not transmit his rights to his heirs. The obligation on the part of the wife to support the husband is personal. C. C. Arts. 2000-2004, 119; *Vasseur vs. Dupré*, 8 Ann. 488; *McCoy vs. McCoy*, 26 Ann. 687; Succession of Robertson, 28 Ann. 832; Succession of Durkin, 30 Ann. 669.
 5. The surviving husband or wife entitled to the marital portion "is bound to include in this portion what has been left to him as a legacy by the husband or wife who died first" C. C. 2382; *Melançon's Widow vs. His Executors et al.*, 6 L. 111; Succession of Derouen, 10 Ann. 675.
 6. "Until the succession is liquidated, it is impossible to ascertain whether the wife died rich, and unless she did and the husband is shown to be in necessitous circumstances the marital portion is not due." *Vasseur vs. Dupré*, 8 Ann. 488; *Duriaux vs. Doiron*, 9 Rob. 103; *Melançon's Widow vs. His Executors*, 6 La. 110; *Harrall vs. Harrall*, 17 La. 376.

T. J. Semmes & Legendre, J. O. Nixon, Jr., L. L. Levy, and J. O. A. Fellows, on the same side.

The opinion of the Court was delivered by

POCHÉ, J. This controversy involves the right of J. B. Piffet, husband of the deceased, to claim the marital portion out of her succession, and the right of his heirs at law to set up their claim thereto as an inheritance from him.

The affirmative of both these propositions was maintained by the district court, and the present appeal is prosecuted by the executor and by legatees under the will of the deceased.

The claim is predicated on the provisions of Article 2382 of the Civil Code, which reads as follows:

"When the wife has not brought any dowry, or when what she has brought as a dowry is inconsiderable with respect to the condition of the husband, if either the husband or the wife die rich, leaving the sur-

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vivor in necessitous circumstances, the latter has a right to take out of the succession of the deceased what is called the *marital portion*; that is, the fourth of the succession in full property, if there be no children, and the same portion in usufruct only, when there are but three or a smaller number of children; and if there be more than three children, the surviving, whether husband or wife, shall receive only a child's share in usufruct, and he is bound to include in this portion what has been left to him as a legacy by the husband or wife who died first."

Mrs. Charlotte Piffet died on January 17, 1884, and her will was admitted to probate on the twenty-first of the same month. She left no issue, and her will contained numerous bequests intended as a full disposition of her estate, which was inventoried at \$417,027.87.

In her will she bequeathed to her husband a certain stock of goods valued in the inventory at \$5,389.69, and the usufruct, during his lifetime, of two pieces of immovable property, producing together a rental averaging \$250 a month; and she released and discharged her said husband from all indebtedness which he owed her, which indebtedness was appraised in the inventory at the sum of \$65,382.37.

The record shows that the two spouses were separate in property by marriage contract.

Some time after judicially claiming the marital portion, J. B. Piffet, the surviving husband, died, and his sole heirs, Adolph Piffet, his son, and J. B. Piffet, Jr., his grandson, renewed it, and they are appellees before us in this litigation.

The district judge found all the facts required by law to entitle the surviving husband to claim the marital portion as well as his heirs to claim under him, and in his judgment, he directed that the amount of indebtedness from Piffet to his wife be deducted from the active mass of the succession, and that one-fourth of the remainder after deducting the debts, (which are insignificant) be set apart as the marital portion, subject to deduction therefrom of the value of the stock of goods bequeathed to the husband as above stated, and of the amount received by him under his usufruct of the two pieces of immovable property, as stipulated in the will.

After a thorough consideration of the case we have reached the conclusion that the judgment of the district court is correct in every particular, and we shall therefore affirm it.

Under our understanding of the pleadings, the issues presented involve a discussion of the following points:

1. Was this demand premature?
2. Was J. B. Piffet entitled to the marital portion?

Succession of Piffet.

3. Having died before he realized it, did he transmit his right to his heirs at law ?

4. Is the testamentary disposition of Mrs. Charlotte Piffet, touching her husband's indebtedness to her, a legacy within the meaning of Article 2382 of the Civil Code, and should the amount thereof be as such deducted from the marital portion ?

I.

The contention that the demand for the marital portion is premature is answered by the record itself, which shows that it came up by way of opposition to the final account of administration presented by the executor, who proposed therein to wind up the succession, and to distribute the whole estate under the terms of the will, without recognizing the right of the surviving husband to the marital portion.

It also appears from the record that by far the greater portion of legacies under particular titles had been delivered, that the remaining property of the succession had been sold, and that the executor had in hand cash funds exceeding one-fourth of the entire amount of the succession, after deduction of the husband's indebtedness which had been extinguished by the testatrix.

If at that juncture, which to our minds was the most propitious for action on the part of the surviving husband, his demand can be deemed premature, it would be difficult to conceive at what period the same objection could not be successfully urged.

It is true, as suggested by appellant's counsel, that when the judgment was rendered below, the condition of affairs was not such as to allow the court to fix in figures the precise amount of the marital portion, but this is owing to a circumstance which cannot affect the legal status of Piffet's demand, as it is due to an incident, which occurred after the institution of his judicial demand, in the shape of a suit by a party setting up ownership to a piece of valuable immovable property which formed part of the succession of the deceased.

But for that unforeseen complication, the succession was practically liquidated, sufficiently to allow the court to precisely determine the amount of the marital portion.

Such was not the condition of the cases presented in the authorities on which appellants place their reliance on this point. *Harrell vs. Harrell*, 17 La. 376 ; *Durieux vs. Doiron*, 9 Rob. 101 ; *Vasseur vs. Dupré*, 8 Ann. 488.

The rule adopted in those cases is that the succession must have reached a point in its settlement at which it may be shown that the

Succession of Piffet.

deceased died rich, and that the survivor is in necessitous circumstances. Those two essential facts are glaring in this record.

II.

And they are the two questions which properly come up under the second point of the discussion.

In this connection the record shows to our entire satisfaction that Mrs. Charlotte Piffet left an estate appraised at a sum exceeding four hundred thousand dollars, all her separate property without debts; that she had brought no dowry, and that she left no descendants, leaving a will by which she disposed of all her property; that at the time of her death her surviving husband, who had met with great disasters in his business, had no property or other resources from which he could derive any income, and that he was over eighty years of age.

Under such a showing, we feel no hesitation in concluding that she died rich, that he was left in necessitous circumstances, and that his case combined all the circumstances required by the article of the Code to entitle him to the marital portion.

But the pivotal contest on this point is found in the argument of appellants' counsel, that with the legacies left him by the deceased, the surviving husband had an income sufficient for his maintenance, even becoming the condition and style of life which he had led during the marriage.

Their contention seems to be that the condition of the surviving spouse, in a contest for the marital portion, must be tested under the effect of his or her circumstances, created by the testamentary dispositions in his or her favor, contained in the will of the deceased.

The proposition might be maintained in a case where the deceased had bequeathed to the survivor an amount equal to one-fourth of the whole succession, as in such a case the marital portion added to the legacies, would vest one-half of the succession in the survivor, to the detriment either of the collateral heirs or of the legatees of the deceased.

The proposition is therefore relatively, but not absolutely correct; and it manifestly has no application to this case in which the amount of the legacies to the survivor is avowedly insignificant when compared to one-fourth of the amount of the succession.

When levelled at the position of appellees in this case, the argument is answered by the very text of the article.

It provides in unqualified terms that the surviving spouse, who is in other respects entitled to the marital portion, "is bound to include in

Succession of Piffet.

this portion what has been left to him as a legacy by the husband or wife, who died first." The article does not contemplate any exception based upon the value or amount of the legacy when compared to the value of the marital portion, as a condition to claim the marital portion, and its proper construction does not bear an interpretation which would defeat the claim for the marital portion, by the consideration that, with what was left as a legacy to the survivor, he could derive an income sufficient to maintain him in the rank or condition which he enjoyed during the marriage.

Thus in a case in which the marital portion might amount to \$100,000, a legacy to the survivor equal to the sum of \$50,000, would not bar him from claiming the marital portion in a case in which it would be one-fourth of the succession. The practical meaning of the text would require him to include the legacy in making up the portion, hence he would take \$50,000 under the will, and \$50,000 under the effect of the law.

As this law finds its source in a noble quality of the human heart, and its sanction in a laudable desire to provide a suitable position for the surviving spouse of a rich consort, so as not to throw on the cold charities of the world a person who had hitherto held a high rank, and had enjoyed the advantages of wealth, the principle which it embodies has always met with a liberal construction by the courts of all the systems of laws which have enacted a similar provision.

Such were the characteristic features of the decisions rendered by the tribunals of that part of France which followed the Roman law previous to the adoption of the Code.

Several interesting cases, too long to be recited in this opinion, are reported by Merlin in his "*Répertoire de Jurisprudence*, Verto Quarte de conjoint pauvre."

The same spirit prevails throughout our own jurisprudence. In one of the earliest cases, *Melançon's Widow vs. His Executor*, 6 La. 105, this Court was called to deal with the two questions, namely: the right of the survivor to the marital portion, and the effect of a legacy in her favor on her alleged necessitous circumstances. The net assets of the succession amounted to \$5000, the value of the legacy to the wife was \$1000—and the court granted the marital portion subject to the deduction of the legacy. This is precisely the rule which the district judge followed in the instant case, and which we propose to enforce.

In the case of the *Succession of Fortier*, the surviving husband was allowed the marital portion of a succession amounting to \$26,000, although he owned property valued at \$1100. 3 Ann. p. 104.

 Succession of Piffet.

It is very clear to our minds that if the law-maker had intended the consideration of the amount of the legacy left to the surviving, by the deceased, spouse, as a condition of his title to the marital portion, he would certainly not have provided that the value of the legacy could have had no other effect but to decrease *pro tanto* the amount to be received as the marital portion.

We therefore hold that the legacies left by Mrs. Piffet to her husband did not affect the condition of the necessitous circumstances in which he was left at the time of her death, so as to debar him of his marital portion out of her succession.

III.

But, it is argued, as J. B. Piffet died before judgment was rendered on his judicial demand for the marital portion, the right which he was seeking to enforce and which was personal to himself has perished with him, and therefore his heirs cannot be heard to claim any benefit to themselves thereunder.

It is argued that the provision of the article simply contemplates a bounty, and that with the death of the beneficiary, the reason of the law ceasing, the law itself becomes a dead letter.

We must first inquire into the real nature of the right conferred in the text itself. We there find the following language: "The latter (the survivor) has a right to take out of the succession of the deceased what is called as the *marital portion*, that is, *the fourth of the succession in full property*, if there be no children." * * Does language, as plain and as unambiguous, bear any other construction but that which the words used import in their ordinary signification? Can the language of the article be made to mean anything else than the creation of a conditional forced heirship?

It cannot be made to mean otherwise than that the surviving spouse, left in necessitous circumstances at the death of his consort who has died rich, is vested at his option with the full ownership of one-fourth of the succession of the deceased, if there be no children.

Conceding, as the appellant contends, that the controlling object of the law-maker was thereby to provide the survivor with the means *bene et honeste vivere*, it appears clear to our minds from the language used that, so anxious and so eager was he to place that boon beyond the possibility of a doubt, or beyond the reach of discussion, that he did not take the pains to guard against the possibility, so strong in human events, of the death of the survivor before he could realize the benefit of the right thus conferred.

Having thus vested that one-fourth of the succession in the survivor

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in *full property*, the law-maker could not, without infringing on the established laws of descent and inheritance, have placed any restrictions to the full ownership which he there contemplated and actually created.

A very material distinction is made in the article between the case where there are no children and that in which there are children. In the latter case the marital portion consists only of the usufruct, but in the former it vests in full property. It is an axiom in jurisprudence that when the law has made no distinction, courts can make none. Is it not as true that when the law does make a clear distinction, courts must in duty observe it? Our laws recognize no mode of abridging the full exercise of the right of ownership which they have once vested in any one.

It is not an unreasonable deduction from appellant's argument that if the right of Piffet to the marital portion perished with him, it must then have been merely a life-time usufruct; whereas, under the very terms of the law, it was a right of full property. Does not that reasoning tend to abrogate or obliterate the clear distinction which the article has made between the two different tenures or titles of use and enjoyment under the right of the marital portion?

The unmistakable tendency of our courts has been to interpret that provision according to the plain terms of the text, and hence the right to the marital portion in cases where there are no children has been designated as an inheritance. *Ambercrombie vs. Caffray*, 1 N. S. p. 1; *Dunbar vs. Dunbar*, 5 Ann. 158; *Connor vs. Connor*, 10 Ann. 440.

We therefore conclude that the right of J. B. Piffet to the marital portion, which he had judicially demanded, and which he was pressing when he was stricken by death, has been transmitted to his heirs at law.

IV.

Conceding for the sake of argument that Piffet, and through him his heirs, have established their rights to the fourth of the succession, subject to the deduction of the legacy, appellants contend that the amount of Piffet's indebtedness to his wife, inventoried as above stated, at \$65,382.37, and from which he was released in the will, should be included as a legacy and as such deducted from the marital portion.

Without undertaking to decide absolutely that such a testamentary disposition is not a legacy, which we think is the correct view, we hold that under the letter, as well as the spirit, of the Article 2382, such a release is not a legacy, the amount of which is to be deducted from the marital portion.

Succession of Piffet

Under the interpretation advanced by appellants, circumstances of easy conception could in many cases entirely defeat the very object proposed by the enactment.

Such a circumstance is very nearly illustrated in this case. Under the judgment rendered below the amount of the marital fourth would be \$87,911.38, and by subjecting it to deductions of the real legacy and of the indebtedness treated as a legacy, it would be reduced to \$9,939.32, and it might be reduced to naught if it should happen that the indebtedness of the survivor was equal in amount to the fourth of the succession.

And thus the object of the law-maker in his attempt to place the survivor of a rich consort beyond the pangs of poverty and actual want would be entirely frustrated.

A legacy is defined to be "a bequest or gift of goods or chattels by testament;" it has also been extended to include real estates. "*Bouvier*."

To every mind it carries the idea of a real affirmative advantage derived through the will or testament of a deceased person, and not the negative relief of being discharged from an obligation.

Speaking of the nature of the remission of a debt, Marcadé says distinctly that it is not a donation, because it transmits no right, but merely destroys a right in renouncing it. Marcadé, vol. 4, p. 598, § 787.

Coin-Delisle in his commentaries on donations and testaments holds the same doctrine. He says: "La remise de la dette, même faite uniquement pour obliger le débiteur, peut être un acte de bienfaisance, mais ce n'est pas en soi une donation, à moins que ce ne soit un profit d'un successible qui doit rapporter à la succession de son auteur tout ce qu'il en a reçu directement ou indirectement." P. 273, par. 14.

As the concluding words of the paragraph evidently refer to collations they suggest to our minds an analogy between the rights of an heir to be exempt from collating a remitted indebtedness which he owed to the ancestor, and that of the surviving spouse to deduct from the marital portion the amount of his indebtedness remitted in the will.

In the case of *Austin vs. Palmer*, 7 N. S. 20, the court dealt with a case in which the ancestor had gratuitously remitted a debt due to him by one of his children, and the court held the release good for the portion of the estate which the law leaves at the disposal of a parent.

It follows from that principle that if the creditor had not been held to the legally disposable portion, and had been as free in the disposition of his property as was the case with Mrs. Piffet, the release would have been held as complete and unconditional.

Woodward vs. Railway Company.

Such is the remission with which we are now concerned, and hence we hold that the indebtedness thus released or discharged, forms no part of the legacy within the meaning and intent of the provision of Article 2382.

In conclusion we note an argument made by appellants, grounded on the provisions contained in the marriage contract between Piffet and his wife.

It is contended that, by the stipulation of an entire separation of property, the spouses were mutually debarred of the right of claiming the marital portion. In view of the exceptional character of the legislation contained in the article of the Code, and of the sweeping provisions therein contained, manifestly intended to carry out a special object, we have not considered the argument as serious, especially as to sustain it appellants were almost driven to the necessity of denying that Mr. and Mrs. Piffet were husband and wife at all.

But the argument, even when strained to that extent, is fully met by the decision of this Court in the case of Gee vs. Thompson, 11 Ann. 657, in which the wife, although living separate from her husband under a decree of separation from bed and board, was allowed the marital portion.

Judgment affirmed.

No. 9826.

THOMAS J. WOODWARD VS. THE AMERICAN EXPOSITION RAILWAY COMPANY.—HENRY WESTON, INTERVENOR.

A railroad constructed on soil not belonging to the owner of, or to the corporation which built the road, is movable property and as such liable to the law regulating pledges of movables.

The pledgee of a railroad may take legal possession, as required by the law on pledges through a third person chosen by him and the pledgor.

A party who is bound as endorser with others for the payment of a note, secured by pledge, is legally subrogated to all the rights of the pledgee by the payment of the note.

A party whose materials, sold to another, were used in the construction of a work, has no privilege on such work, because his materials were not sold to the owner or his agent, or his sub-contractor.

A PPEAL from the Civil District Court for the Parish of Orleans.
Righthor, J.

E. M. Hudson, W. F. & D. C. Mellen and J. P. Horner for Plaintiff and Appellee :

A railroad constructed on the soil of another is movable personal property; and a pledge thereof is governed by the law regulating the pledging of movables. 3 R. p. 166; C. C. arts. 3140, 3152.

39 566
46 1067

39	566
122	736

Woodward vs. Railway Company.

The vendor of movables has a special privilege on the same superior to that of any creditor except the lessor. C. C. art. 3217, No. 7; arts. 3227, 3263.

Subrogation takes place by operation of law, "of right," "for the benefit of him, who being bound with others, for the payment of the debt, had an interest in discharging it." C. C. art. 3249, No. 3.

A privilege in favor of a furnisher of material for the construction of buildings or other works, exists on the same only when the materials have been sold by the furnisher to the owner of the work, a third person employed by him, his agent or sub-contractor, C. C. arts. 3249, No. 3, and 3272.

Braughn, Buck, Dinkelspiel & Hart for Intervenor and Appellant:

Those who have supplied the owner, or other persons employed by the owner, or the agent of the owner, with materials of any kind for the construction of an edifice or other work are entitled to a privilege thereon. C. C. 3249.

The general issue is waived by a plea of novation. Hennen's Digest p. 1141.

A conventional subrogation must be made at the time of payment. 15 Ann. 400; 24 Ann. 471.

A contract of mandate may be tacit as well as express, and may be gathered from circumstances as well as from declarations. 8 Robinson 236; 14 Ann. 302; 22 Ann. 496.

The opinion of the Court was delivered by

POCHÉ, J. This case presents a contest between plaintiff and intervenor, both creditors of defendant company, for preference of payment out of the proceeds of portions of the railroad property.

Plaintiff is the holder of a note representing the balance of the purchase price of the rails and other iron appurtenances used in the construction of the road, which connected Canal street, in this city, with the grounds of the American Exposition.

The note, which had been executed by the defendant corporation in favor of the vendor of the materials referred to, had been endorsed by plaintiff and by other persons, and had been secured by an act of pledge, under which the railroad and all its appurtenances had been placed in the possession of a third party by mutual consent of the contracting parties. After maturity of the note it was paid by plaintiff, who thus acquired the ownership and possession thereof. In his suit he claimed to have been subrogated, by payment as endorser, to all the rights of the original holder of the note, including the vendor's privilege on the materials sold by the latter, and the right of pledge over the entire property, against which he sued out a writ of sequestration.

Intervenor claims a privilege on that portion of the road in the construction of which, lumber, which he had sold, was used, such as bridges, cross-ties, etc., and he resists plaintiff's right of pledge on that part of the work. He prosecutes this appeal from a judgment in favor of plaintiff.

The vendor's and furnisher's privilege claimed by intervenor, is resisted on the ground that his lumber was not sold to the defendant

Woodward vs. Railway Company.

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Woodward vs. Railway Company.

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The note, which had been executed by the defendant corporation in favor of the vendor of the materials referred to, had been endorsed by plaintiff and by other persons, and had been secured by an act of pledge, under which the railroad and all its appurtenances had been placed in the possession of a third party by mutual consent of the contracting parties. After maturity of the note it was paid by plaintiff, who thus acquired the ownership and possession thereof. In his suit he claimed to have been subrogated, by payment as endorser, to all the rights of the original holder of the note, including the vendor's privilege on the materials sold by the latter, and the right of pledge over the entire property, against which he sued out a writ of sequestration.

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The vendor's and furnisher's privilege claimed by intervenor, is resisted on the ground that his lumber was not sold to the defendant

Woodward vs. Railway Company.

corporation, or to another person employed by the company, or by its agent or sub-contractor; but it is alleged that the lumber was purchased from intervenor by "Cummings & West," a firm who had acquired certain privileges on the Exposition grounds, by which firm it had been sold to the Exposition, and in turn sold by the latter corporation to the defendant, by which it was used in the construction of the road.

The pivotal question involved in intervenor's contested privilege hinges upon the fact of who was the purchaser of his lumber, in the direct sale made by him.

If it was purchased by the defendant or by a person employed by it, or by its agent or sub-contractor, his privilege must be enforced. C. C. art. 3249, sec. 3.

But if the lumber was purchased by "Cummings & West," and from them through the Exposition it reached the defendant, the case is against him.

The notes which he holds as representing the purchase price of the lumber was executed by the Exposition management, and made payable to the order of "Cummings & West."

That circumstance is conclusive proof that the lumber was not sold directly to the railway company; and it is *prima facie* evidence that the lumber had been sold by "Cummings & West" to the Exposition.

That presumption is strenuously resisted by intervenor, who contends that "Cummings & West" were merely intermediaries between the Exposition and himself in the negotiations which led to the contract of sale.

On this point the voluminous testimony in the record is decidedly conflicting, and fortunately the necessities of this case do not absolutely require a final adjudication thereof.

In the face of the overwhelming evidence showing that the lumber was once purchased and owned by the Exposition, by purchase, either from "Cummings & West" or from himself directly, intervenor abandons on appeal the contention that he had dealt in the premises directly with the railway company, but he relies on the theory that in their purchase of the lumber from him, the officers of the Exposition were in fact the agents of the defendant corporation.

From our reading of the record we find that at the date of the purchase and delivery of the lumber in question, the railway company had not yet been created or organized, and that the officers then contemplated the construction of the railroad at the cost, and for the use and benefit of the Exposition.

Woodward vs. Railway Company.

But the plan was subsequently abandoned and a new and distinct corporation was organized, known as the American Exposition Railway Company, by which the road was built and operated, and to which the Exposition sold the lumber which it had acquired for the purpose of building a railroad, and for which it obtained valuable consideration from the defendant company, purchaser.

These facts are effectively destructive of the pretension of intervenor, who is thus left without a vendor's privilege, or the privilege of the furnisher of materials used in the construction of a work. As to the privilege set up by plaintiff on the whole road, it clearly results from the record and from the law applicable to the case.

As the railroad was constructed on the soil of another, it was movable property, and as such governed by the law regulating pledges on movables. *State vs. Mexican Gulf Railroad Company*, 3 Rob. 513.

Under the terms of the act of pledge, the creditor was legally put in possession of the thing given in pledge to him, by means of a third person agreed upon between the parties. *C. C. 3152, 3162; Weems vs. Delta Moss Company*, 33 Ann. 973.

As plaintiff was bound with others for the payment of the note, he became by operation of law subrogated to all the rights of the original pledgee at the moment that he paid the note. *C. C. 3249, No. 3.*

In this connection, intervenor makes the point that plaintiff must be defeated in his claims based on the act of pledge, because, in his answer to the petition of intervention, he rested his right thereto on a conventional subrogation executed in his favor by the original pledgee several months after his payment of the note, on the ground that the conventional subrogation, which should be made at the time of payment, was made too late to be of any avail to him in the premises.

It is true that such a subrogation was made, and that it was made too late; it is also true that in his answer to intervenor, plaintiff does claim relief thereunder, but this was simply cumulative pleading—and as such not destructive of the allegation in his original petition, wherein he correctly grounded his claim to the pledge by right of legal subrogation, and that is the right which we herein sustain in his favor.

These views have led us to the conclusion that the district judge has done substantial justice to the parties in this litigation.

The judgment appealed from is, therefore, affirmed at appellant's costs.

Milling Company vs. Lawler.

the stock of goods and all the personal property to the payment of the ordinary claims, which funds should have been applied to the payment of the privileges, and among the first to her own, and after occupying for more than three years the dwelling and storehouse belonging to the succession, without paying or accounting for the rents, she cannot now be heard in her demand upon the mortgage creditors to yield up to her enough of the proceeds of the mortgaged property in their hands to pay her claim, when she has possessed the means, and could, by the proper application or imputation of those means, have satisfied her privilege without touching on the rights of these creditors.

Judgment affirmed.

No. 9542.

YEAGER MILLING COMPANY VS. HENRY T. LAWLER.

In a contract of sale on terms of credit, breach of the resolatory condition on the part of the buyer does not arise till the term of credit has expired, before which time an action to annul on this ground will not lie.

Fraud, however, when established, vitiates the contract *ab initio* and is not dependent, for its assertion, upon the expiration of the term of credit.

A representation of solvency on the part of the buyer is ordinarily implied in every application to purchase goods on credit; but it requires a wilfully false statement to that effect, as a *fact* and not as a mere *opinion*, to vitiate the contract; or else it must appear that, at the date of the purchase, the buyer contemplated a swindle and did not intend or expect to pay for the goods.

In this case no fraud is established such as to vitiate the sale, and the action of plaintiff to annul the sale before expiration of the terms of credit and sequestering the goods was premature.

The sequestration having been wrongfully issued, defendant was entitled to actual damages which are assessed according to the peculiar circumstances of the case.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Singleton, Browne & Choate for Plaintiff and Appellee.

J. O. Nixon, Jr., for Defendant and Appellant.

Henry Denis, A. Pitot and Henry C. Miller for Intervenor and Appellees.

The opinion of the Court was delivered by

FENNER, J. Plaintiff had sold to defendant a large quantity of flour on credit, evidenced by the latter's acceptances, amounting to \$11,345, maturing at various dates in May, 1880.

39	572
52	26
39	572
113	903

Before the maturity of any of these acceptances, plaintiff, averring that the flour had been obtained by the defendant through fraud and misrepresentation, and that he was then making way with it, with the view of defrauding plaintiff, brought this suit to cancel and annul the sale, and obtained a writ of sequestration, under which 2352 barrels and 1500 sacks of flour were seized herein.

Part of the flour sequestered was in process of loading under shipment to Europe, and the bills of lading, therefore, had been advanced upon by the Citizens' Bank to their value. The remainder had been pledged to the Hope Insurance Company and the Mechanics and Traders' Insurance Company, also to its value.

These parties intervened in the case and bonded the flour on which their claims rested; and their claims were sustained by the final judgment of the Court, of which, in this respect, neither party complains.

Defendant moved to dissolve the sequestration on the ground, amongst others, that the affidavit on which it issued was untrue, and subsequently filed answer denying specifically the truth of plaintiff's allegations, together with a reconventional demand for \$35,000 damages. Considerable testimony was taken on the rule to dissolve, but it was finally referred to the merits. Subsequently plaintiff filed a supplemental petition, representing that, in view of the claims of intervenors, it might prove impossible to recover the property sequestered, and praying for personal judgment against defendant for the price of the flour, the sale of which should not be annulled, and the same returned.

The judgment appealed from sustained the claims of the intervenors, quashed and set aside the sequestration, gave judgment against the defendant for the price claimed, and rejected defendant's reconventional demand.

We think the court erred in rejecting the reconventional demand.

There is no room here for the application of the resolutive condition implied in commutative contracts, which only takes effect when either of the parties has failed to "comply with his engagements." C. C. 2046. At the date of the sequestration the term of payment accorded to Lawler under the contract of sale had not expired, and therefore there was no breach of his obligation.

But there exist other causes for the avoidance of contracts, amongst which is fraud, which is defined in our Code to be the "cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one

Milling Company vs. Lawler.

party, or to cause an inconvenience or loss to the other." C. C. 1847, 1881.

This vice, when established, destroys the contract *ab initio* and is not dependent for its assertion upon the expiration of the term allowed. *Brull vs. Peets*, 3 La. 282; *Parmeles vs. McLaughlin*, 9 La. 436; *St. John vs. Sanderson*, 15 La. 365; *Galbraith vs. Davis*, 3 Ann. 95; *Cook vs. West*, 3 Rob. 332.

The party alleging fraud carries the burden of proving it. C. C. 1848.

The only fraud alleged in this case is that, before obtaining the credit, defendant falsely and with intent to defraud represented himself to be solvent, knowing that he was not so.

A representation of solvency is ordinarily implied in every application to buy merchandise on terms of credit; but it requires a wilfully false statement to that effect, as a fact, and not as a mere opinion which may be innocently mistaken, to vitiate the contract. *Morse vs. Shaw*, 124 Mass. 59. Or else, it must appear that, at the date of the purchase, the buyer contemplated a swindle and did not intend or expect to pay for them. *Benjamin on Sale*, sec. 440, note (c) and numerous authorities cited.

The evidence here does not satisfy us that Lawler had, at the time of sale, any fraudulent purpose, or made any such misrepresentation as would invalidate the sale.

The only misrepresentation sought to be proved is that, in February, 1886, he had made certain statements to the manager of plaintiff to the effect "that he had a plantation, a sugar plantation, and his residence in the city, and that he was in a better condition now than he was when we had trusted him for a larger amount in the past; that he had always paid what he owed, and that we were running no risk in selling him anything that he wanted to buy; that he was perfectly able, and that we were dealing with an honest man; * * that there was no risk, as he had given up his expensive store and reduced his expenses in every way, was making money and was able to take care of all his liabilities."

The statement rests on the testimony of a single witness, and is contradicted by Lawler, who gives quite a different account of the interview. Moreover, so far as the statements of fact are concerned, they are substantially true. He did own the plantation and residence; had always met his commercial obligations, and actually continued to do so until after the institution of this very suit; and we believe, honestly considered that he was solvent, and fully intended and expected at the time of those subsequent purchases to pay for the goods.

Nor does the evidence in this record make it clear, by any means, that Lawler was actually insolvent. His use of the flour purchased, in selling, shipping and pledging it, was entirely in accordance with the usages and necessities of trade, for the purpose of carrying on his business, and nothing stamps it with any sinister character. We conclude, therefore, that plaintiff's sequestration was entirely unfounded and unlawful, and that it was properly dissolved. From this it follows, as an indisputable legal sequence, that defendant is entitled to the damage actually occasioned by the seizure. *Cretin vs. Levy*, 37 Ann. 182; *Roos vs. Goldman*, 36 Ann. 132; *Block vs. Meyers*, 35 Ann. 220; *Barrimore vs. M. Feely*, 32 Ann. 1182.

We are not, however, disposed to attach weight to the exaggerated estimate of injury set forth by defendant.

We are quite convinced that, without indulgence from plaintiff and other creditors, defendant's commercial failure was inevitable, and that the loss of business and injury to his credit must have resulted in any event. Other claims of damage come, with bad grace, from a debtor, who, after purchasing the goods of plaintiff on credit, and having availed himself of their full value, has failed to pay for them. It was his duty, however, to himself and to those from whom he had obtained advances on the goods, to contest and set aside the sequestration, and for his counsel fees and expenses in this behalf, as distinguished from the general defense of the suit itself, he is entitled to be recouped. We will fix the amount at five hundred dollars for which he should have had judgment on his reconventional demand.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be amended by reversing that part thereof which rejects the reconventional demand, and by giving judgment thereon in favor of defendant and against the plaintiff for the sum of five hundred dollars, with legal interest from the date of judgment in the lower court; and that, in other respects, the same be affirmed, plaintiff to pay costs of this appeal.

No. 9824.

MOHR, HANNEMAN & CO. VS. FERDINAND MARKS.

The judgment of court awarding an insolvent a discharge from his debts has no other or further effect than one homologating the *proces verbal* of the proceedings of the meeting of his creditors granting the discharge.

The creditors are called before a notary by summonses issued pursuant to an order of court.

This is not a technical citation.

Proceedings in matters of insolvency are of a *summary* character.

Mohr, Hanneman & Co. vs. Marks.

Notwithstanding the exclusion of *parol* testimony for the purpose of correcting, amending or supplementing the return of the sheriff upon a citation, the party urging it as an objection will be estopped, if he has previously introduced *parol* testimony on the subject.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

J. O. Nixon, Jr., for Plaintiffs and Appellees.

Braughn, Buck, Dinkelspiel & Hart for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The plaintiffs, as judgment creditors of the insolvent defendant, have brought this direct action against him, to have annulled and declared of no effect, the proceedings taken by him, under the State insolvent law, and whereby he claims to have been duly and legally discharged from the claims and demands of his creditors against him.

They allege that said proceedings are null and void and of no effect, in respect to their judgment, for the following reasons, viz:

1st. That they received no notice whatever of same.

2d. That the *proces verbal* of the proceedings of the meeting of the creditors is incorrect in reciting "that Ferdinand Marks was granted a discharge by his creditors."

That the fact is, as will appear from an inspection of the schedule and the *proces verbal*, that the majority in number and amount of the creditors did not vote for his discharge.

They pray judgment decreeing the nullity of the certificate and *proces verbal* of the notary, and that they are entitled to proceed with the execution of their judgment against the defendant.

I

The defendant tendered the peremptory exception of no cause of action, because the suit is directed against the *proces verbal* of the notary, and not against the formal decree of the court discharging the insolvent.

We do not regard the objection as well taken. The judgment has no other or further effect than one of homologation of the proceedings of the creditors before the notary. It is predicated upon the proceedings of the creditors and evidences their regularity only.

II.

In answer the defendant pleads his discharge, which he avers was perfectly regular and legal and operates his absolute release from the plaintiff's judgment, and that same is a complete bar to any further proceedings thereon.

He represents that upon the schedule of his debts the plaintiff's name and claim were entered.

That all the creditors, whose names appear thereon—including plaintiffs—were duly summoned and notified of his surrender and proceedings for discharge.

But if the plaintiffs were not notified, it was the fault of the sheriff, whom they call in warranty.

The only question that is insisted on here is the absence of any summons and the want of notice to them of the proceedings for defendant's discharge.

I.

The law provides that "in all the deliberations which shall take place between the creditors, either for the choice of syndic or for the sale or disposal of the property surrendered, or for any other object relative to the interest of the mass of the creditors, the opinion of the majority of the creditors in number and amount shall prevail," etc. Rev. Stats., sec. 1799; R. C. C. 2177.

"A cession of property *discharges* all the debts which the debtor placed on his *bilan* * * provided a majority of his creditors in number, and who are also creditors for more than half of the whole sum due by him, agree to such discharge." R. C. C. 2177.

The meeting of creditors is called at the office of some notary, by order of the judge, "at which meeting the creditors shall be *summoned* to attend by process issued from the court" if the creditors reside in the parish, "or by letters addressed to them by the notary, if they are not residing in the parish."

Those residing out of the State are not summoned to the meeting. They are represented by an attorney appointed by the judge to represent them. R. C. C. 3087, 3088.

Insolvency proceedings are *summary* in their character and carried on in chambers out of term time and before a notary, and without the observance of the strict formalities required in ordinary cases. C. P. 92, 755.

Hence the law provides that the creditors "shall be *summoned* to attend by *process* issued from the court." R. C. C. 3087.

Formal citation is not required as in ordinary suits. C. P. 170.

There is no form prescribed for the summons, nor for the particular manner of service thereof or the return thereon, or what it shall contain.

This summons has been treated as a citation in the opinions of some of our predecessors, or as having the effect of a citation.

Mohr, Hanneman & Co. vs. Marks.

In *Barnbridge vs. Clay*, 3 N. S. 266, they say: "To prevent judicial pursuit by creditors, it is necessary that they should be *cited* in the *jucio de concurso*. * * *

"In the case now under consideration, it is *not shown that the plaintiff had any kind of notice* of the proceedings carried on by the defendant in the *suit* against his creditors."

In *Thomas vs. Breedlove*, 6 La. 577, they say: "We lay it down as a first principle of our jurisprudence that *citation* to a defendant, or *something which the law prescribes as an equivalent*, is necessary to the validity of a judgment. By express statutory provisions of the State, *citation* to the creditors in a *concurso* is required. * *

"The article of the Code requires that creditors residing within the parish, when the meeting may be called, should be *summoned* to attend by process issued from the court holding cognizance of the *concurso*."

In *Breedlove vs. Robison*, 7 Peters, 434, the Supreme Court in deciding a case arising under the Louisiana insolvent law, say:

"It is unquestionable that *summary proceedings* of this description must be regular, and that their regularity must be shown by the party who relied upon them. Notice to the creditors is material, and the law prescribes that notice and defines it. * * * Personal notice must be given to a resident within the parish, by *proces*; to a non-resident, by a letter from the notary. The law decrees this notice indispensable, and the court cannot dispense with it. For want of it the judgment of discharge was no bar to this action."

It was an ordinary suit to recover judgment on a promissory note.

This doctrine was affirmed in *Haydel vs. Girod*, 10 Peters 284.

If then the plaintiff did not have the requisite notice or summons to attend the meeting of defendant's creditors, their proceedings cannot operate a bar to this suit. 20 Ann. 864, *Burdon vs. His Creditors*.

II.

The record of the defendant's insolvency proceedings does not affirmatively show that the plaintiffs were notified.

The defendant offered to show by *parole* testimony that in truth and fact the plaintiffs had been summoned, but this kind of evidence was objected to, and the objection being sustained the defendant's counsel retained a bill of exceptions.

The grounds of objection were substantially to the effect that service of citation must appear of record, and no other evidence than the sheriff's return can be received to prove it; that a sheriff's return on a citation cannot be amended or corrected after judgment, so as to

Succession of Keller.

cure nullities resulting from a defective citation ; that parol proof cannot be heard as a substitute for the return of the sheriff.

The authorities are to that effect. 3 N. S. 686, *Skillman vs. Jones* ; 10 R. 26, *Bank vs. Elam* ; 11 Ann. 252 *Webb vs. Coons* ; 1 R. 30, *Watson vs. Alexander* ; 21 Ann. 26, 682.

But we have already shown in the preceding paragraph that the one in contemplation of insolvency proceedings was not a technical citation, hence the technical rules governing it do not apply strictly.

Even if it were, the plaintiffs themselves introduced parol evidence on the subject in the opening of their case. They introduced Mr. E. M. Hansel, of plaintiffs' firm, and propounded to him this :

Question—"Did you or your firm ever receive any notice to attend a meeting of the creditors of Ferdinand Marks, by the Civil District Court of the parish of Orleans?"

Answer—"No, sir."

They introduced Mr. A. H. Hanneman and asked him the same question, and received the same answer.

Upon the evidence of those two witnesses, and some documentary evidence the plaintiffs rested their case. By introducing *parol* testimony to show the absence of notice to them, and the want of service upon them, of any process, whereby to acquaint them with the fact that the defendant had applied for a discharge, and had convened his creditors for that purpose, they opened the door for the introduction by defendant of like evidence on the same subject. We think the defendant's bill well taken.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be avoided, annulled and reversed, and this cause be remanded for the purpose of enabling the parties to introduce the rejected evidence.

The costs of appeal are taxed against the plaintiffs and appellees ; the costs of the lower court to await final judgment therein.

Judgment reversed and case remanded.

No. 9896.

SUCCESSIONS OF JOHN KELLER AND WIFE.

A bond furnished in the amount fixed by the order of the court for a suspensive appeal which alone was prayed for, but not furnished within the delay prescribed by law for a suspensive appeal, is sufficient to sustain the appeal as devolutive.

The order, although restricted in terms to a suspensive, covers any appeal, the character of the same, as suspensive or devolutive, being determined by the amount of the bond fixed and furnished, and by the time at which the bond is filed.

39	579
47	223
39	579
49	361
49	1529
39	579
51	1548
39	579
158	1187
39	579
111	988
39	579
114	705
39	579
120	101
120	166

Succession of Keller.

The correctness or regularity of the judgment of a competent court, making the appointment of an undertutor, cannot be questioned or reviewed collaterally, even by the court which had made the appointment. His appointment is full proof of his capacity and has effect on third persons until set aside by appeal or in an action of nullity.

Hence, an adjudicatee of succession property cannot set up the nullity of the proceedings leading to the sale, on the ground of the alleged illegality of the appointment of the undertutor who presided over the family meeting which recommended the sale, if the record shows that he was appointed by a court of competent jurisdiction.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

W. O. Hart and C. F. Buck for the Appellant.

E. J. Wenck for the Appellee.

The opinion of the Court was delivered by POCHÉ, J.

MOTION TO DISMISS.

The grounds of the motion are that the prayer, the order, and the bond of appeal were for a suspensive appeal and that the bond was not filed within the time required for such an appeal; and that there was no prayer, and there is no order, for a devolutive appeal.

Appellees rely on the decision in *Reed vs. Creditors*, 37 Ann. 907, in which the appeal was dismissed on similar grounds.

In that case it was held that under a prayer and an order for a suspensive appeal, a bond not filed within the prescribed delays would not sustain a devolutive appeal, because the order was exclusively for a suspensive appeal.

At the earnest request of appellant's counsel in the instant case, we have made a thorough examination of our jurisprudence on this point, and we leave the investigation with the conclusion that the weight of authority conflicts with the rule in *Reed's case*, and that the latter must, therefore, not be followed.

The preponderance of the decisions, turning upon this contention, is to the effect that the nature or character of the appeal is not determined by the prayer for, or the order of, appeal, but by the amount of the bond and by the time at which it is furnished.

If the prayer and the order contemplate a suspensive appeal, and the bond, in the amount fixed by the order, is furnished within the delay prescribed by law, the appeal is suspensive.

But where both the prayer and the order are for a suspensive appeal, if the amount of the bond furnished, in compliance with the order of the court, is insufficient in amount for a suspensive appeal, or if it be not filed within the prescribed delay for such an appeal, but is filed within the year, the appeal will be sustained as devolutive only.

Succession of Keller.

We yield our previous convictions to the weight of authority under numerous opinions which, in the midst of a serious conflict, lead to satisfactory conclusions. 5 La. 129, Poydras vs. Pattin; 3 Rob. 63, Tipton vs. Crow; 8 Rob. 42, Brode vs. Ins. Co.; 9 Rob. 185, Jones vs. Frellson; 2 Ann. 462, Balph vs. Hoggutt; 2 Ann. 754, Lewis vs. Splane; 4 Ann. 534, Ludeling vs. Frellson; 20 Ann. 340, Succession of Armat; 27 Ann. 97, Edgerly vs. Smith.

Under the views which prevail in these cases, the present appeal must be sustained as devolutive.

It is therefore ordered that the motion to dismiss herein made be overruled.

ON RULE TO COMPEL THE ADJUDICATEE OF SUCCESSION PROPERTY
TO ACCEPT TITLE.

The adjudicatee at the succession sale of a piece of immovable property depending upon these successions has taken this appeal from a judgment condemning him to comply with the terms of the bid made by him at that sale.

His resistance is grounded on the alleged illegal composition of the family meeting which deliberated in behalf of the minor heirs of said successions, for the purpose of recommending and of fixing the terms and conditions of the sale.

That illegality is attributed to the fact that the undertutor of the minors participated in the proceedings of the family meeting as a member thereof, instead of presiding over the same and approving its deliberations as required by law.

The facts, as shown by the record, are: that at the death of his wife John Keller was qualified as natural tutor of the minor children issue of the marriage, with Louis Imholte as undertutor.

At the death of John Keller, in July, 1886, the two successions were consolidated, and A. G. Ricks took charge of the same, as testamentary executor of the husband and as testamentary tutor of the minors, of whom Joseph Voegtle was appointed and qualified as undertutor. At the family meeting which recommended the sale under discussion, Joseph Voegtle acted as undertutor, and Joseph Imholte acted as a member, with seven other relatives and friends of the minors.

Appellant makes the point that, as the functions of the undertutor, Imholte, who had been appointed in September, 1883, did not terminate with the natural tutorship at the death of John Keller, the subse-

Succession of Keller.

quent appointment in July, 1886, of Joseph Voegtle, as undertutor of the same minors, was unauthorized, illegal, null and void, thus vitiating the deliberations of the family meeting over which he presided as undertutor.

But the record shows, and appellant does not deny, that the court which appointed Voegtle was fully competent, and hence his proposition involves him in a collateral attack of the judgment of a court of competent jurisdiction, making the appointment of an undertutor.

Now, one of the most familiar rules of our jurisprudence is to the effect that the correctness or regularity of a judgment of a competent court appointing a tutor cannot be collaterally reviewed or questioned, even by the court which has made the appointment.

Out of numerous decisions to be found on the subject in our reports, we have culled the following as bearing more directly on the point: Succession of Winn, 3 Rob. 305; Hoover vs. Sellers, 5 Ann. 182; Thibodeaux vs. Thibodeaux, 5 Ann. 598; Martin vs. Jones, 12 Ann. 168; Tutorship of Hughes, 13 Ann. 380; Caillebeau vs. Ingrouff, 14 Ann. 623.

The rule has been applied to the case of a foreign tutor or guardian, (12 Ann. 168), and it has been extended to the presumption that the tutor, shown to have been appointed by a competent court, had been qualified, in the absence of direct proof of that important fact. (5 Ann. 182.)

It requires no argument to show that the same rule must govern in the case of the appointment of an undertutor, whose functions are not less sacred, important and indispensable in the interests of minors than those of the tutor.

It may be, as suggested by appellant, that the appointment of Voegtle as undertutor of the Keller minors was unauthorized and illegal, but that is the question which cannot be investigated in a collateral manner. His appointment by a court of competent jurisdiction is full proof of his capacity, and has effect against third persons until set aside by appeal or in an action of nullity.

As this alleged illegality was the sole defect urged against the proceedings which are the foundation of the adjudication herein resisted by appellant, it is clear to our minds that the sale was correctly sustained by the district court.

Judgment affirmed.

Insurance Company vs. Harbor Protection Company et als.

No. 9892.

FACTORS AND TRADERS' INSURANCE COMPANY VS. THE NEW HARBOR
PROTECTION COMPANY ET ALS.

When a judgment is rendered, interpreting a former appealable judgment by incorporating in it a feature which, if it had been expressly contained therein, would have supported an appeal to this Court, such latter judgment will also be appealable.

Other grounds of motion untenable.

The judgment of a district court which has been signed can only be revised or altered in the modes provided by law. Under the guise of interpreting the judgment, the judge cannot, after signature, make a substantial change in the judgment itself on a mere rule for that purpose.

Interest cannot be collected on a judgment for money which is silent as to interest.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Nicholls & Carroll for Plaintiff and Appellant.

M. M. Cohen, T. Gilmore & Sons for Merchants Insurance Company
and Harbor Protection Company Defendant and Appellee.

Braughn, Buck, Dinkelspeil & Hart for People's Insurance Company,
Defendant and Appellee.

MOTION TO DISMISS.

The opinion of the Court was delivered by

FENNER, J. The motion is based on three grounds, viz :

1st. Want of jurisdiction, because of insufficiency of amount involved. The suit is one for partition, involving the distribution of a fund exceeding sixteen thousand dollars. A final judgment was rendered, homologating the report of the notary to whom the partition was referred.

After said judgment had become final, a difference arose as to the interpretation thereof, two of the parties claiming that they were entitled to receive interest on their claims, although in forming the passive mass, and in the tableau of distribution their claims had been extended and allowed only to the amount of the principal thereof.

These parties took a rule on the others interested to show cause why, under said judgment, as properly interpreted, they should not be paid the amount of said interest. After contradictory pleading and hearing judgment was rendered making the rule absolute, from which judgment the present appeal has been taken.

Had the original judgment expressly allowed this interest, the other parties could undoubtedly have appealed to this court by reason of the amount of the fund to be distributed. We see not why they

39	583
45	1402
39	583
47	1464
39	583
51	1884

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should not have the same right when the allowance is thus subsequently made in interpreting the judgment, the very question being whether the subsequent judgment is a proper interpretation of the former one, or is an alteration thereof, which the court had no authority to make. It is very certain that the allowance of interest thus made affects the result of the entire distribution of a fund largely exceeding \$2000, and we think our jurisdiction is properly invoked.

2d. Insufficiency of the bond of appeal.

The amount of the bond was fixed in the order of appeal, and is, in any event, sufficient for a devolutive appeal.

3d. Absence from the record of any extract from the minutes, showing that the motion and order for appeal was granted by the court. The motion and order are copied in the record, and under *certiorari* the extract from the minutes has been supplied.

Motion denied.

ON THE MERITS.

This is a partition suit, which was referred to Castell, notary, who proceeded to make the same as directed by law.

He first formed the active mass, amounting to \$16,550.

He then recited the claims presented by various creditors, most of whom were holders of interest-bearing notes, as stated in his recital of their claims.

He then proceeded to form the passive mass; but in so doing he allowed the claimants only the principal of their notes without interest. He thus footed up the passive mass at the sum of \$7224.30, which he deducted from the active mass, leaving a sum of \$9325.70, which he divided *pro rata* among the parties in interest, assigning to each a specified sum of money. When this report was presented in the court sundry oppositions were filed thereto. Amongst others, one was filed by the People's Insurance Company, one of the note-holders, the principal of whose claim alone had been carried by the notary into the passive mass, and who claimed that the report should be amended by allowing the interest also. This opposition was sustained by the judgment of the court. None of the other note-holders made any opposition on this ground; but, on the contrary, two of them, the Merchants' Insurance Company and the Harbor Protection Company, filed a motion to homologate the report so far as not opposed, and obtain an order to that effect.

After hearing, the judge rendered final judgment, dismissing all oppositions except that of the People's Insurance Company, which

Insurance Company vs. Harbor Protection Company et als.

was allowed its interest as claimed, homologating the report as thus amended, and directing "that the proceeds be distributed in accordance therewith."

This judgment was signed, became final, and has not been appealed from. Thereafter two of the note-holders, the Merchants' Insurance Company and the Harbor Protection Company, took a rule upon the stake-holder of the fund to be distributed, the Crescent Insurance Company, to show cause why they should not be paid interest upon their notes, on the ground that such was the proper and legal interpretation of the notarial act of partition and judgment homologating the same.

The judge *a quo* rendered judgment making the rule absolute, from which this appeal is taken. We can discover no possible room for misconception as to the true meaning of the notarial partition and the judgment homologating the same, especially when viewed in connection with the opposition of the People's Insurance and the amendment made in accordance with its prayer.

The People's Insurance Company stood precisely in the same case with complaining note-holders. It saw that it was allowed no interest on its notes and opposed the homologation on that ground: and its opposition was sustained and the notarial partition amended by allowing such interest. The Merchants' Insurance Company and the Harbor Protection Company, with this opposition on file, far from seeking a like relief for themselves, actually moved to have the tableau homologated so far as not opposed.

The judgment appealed from, under the guise of a professed interpretation, is really an amendment and alteration of the original judgment, in clear violation of the laws on that subject. C. P. 547, 548, 556.

It is perfectly plain that the judgment failed to allow interest upon the notes, and we have held, on most careful consideration, that interest cannot be collected on a judgment which is silent as to interest. *Succ'n of Anderson*, 33 Ann. 581.

If there was error, the complaining creditors have themselves to blame in not following the example set them by their fellow-creditor.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that the rule herein taken by the Merchants' Mutual Insurance Company and the Harbor Protection Company be dismissed at their cost in both courts.

 Allen, West & Bush vs. Steers.

No. 9819.

ALLEN, LUSH & WEST vs. S. B. STEERS.

A contract made by parties, who are commission merchants and factors, for the storage of cotton assigned to them, during a certain period and at a stated price *per bale*, must be viewed as entered into for *their* own account and not for that of their customers, although it may be that they charge for such storage and other items a price *per bale* including a rate higher for the storage.

Such parties could not shirk responsibility in a suit against them for unpaid storage, by saying that the contract was not entered into by them for their own account, but for that of their customers. As they could be held liable, they have a right to sue for damages sustained by them, in case of breach of contract, specially the difference between the rate of storage agreed on and that paid.

A right to claim damages for breach of contract, remains unrestricted, in the absence of qualification in the contract and can be exercised so as to include all injury sustained, whether foreseen or not.

A putting in default would be a vain ceremony and unnecessary, in presence of an acknowledged inability to perform.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

Alfred Goldthwaite, for Plaintiffs and Appellants:

Factors and commission merchants are entrusted with the possession and control of cotton consigned to them for sale, and have a special property in said cotton, and are treated as owners in contracts made by them with third persons. *Russell vs. Factors*, 252-6, 234; *Story on Agency*, Sections 111, 112 and 401; *Cowper's Report*, 254; 11 *Adol. & Ellis*, 349; *Smith on Mercantile Law*, p. 77; *Paley on Principal and Agent*, p. 13.

In contracts made with third persons, there is no privity between their patrons and such third persons, unless the contracts are made for the benefit of the patrons, or their names disclosed, so as to create the relation of principal and agent. 68 *N. Y.* 494.

When there is an acknowledged inability on the part of defendant to perform his contract, a putting in *mora* is not necessary. 14 *Ann.* 81; 34 *Ann.* 211; 37 *Ann.* 470; 7 *Martin*, O. S., 212; 8 *La.* 522; 9 *Rob.* 377; 2 *Ann.* 957.

Kennard, Howe & Prentiss for Defendant and Appellee:

Plaintiffs sue for their own interest, and in order to recover must show damage to themselves. As factors or commission merchants, they are mandataries and not owners, and on the face of the pleadings and testimony have no interest to recover in this case. The "special property," they assert in this case, is only a possessory right, which may be defended for certain purposes and in certain ways, but does not support their claim herein. 16 *Ann.* 241; 11 *Ann.* 218; 37 *Ann.* 803; 35 *Ann.* 1115.

The facts of the case discussed, which show that no contract was entered into.

Where the violation of a contract has been passive, a putting in default is a necessary prerequisite to a suit for damages. C. C. 1931; 37 *Ann.* 641.

Only such damages can be recovered as were in the contemplation of the parties at the time the contract was entered into, or may reasonably be supposed to have been contemplated by them. *Pothier on Obligations*, p. 161. (English translations); C. C. 1934, No. 1; *Field on Damages*, Section 232.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit in damages for breach of contract to store cotton, during a certain period, at a stated rate *per bale*.

39	586
47	1235

39	586
50	1297

39	586
108	4

39	586
120	1055

Allen, West & Bush vs. Steers.

The injury sustained is fixed at 8 cen^{ts} per bale—the difference between the rate agreed upon (42) and what actually paid (50) on 31,401 bales.

The defense is a general denial; but specially, that the plaintiffs have no interest at stake; that there was no contract entered into; that, in any event, defendant was not in default; that, even then, the damages claimed were not in the contemplation of the parties at the date of contract.

From a judgment rejecting their demand, the plaintiffs have appealed.

I.

On the face of the petition, the plaintiffs have shown an interest at stake, therefore a standing in court. They aver that they have made the contract with defendant, who has failed to comply with it and who in consequence has caused damages claimed, for which he is liable.

It is true, that they aver that they are commission merchants and factors; but that circumstance was not an essential element for their recovery and it cannot be used as a weapon to defeat their claim. The plaintiffs might have omitted setting forth that fact and still have a right of action, for they do not allege that they made the contract for account of others. They state the nature of their business, possibly in order to establish more particularly the importance of their relation with the defendant.

They say that *they contracted*; that means *for their own account*, with the defendant and that he failed to perform. They would not have contracted otherwise, for it is certain that defendant would not have entered with them, into a contract, for account of those whose business they did and whom he did not know. He contracted with the plaintiffs and had he stored, and had the storage not been paid, it is not credible, that he would have looked to any one else, for payment, but the plaintiffs. These could not have shirked responsibility by saying that they had contracted for *others*, so *they* may claim from him.

The case is not germane to that of Corral, 37 Ann. 803, in which this Court held, that a ship agent cannot recover damages, charged to have been caused to vessels consigned to him, on account of overcharges on towage, when the amounts overcharged were paid by the owners, or charterers of the vessels, themselves.

Neither the petition, nor the evidence in this case, shows that the damages claimed here, or the eighty cents per bale, were paid by the consignors of the cotton to the plaintiffs. The proof, on the contrary,

Allen, West & Bush vs. Steers.

is that the difference which is claimed as damages sustained, was paid by the plaintiffs out of their own money.

It must have been and actually was, a matter of perfect indifference to the defendant, what charges the plaintiffs would make to their customers, for the disposal of their cotton. The plaintiffs could charge more or less than 67 cents per bale, and in neither event would the defendant make or lose. The plaintiffs were the only ones concerned in the profit or loss.

The recourse of the defendant for the 42 cents per bale, could have been *alone* against the plaintiffs and in no way against their customers whom they did not know and who never were disclosed.

II.

An attentive reading of the scattering testimony offered on the trial as well as of the documentary evidence, the despatch and the correspondence, and the order of delivery, leaves a forcible impression on the mind, amounting to conviction, that the alleged contract was actually entered into, between the plaintiffs and the defendant, namely, that some time prior to September 1, 1884, the plaintiffs and defendant had agreed that the latter would store all the cotton which the plaintiffs would receive, from that date to 1st of September following, 1885, at 42 cents per bale; that the defendant proved unable to store the cotton, when received, and that the plaintiffs had to make arrangements with another party for the storage, but at a higher rate, 50 cents per bale, which was paid on 31,401 bales which were stored by said party.

The only testimony offered to negative that adduced by the plaintiffs, is that of the defendant, who, withal, admits the agreement, but with the qualification, that he would agree to store, *provided* he would be able to make arrangements to store, as he had not then enough space to undertake an absolute obligation to store *all* of plaintiffs' cotton.

It does not enter in the order of probabilities that the plaintiffs would have accepted any such terms, as it is manifest that they would thereby have exposed themselves to much contrariety, loss and injury.

It is perhaps true that the defendant was not at the time, in a condition to receive a large quantity of cotton; but he induced the plaintiffs to believe, and they acted on his representations, that he would arrange with others to store their cotton temporarily, until he, the defendant had become ready, that is, procured the place and put up his compressing *apparatus*. If he failed to make those arrangements, or

Dunbar vs. Creditors.

if having made them, they were not kept and if the plaintiffs have sustained injury in paying a higher rate, it is more than clear and nothing but right that he be bound to repair the damage which he had thus occasioned.

III.

It was unnecessary to put the defendant in default. His refusal or acknowledged inability to receive the cotton, dispensed with any such putting in default, if any was necessary.

IV.

There is nothing to show that the parties at the time the agreement was entered into, considered the possibility of a breach of the contract, or restricted the right to recover damages in case of such breach.

Non-performance by the defendant of his undertaking, justifies the claim in damages which is brought and proved against him.

It is therefore ordered and decreed that the judgment appealed from be reversed, and it is now ordered and adjudged that the plaintiffs, Allen, West & Bush, recover of the defendant, S. B. Steers, the sum of twenty-five hundred and twelve dollars and eight cents, \$2,512.08, with legal interest from judicial demand till paid, and costs in both courts.

No. 9818.

JOSEPH DUNBAR VS. HIS CREDITORS.

An attorney employed by a person in insolvent circumstances and in contemplation of declaring his insolvency and of making a *cession*, is entitled to compensation for advice and services rendered in the preparation of his petition and schedules; and that compensation must be fixed by the court having jurisdiction of the insolvent's estate according to the proof.

The provisions of Rev. Stats., Sec. 1817, exclusively apply to the "fees of the counselor who shall be appointed to represent the absent creditors," and same must be deducted from the amount awarded to them.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. S. Benedict and H. C. Cage for Syndic, Appellant.

Singleton, Browne & Choate for Opponents and Appellees.

The opinion of the Court was delivered by
WATKINS, J. The sale of the property of the real estate realized

39	589
46	1355
89	589
108	204

Dunbar vs. Creditors.

\$23,238.11, and this sum is carried on the account and tableau of distribution, as the principal asset of the insolvent's estate.

Singleton, Browne & Choate oppose the homologation of the account and tableau in respect to several items of debit entered thereon and two items of credit—in the aggregate \$2,221.07.

The opponents allege that the sum placed upon the account as an item of credit, due by them to the estate, of \$382.17, is incorrect and not by them due and owing; but that said sum had been received by them from the insolvent for professional services and advice rendered him in connection with the insolvency, and various matters appertaining thereto, and for the preparation of his petition and schedules in the insolvency proceedings, as his attorneys and counsellors at law.

They also claim the sum of \$31.50, expended for stamps employed and used by the insolvent in the course of those proceedings.

They claim, in addition, that the insolvent is indebted to them, for professional services rendered him in the suit of the city against him for \$400, as a license for 1883, \$40.

These items do not appear on the account and tableau.

In the court below there was judgment in favor of the opponent, striking from the account the items complained of, reducing the auctioneer fees, recognizing opponent's demands against the estate of the insolvent, and in all other respects approving and homologating the account.

The syndic alone appeals.

The record discloses the following material facts, viz :

That the law firm of Singleton, Browne & Choate were consulted by Joseph Dunbar, previous to his declaration of insolvency, in reference to his proposed surrender.

That it was by them regarded a serious question whether he was or not entitled to the benefits of the State insolvent law. There was difficulty in obtaining the consent of the Factors and Traders' Insurance Company to a sale of the property on which they held a lien, upon such terms as would benefit the other creditors, and at the same time secure themselves.

That firm visited the various creditors of Dunbar and explained to them his situation, and obtained powers of attorney from the absent and non-resident creditors. These services continued during a period of five or six months, and to the date of Dunbar's *cession*.

The petition and schedules of the insolvent were prepared, signed and filed by those gentlemen as his attorneys.

The petition for the discharge of the insolvent was prepared and filed by them, and final discharge obtained by them.

Thereafter different counsel were chosen to represent the provisional and definitive syndics, who were placed on the tableau as creditors for a fee of \$650.

There was no attorney appointed to represent the creditors residing out of the State. R. S. Sec. 1789.

It is claimed by opponents that they had, by their services previously rendered, obviated that necessity and expense to the estate of the insolvent.

On this state of facts the question is raised as to the correctness of the allowance in favor of the opponents.

The counsel for the syndic states that "the law is clear, that an attorney presenting the schedules of an insolvent, is entitled to a fee with privilege on the assets surrendered which, *in no event*, can exceed \$250.

He doubtless relies upon R. S. Sec. 1817, as authority for this assertion. But in this he is under a mistake. That section refers to "the fees of the counsellor who shall be appointed to represent the *absent creditors*," and not the *attorney employed by the insolvent* to advise with his creditors and prepare his petition and schedules.

Indeed, that section distinctly provides that such fees as those of the counselor for absent creditors "shall in no case be paid by the *mass creditors*," and "in no case shall the fees exceed the sum of \$250."

The only duties that are imposed upon an attorney for absent creditors are to give them notice of the filing of the schedules and to look after their claims and superintend the proof of same before the notary. R. C. C. 3088.

In the nature of things, no definite amount of compensation could be fixed for the attorneys of the insolvent. The amounts must necessarily vary, as the affairs of the insolvent might be simple or complicated, great or small.

The authorities cited by the counsel of the syndic support the theory that "an attorney employed by the insolvent to give him advice and to prepare his schedules" is entitled to receive some compensation out of the estate of the insolvent. 3 O. S. 363; 6 O. S. 560; 5 N. S. 399, 401.

We think the proof amply sustains the charge that is made. It also establishes the fee of \$40 claims.

Judgment affirmed.

Blackman vs. Tax Collector et als.

No. 9897.

39 562
52 226

JOHN W. BLACKMAN VS. JAMES D. HOUSTON, TAX COLLECTOR, ET ALS.

Property used exclusively for a commercial college, such as "Blackman's Commercial College," in New Orleans, is exempt from taxation under Act 207 of the Constitution. The character of such property as used exclusively for school purposes, is not affected or impaired by the fact that the owner thereof, who is the principal of the school and one of the teachers therein, resides in the building with his family.

Teachers and necessary servants who occupy rooms in a college building on the premises, are necessary adjuncts to such an institution, and the property does not thereby cease to be used exclusively for a college, within the meaning of the Constitution.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

F. L. Richardson for Plaintiff and Appellee.

M. J. Cunningham, Attorney General: *L. O'Donnell*, Assistant City Attorney, and *Jas. C. Moise* for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff's object is to obtain a decree adjudging a house and lot which he owns in this city to be exempt from taxation under the provisions of Article 207 of the State Constitution, on the ground that the property is used exclusively for school purposes.

The defense is a general denial, and the judgment of the district court is in favor of plaintiff, recognizing the exemption claimed.

As the record shows that a portion of the house is occupied as a residence by plaintiff and his family, appellants argue that the property is not exempt from taxation because it is thus shown that the same is not used exclusively for school purposes.

The fallacy of the argument results from a too narrow construction of the article of the Constitution, which exempts from taxation * * all buildings and property used exclusively for colleges or other school purposes, * * provided, the property so exempted be not used or leased for purposes of private or corporate profit or income."

The record shows that plaintiff himself is a teacher in his school, which is known as "Blackman's Commercial College," which has an average attendance of fifty scholars, and which employs several assistant teachers.

In their contention appellants appear to entirely ignore or to radically misconstrue the *proviso* which is contained in the article and which is hereinabove transcribed.

It is shown, and we do not understand that it is denied, that the controlling use of that property is for the purpose of "Blackman's Com-

mercial College." Under that showing the exemption applies, even when tested by the rule that exemptions should be strictly construed against the application therefor.

Now, does the fact that one or more teachers employed in the college or school, as indispensable means to carry out the object in view, occupy "certain rooms in the buildings or on the premises thus used, destroy the character of the object to which the property has been destined? The question is answered by the very nature of things and also by the *proviso* which forbids the use of the property so exempted for private or corporate profit or income," but is silent as to any other use which does not bring either profit or income.

It stands to reason that a college, with some two or three hundred scholars, who would also be boarders, would not lose its character as being used exclusively for school purposes, because forsooth it would contain rooms for the accommodation of necessary teachers, as well as for the servants required for the preparation of the food of teachers as well as of scholars, and for the performance of other household duties.

It is too plain in our minds for argument that all these incidents are necessary adjuncts to property used exclusively for college purposes.

It would certainly be imprudent, if not dangerous, to leave unoccupied at night, or when classes are not being actually taught, a building used for school purposes in a large city; and the argument which would hold that the occupation of such building by a janitor and his family would destroy or even impair its character as being used exclusively for school purposes, would doubtless find no sanction under the true meaning of the article of the Constitution, or even in reason and common sense.

Is it entitled to more consideration or to greater weight when applied to the owner of the building, who is the principal and one of the teachers of the school kept therein?

This Court has held that the right of exemption from taxation of a "textile fabric" was not affected or impaired by the fact that the owner occupied the same building with his family as a residence. *City of New Orleans vs. Arthurs*, 36 Ann. 98.

A careful examination of the various provisions contained in the Constitution on the subject of education, will satisfy any observing and impartial mind that the Convention which framed it intended, by all means in its power, to foster and promote education in the State, and that a too narrow construction of the provisions now under consideration, and which was one of the most efficient means adopted

 Calhoun vs. Lane et al.

for the end in view, would be repugnant to the manifest policy of the Convention on the subject of education.

We note the great reliance placed by appellant's counsel on the case of *St. Mary's College vs. Crowl*, 10 Kansas 442, which they quote as sustaining the proposition that "the school-house used as a boarding school is not exempt from taxation, as the owner resided therein with his family." Counsel seem to have entirely misunderstood that case, in which the exemption claimed was for a farm of several hundred acres of land, attached to a college, which, with all its appurtenances and grounds covering eighty acres, had never been taxed. The ground of the exemption claimed by plaintiff was that the entire property should be exempt, and the court refused the additional exemption on the ground that some of the products of the lands were sold for income. The exemption clause of the Constitution of Kansas touching the subject of education is about of the same import as the Article 207 of our Constitution. In the case in question the court said: "For the purposes of this case, it may also be conceded that if the property were used exclusively for teaching the Indians agriculture, and for raising food for them and the professors and the necessary stock kept on the farm, it would still be exempt. But when it is used to raise food for stock, not necessary to the farm, and to raise produce to sell, no further concessions in favor of its exemption can be made."

Judgment affirmed.

No. 9904.

WM. S. CALHOUN VS. M. M. A. LANE ET AL.

It cannot be contested that a married woman, duly authorized thereto by her husband, has the right to compromise a lawsuit pending against her, or to make a transaction relative to her separate paraphernal property or estate, for the purpose of *preventing* a lawsuit appertaining thereto.

Such a compromise and transaction have, between the interested parties, a force equal to the authority of things adjudged.

In case brother and sister, who are sole heirs-at-law to an estate fallen to them by a deceased ancestor, compose their differences, and one sells to the other his or her share, the husband of the sister is a *nominal*, though necessary party, and his appearance therein does not convert it into a community covenant.

A married woman cannot be heard to set up the defense that the debt was her husband's, in a suit upon the compromise, after she has failed to make it in the previous suit, or withdrawn it in consideration of the advantages she secured by the compromise.

The cases suggesting that a married woman is *not estopped* from attacking her own judicial confession, are based *entirely* upon the supposition that such confession may have been induced by marital coercion.

39 594
47 1068
47 1273
47 1275
39 594
109 676

Calhoun vs. Lane et al.

Outside of such cases, she may, under exceptional circumstances, not existing here, be permitted to *attack* a transaction that has received the sanction of her *husband only*, upon proper averments and proof of error as to the matters transacted, fraud, violence or duress, and perhaps of her husband's indebtedness.

This class of contracts is clearly distinguishable from that in which equivalents are exchanged. By the very nature of the agreement, the intention of the parties is the avoidance of litigation, even at the expense of what belongs to them.

A force equal to the authority of things adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed; or because it has been affirmed on appeal.

If extraneous proof were required, in support of a transaction entered into by a married woman, it could not be said to have a force equal to the authority of things adjudged. It would be thereby deprived of the character of an unappealable judgment and reduced to the rank of a conventional obligation. To decide that a married woman may, with the authorization of her *husband only*, enter into a transaction, is to decide that no extraneous proof is required to entitle interested parties to a judgment for the enforcement of it, upon its production and proof of its execution.

A PPEAL from the Twelfth District Court, Parish of Grant.
Overton, J.

Thorpe & Peterman for Plaintiff and Appellant :

1. A married woman, authorized by her husband, can enter into a valid compromise of disputes and rights affecting her separate property. In a suit upon such compromise, if she fails to plead or prove that the debt was her husband's or the community's, or that the compromise was secured by fraud or forced under marital coercion, and offers no evidence on the trial, she is bound; and the creditor having shown that the compromise was properly executed, and had relations solely to her paraphernal property, can enforce the same. 26 Ann. 289; 37 Ann. 679.
2. The consideration named in a compromise is the foundation of the rule which gives to the compromise the authority of the thing adjudged. 23 Ann. 696.
3. Compromises are not of that class of contracts to which sales belong; therefore, a transaction entered into to end litigation, strife and disputes in the family, although only a cession of rights and pretensions, has a good consideration, and is enforceable at law. 30 Ann. 248.
4. Where it is shown that a married woman owned large separate interests, and that she had compromised disputes relating thereto, the Court will not presume that they yielded no revenue, or were insufficient to justify her in executing the compromise. If this is her defense, she must allege and prove it. 16 Ann. 209; 34 Ann. 995-1063.
5. Parties to a compromise are not entitled to restitution, their intention in executing it being the avoidance of litigation, "even at the expense of what belongs to them." 1 Poth. Oblig. [35-36].
6. The fact that the husband is bound in nowise changes or lessens the wife's obligations. If the compromise is for the benefit of her separate property, it is binding on her, whether executed by herself or by her husband with her consent. 29. Ann. 749.

R. J. Bowman, White & Thornton and *J. B. Tucker* for Defendants and Appellees.

The declaration of plaintiff of the ownership of the defendant of his interest in the succession of his mother (except the portion in Pennsylvania), and his warranty and stipulation to defend said title and the defendant to pay \$42,500 in consideration thereof, is a sale, and not a compromise.

 Calhoun vs. Lane et al.

Such a sale to a married woman on credit, without proof or means of revenue to make the purchase, is a contract of the community, for which she is not bound. 5 Ann. 173; 12 Ann. 663; 20 Ann. 290; 30 Ann. 1021; 34 Ann. 1065; 34 Ann. 975; 39 Ann. 75.

The instrument sued on does not claim the contract it contains to be a compromise; neither is it claimed to be one in the petition, while the conveyance, by declaration of ownership, the warranty of title thus conveyed, and the price to be paid, are not the features or characteristics of a compromise, but are of a sale.

The sale of 1873, if real, proves too much, and estops the plaintiff from setting up claims and rights, and raising disputes about property that he has sold and warranted to defend. If a simulation, it strips the contract of its cloak of concealment, and exposes its true character, a sale.

A part of the consideration of the contract is the release or cancellation of claims against her husband, and poisons and nullifies the contract. 1 Ann. 301; 16 Ann. 310; 23 Ann. 439.

Farrar & Kruttschnitt on the same side.

The opinion of the Court was delivered by

WATKINS, J. The plaintiff and defendant are brother and sister, and sole heirs-at-law of their deceased mother, Mary Smith Calhoun, who died in 1871.

Plaintiff alleges that, for a long time, there had been disputes and differences between them in regard to their respective rights and interests in their mother's succession, and that, in order to adjust and put an end to said claims, disputes and differences, and "*to perfect and quiet the title asserted*" by defendant, in and to the property of the said succession," he and defendant made a written agreement, wherein he renounced and released to her all his right, title, interest and claim, of every kind and character, in all the property, movable and immovable, of whatever description and wheresoever situated, of their mother's succession; and wherein she waived, renounced and released all claims, of whatever character and from whatever cause, against him; and further agreed to pay and satisfy a certain judgment obtained against him for the capital sum of \$5200, by L. L. Levy, to execute to his daughter a donation to a five hundred acre tract of land, and to pay him, in addition, \$17,500.

This agreement bears date December 23, 1882, and the signature of defendant was duly authorized by her husband.

Petitioner represents that he has fully complied with his part of the agreement in good faith, but that defendant has wholly failed and refused compliance therewith, and this suit is brought for its enforcement.

Plaintiff's contention is that the said agreement evidences a transaction and compromise having the force of *res judicata* while, on the other hand, defendant's contention is, it was a contract of the community existing between the defendant and her husband, G. W. Lane, for

which defendant, a married woman, could not be held responsible—that one of its covenants seeks to bind her jointly with her husband, for the payment of the Levy judgment; and that a part of the pretended consideration of said contract was the cancellation of the obligation of her husband; and both in violation of a prohibitory law.

Defendant's counsel argue that the agreement evidences a sale to a married woman and not a transaction or compromise; that she was unauthorized in law to bind herself for the payment of so large a sum, without adequate means to discharge the same, and that the contract was, without consideration, for more than \$30,000.

I.

The issue must be determined by the proper construction to be placed upon the agreement.

The record discloses that, on the 23d of June, 1873, plaintiff and defendant were recognized as the sole heirs-at-law of their mother, Mary Smith Calhoun, deceased widow of Meredith Calhoun, from whom she was separate in property; and by a decree of the Probate Court they were placed in possession of her property and estate.

At that date defendant was of full age, unmarried and *sui juris*.

They accepted her succession unconditionally.

The agreement sought to be enforced contains, substantially, the recitals of fact set out in the petition.

The first paragraph declares that defendant “is the true and lawful owner of, all and singular, the property formerly owned by his mother, Mary Smith Calhoun, deceased, both real and personal.” It further declares that plaintiff releases and renounces any and all right, title or interest in any property therein referred to, and all claims against his sister and against her husband, *if any be, may, or might have been,* whether arising from, or out of said property, or any portion thereof, in any manner whatever, either as heir or legatee of Judge William Smith, his grandfather; Mary S. Calhoun, his mother; or Meredith Calhoun, his father, or otherwise, binding himself “to warrant and defend the title and ownership which his sister *now has and enjoys* in and to the property before referred to.”

In the second paragraph the defendant voluntarily and fully releases any and all claim against the plaintiff, “whether arising from, or out of, his management of any of the property aforesaid or the revenues thereof; or from or out of his management of the property formerly owned by Meredith Calhoun, their father, or the revenues thereof; or from or by reason of any debts, expenses, law charges, or other

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expenses named or paid for his account, or from any and all other sources whatever," etc.

These two paragraphs are mainly relied upon as indicating the character of the differences and disputes that the parties, by their agreement, composed and adjusted.

In the third paragraph the defendant binds herself to pay and satisfy the Levy judgment against the plaintiff of \$5250, with interest.

In the fourth paragraph she obligates herself to make a donation of "five hundred acres of land to plaintiff's daughter." The land is particularly described and indicated thus: "A part or portion of said lands is now claimed as the property of the succession of Meredith Calhoun, having been advertised for sale therein, and said sale has been enjoined by said Mrs. Lane; and which suit she declares she will prosecute to a successful termination; and, if unsuccessful, that she will purchase said land at the succession sale, in order to perfect the donation; or, on her inability so to do, she promises to make a donation to his said niece of five hundred acres of land of *equal value*. The formal act of donation, before a notary, shall be executed and signed whenever W. S. Calhoun desires," etc.

There is no valuation placed, by the agreement, on the land that is to be donated.

This paragraph indicates a reason why the plaintiff transfers to his sister his interest in the succession of his father, Meredith Calhoun, and that is to enable her to complete the proposed donation.

In the fifth paragraph, defendant's pecuniary obligations are expressed.

"For and in consideration of the *acknowledgments*, declarations and agreements made by the said W. S. Calhoun, as aforesaid, and in order to secure peace and a final termination of all possible disputes present and future," defendant agrees to pay to the plaintiff \$17,500—that is to say, \$10,000 in cash within forty-five days, and for the remainder of \$7,500 to execute her note, secured by mortgage, due at twelve months.

II.

There was introduced in evidence, on the part of plaintiff and in connection with the agreement, what purports to be an act of sale, whereby plaintiff, on the 27th of May, 1873, conveyed to his sister, his interest in his mother's succession, which is differently construed by counsel, and should be considered in connection with the agreement.

It is six days prior in date to the order of court placing them in possession of their mother's succession.

An examination of that act shows that plaintiff did convey, with full warranty to his sister, the defendant, his interest in his mother's succession for the express consideration of \$35,000, in cash paid.

At that time, it appears the defendant was of full age and unmarried, and therefore fully capable of making the contract.

The act was executed before A. Hero, a notary in this city. The property, with the exception of the plaintiff's interest in the successions of his father and grandfather, is identical with that which is described in the agreement, and *acknowledged* therein to be the property of defendant. The agreement in terms recites that the defendant "is the true and lawfull owner of all and singular the property formerly owned by his mother, Mary Smith Calhoun."

The only essential difference between the act of sale and the agreement is in respect to the consideration.

In the former it is mentioned as *cash*; while in the latter it is differently specified, as above recited, viz:

Satisfaction of the Levy judgment for \$5,250, with accumulated interest, and in cash and note \$17,500.

There is no valuation placed upon the five hundred acres of land to be donated. Nothing is said in the agreement upon that subject. The consideration that is expressed in the act of sale is \$35,000, an equal, if not greater, amount than defendant promises to pay in agreement.

The only legitimate conclusion we can arrive at is that the act of sale of May 27, 1873, was recognized by the agreement, and all differences and disputes between the parties appertaining thereto or growing out of same, were therein adjusted and composed; and, that the consideration that was specified in the act of sale as *cash*, was explained and arranged to suit defendant's circumstances.

III.

Assuming the agreement to be a sale and not a compromise, defendant's counsel further argues that it is void, for the reason that a married woman is not permitted to purchase property on terms of credit on her separate account, unless she is possessed of adequate means to discharge her obligations from her own resources.

While that is true, as a general proposition, the principle is not properly invoked here. We have already ascertained that the agreement is not a sale; but, it is one in which the *previously* existing title of defendant is recognized and affirmed. We have also ascertained that the defendant acquired her title after her full majority, but prior to her marriage—hence there was involved, in its acquisition, no ques-

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tion of marital restraints or authority. In the answer of defendant's present counsel, he challenges the validity of the consideration for the agreement *beyond* the sum of \$30,000. Impliedly he admits that to be a fair valuation of plaintiff's interest. In our view, the defendant's obligations are less than that amount. But on that basis she became possessed of property worth \$60,000—including her share—and which was certainly adequate to the *paraphernal* acquisition.

IV.

A further argument is made to the effect that plaintiff released and abandoned all claims upon the *property* referred to as against his sister and against her husband, "if any he *may* or *might* have," and bound himself "never to make demand, call upon or prosecute his said sister, her husband, or their heirs, *for an account relating thereto*;" and, therefore, the whole agreement is tainted with illegality and cannot be enforced: It is difficult to conceive what claim plaintiff could have had against defendant's husband on account of his mother's succession or property. But it is a sufficient answer to say there is no proof furnished by the agreement or otherwise of any debt or demand the plaintiff had against the defendant's husband; and, inasmuch as both plaintiff and defendant were of full age in 1873, when they accepted their mother's succession unconditionally, no account was due the defendant.

We regard those as precautionary recitals in the act, and exercising no control over its general effect.

The act of sale was doubtless introduced by plaintiff as *adjuvatory* to, and as a basis for the agreement of compromise—to show the *status* of the parties thereto with respect to each other at the time it was made—and to indicate the relations existing between the title and the agreement itself.

V.

It cannot be contested that a married woman has the right to compromise a law suit pending against herself, or to make a transaction for the purpose of preventing a law suit against herself; and transactions have, between the parties, a force equal to the authority of things adjudged. 26 Ann. 289, Barion vs. Solibellos; 37 Ann. 679, Sentell vs. Doia Stark; 34 Ann. 1171, Thornhill vs. Bank; 37 Ann. 324, Chaffe vs. Watts; 20 Ann. 248, Davis vs. Lee; 23 Ann. 696, Roburn vs. Pierson; R. C. C. 3071, 3073, 3078.

The agreement appertains exclusively to the defendant's *separate* property. It is a compromise between two forced heirs to the succession of their mother, and had its foundation in a sale made ten years before and prior to the defendant's marriage.

On its face the consideration appears to be just and adequate, and its sufficiency has not been assailed or questioned here, except in argument and pleading.

The defendant appeared and signed the act in the presence of her husband, who signed with her, and her counsel, F. W. Baker, who also signed, attesting.

There is, in our opinion, no question of the validity of the agreement, and plaintiff is entitled to the enforcement of it.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be avoided, annulled and reversed; and proceeding to render such judgment as should have been rendered by the court *a qua*, it is ordered, adjudged and decreed that the agreement sued on be recognized and enforced, and that the plaintiff and appellant do have and recover of the defendant and appellee the sum of ten thousand dollars, with five per cent interest from judicial demand; that defendant be required to execute her note and mortgage in favor of plaintiff for the further sum of seven thousand five hundred dollars, with interest and mortgage, as stipulated in the agreement sued on; that she pay and discharge the Levy judgment of \$5200 and interest, and execute the donation to plaintiff's daughter of the land described, or that of equal value, and according to the terms and stipulations of the agreement; and that all costs of both courts be taxed against said defendant and appellee.

ON REHEARING.

We are requested to review and recast our opinion, upon the following grounds, viz:

1st. Because there is no evidence of the existence of disputes and differences other than the recitals of the act, and they are insufficient to bind a married woman.

2d. "If the contract sued on is, as the court terms it, a sale of plaintiff's interest in his mother's succession, it cannot be a compromise."

3d. If the contract could combine both a sale and a compromise, the portion resting upon the nature of a sale, could not bind a married woman.

4th. The plaintiff having proved the validity of the sale of 1873 to the defendant, he is estopped from disputing it; and, as warrantor, he is estopped from raising disputes and claiming rights growing out of said property, and a compromise based upon such a consideration is a nullity.

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5th. Because, if the court holds that the act of sale of 1873 is a simulation, then the contract is a sale, pure and simple, to a married woman not separate in property and upon terms of credit beyond her means.

6th. Because the court erred in supposing the husband to be a merely nominal party to the contract.

The issues tendered by defendant's answers are the following, viz :

1st. A general denial, coupled with the averment that plaintiff disclosed no legal right "upon the face of the papers" to bring him into court.

2d. That the agreement sued on evidences a community contract.

3d. That she is sought to be bound jointly with her husband for the Levy judgment.

4th. That part of the consideration of the agreement is the cancellation of her husband's obligation.

5th. That the agreement is a simulation and null *upon its face*.

On the trial the defendant was not sworn as a witness, and her counsel introduced no evidence. Hence none of her defenses are made out.

The agreement shows upon its face a *prima facie* right in plaintiff to bring the defendant into court.

It does not, in its recitals, evidence a community contract. They do not show that her husband's obligations enter into its consideration. It contains no inherent proof of its simulation. The Levy judgment is against the *plaintiff*, and there is no legal prohibition against the defendant's husband binding himself cojointly with her for its payment, to a stranger.

Recurring to the defendant's application for a re-hearing, we find, in our opinion, no warrant for the assertion that it construed the agreement to be a sale; or, as one partaking of both the nature of a sale and a compromise. The record does not disclose any evidence to justify the inference that plaintiff denies or disavows the title of 1873; or that he raised the disputes and differences concerning it. We gave no intimation to the effect that the sale of 1873 was a simulation—though the defendant and her counsel assert it was—and our inference that defendant's husband was only a nominal party, was drawn from the *want* of proof, of any kind, that he was an interested party. The opinion is plain and unmistakable.

It reads thus: "The agreement appertains, exclusively, to defendant's *separate* property. It is a compromise between two forced heirs to the succession of their mother; and had its foundation in a sale made ten years before, and prior to the defendant's marriage.

"On its face the consideration appears to be just and adequate; and its sufficiency has not been assailed or questioned here, except in argument and pleading. The defendant appeared and signed the act, in the presence of her husband, who signed with her and her counsel, F. W. Baker, who also signed, attesting."

The opinion further holds that a married woman has the incontestable right to compromise a law suit that is pending against herself, or to make a transaction for the purpose of *preventing* a law-suit being brought against her; and that transactions have a force equal to the authority of things adjudged.

The only remaining question for consideration is whether or not *extraneous* proof of differences and disputes should have been adduced, in order that a transaction or compromise should have binding force and effect upon a married woman, authorized by her husband alone, though not separated from him in property.

Defendant's counsel say, in their brief: "We plant ourselves upon the position that there is not, in this case, that *quantum* of evidence, adduced by the plaintiff, to authorize the Court to render a judgment against a married woman, on a contract signed conjointly with her husband, without the authorization of the judge. The whole case turns upon this question."

Further: "There is no doubt about the power of a married woman to enter into a compromise. A compromise is only one form of *contract*, which any person with power to alienate the thing with reference to which the compromise is made, can enter into. She has the option, unless the other party objects, to enter into such a contract of compromise, solely with the consent of her husband." But the other party "accepts a contract which imposes upon him the burthen of proof to show that the compromise was for the separate use of the wife."

It is a well established principle—one deeply imbedded in our jurisprudence—that he who sues a married woman upon a contract, or obligation, must show by proof administered that the "*contract turned* to her advantage"—or inured to her separate benefit. We do not understand that this rule obliged the plaintiff to administer proof to establish the verity of the contract, or the sufficiency of the consideration of the written instrument; but it does oblige him, by some evidence, to show that an established contract "*turned* to her advantage."

Defendant's counsel contend that in neither *Barron vs. Sollibellos*, nor *Sentell vs. Stark*, were the recitals of the act held sufficient proof of a transaction; but that proof *aliunde* was administered for the purpose of establishing it.

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In the former case, Mrs. Barron enjoined the execution of a judgment she had confessed, upon the double ground that the obligation was of her husband's and that it did not inure to her benefit.

The Court say: "The simple question presented is, can a married woman compromise a lawsuit pending against herself? We apprehend no one will dispute her right to do so. And 'transactions have, between the interested parties, a force equal to the authority of things adjudged. It is difficult to imagine how it can be pretended that money loaned to Solibellos for the purpose of enabling the compromise to be effected did not inure to her benefit. *Nor can she be listened to* when she says that the debt, on which Miltenberger has sued her, was the debt of her husband; for, by the compromise, they agreed to put an end to the lawsuit, to adjust their differences by mutual consent in the manner which they agreed on, and which each party preferred to the hope of gaining balanced by the danger of losing. The injunction was immediately maintained." 26 Ann. 289.

In the latter case plaintiff sued Mrs. Dora Stark on several mortgage notes that she had executed in pursuance of an act of compromising a lawsuit, and her defense was that the debt was her husband's, and marital coercion. The Court say: "That a married woman may compromise a pending lawsuit against herself, has been decided in *Barron vs. Solibellos*, where the facts were very similar to those in the case at bar, and *she cannot be heard to set up the defense that the debt was her husband's, in a suit upon the compromise*, after she has failed to make it in the previous suit, or withdrawn it, in consideration of the advantages she secured by the compromise.

"If a married woman, under such circumstances, can go behind her own judicial admissions and repudiate them, she will have invaded the law that the law has not conferred upon her. . . .

"We think the defendant has no escape from the payment of the obligations, and that the judgment in her favor is error." 26 Ann. 1171.

In *Thornhill vs. Bank*, suit was brought to annul a judgment rendered in pursuance of a compromise on various grounds, and among others that it was the husband's debt. The Court say: "The authority of a married woman to make a compromise, with the authority of her husband, has been judicially determined in *Barron vs. Solibellos*, 26 Ann. 289.

"The effect of the compromise and of the judicial proceeding based thereon, was only to effect that which the plaintiff would have had the unquestioned right to do, assuming that the debt was

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separate debt, viz: to subject her separate property to the payment thereof.

"Can the plaintiff be heard to deny that the debt did inure to her separate benefit? We think not. She was a party to the suit in which the judgment assailed was rendered, and she judicially confessed the fact.

"The cases suggesting that a married woman is *not estopped from attacking her own judicial confession* are based entirely upon the supposition that such confession may have been induced by *marital influence*," etc.

Instead of the court holding that extraneous proof was necessary, they declined to hear and consider such evidence in those cases. Instead of holding that proof should be administered to establish that the debt inured to her advantage, they say that the only reason that a married woman is estopped from *attacking* her judicial confession is based upon the supposition of marital influence. We have no such allegation here. On the contrary, the defendant's husband appeared as her counsel and filed her first answer, and his act was not subsequently repudiated.

In the last decided case—Sentell vs. Stark—defendant plead in her answer marital coercion and non-liability for her husband's debt; but she failed to substantiate the former and the court would not listen to the proof of the latter.

As illustrating the view taken of this subject, an early case may be quoted, in which it was said: "The wife was bound by the note which she executed jointly and severally with her husband; although, if the debt for which it was given was her husband's alone, and she merely a security, she could have resisted the execution of the amount by availing herself of her exception to such a contract resulting from her condition as a married woman. But having made the exception, and no *fraud, restraint, or duress* having been charged to be exercised in relation to her *non-appearance* after citation, the *judgment against her must be considered as valid*." 2 Ann. 342, Aubie vs. Gill.

In 23 Ann. 314, Darcy vs. Martin, the court sanctioned the right of a married woman to enjoin the execution of a judgment she had confessed with the authorization of her husband, on the grounds of error, fraud and marital coercion and restraint.

Similar rulings were made in 28 Ann. 839, Strother vs. Hamlet; 15 Ann. 628, Baines vs. Burbridge; 15 Ann. 621, Medart vs. Fasnach; 34 Ann. 1065, Succession of Andrus.

But to show how guarded this Court has been in admitting married

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women to urge such defenses against judgments, we have noted the striking language employed by our immediate predecessors in treating of them:

"And that principle has been carried so far that the wife is permitted to sue to annul and to enjoin the enforcement of a judgment she has confessed." 30 Ann. 1024, *Sara Bowman vs. Kaufman*.

The Code teaches that a transaction or compromise is an *agreement* "between two or more persons who, for *preventing* or putting an end to a lawsuit, adjust their differences by *mutual* consent, in the manner which they agree on, and which one of them prefers to the hope of gaining balanced by the danger of losing." R. C. C. 3071.

A transaction is an *agreement* of two or more parties. *It has for its* object the prevention or termination of a lawsuit between the parties. It is an adjustment of differences and disputes by mutual consent. This adjustment is preferred to the hope of gaining balanced by the danger of losing.

It was well said in *Raburn vs. Pierson*, that the law which gives to "the transaction the authority of the thing adjudged is founded upon the maxim that it is for the interest of the commonwealth that there should be an end to litigation." 23 Ann. 696.

This class of contracts is clearly distinguishable from that in which equivalents are respectively given and received.

It was correctly observed by our predecessors that "in transactions, as they are defined in the Code and in the Roman law, there is, from the nature of such contracts, something aleatory." 20 Ann. 248, *Davis vs. Lee*.

Pothier, in writing on the subject, employs this language: "There are certain agreements in which persons of full age are *not* entitled to restitution, be the injury ever so considerable. Such are compromises according to the edict of Francis II. These are agreements respecting pretensions upon which there are *impending or expected litigations*.
* * By the very nature of such agreements, the intention of the parties is the avoidance of litigation, even at the expense of what belongs to them." 1 Pothier Ob., p. 121 (36).

The Code declares that a transaction has "between interested parties, a force equal to the authority of things adjudged." and that "they cannot be attacked on account of error in law or *any lesion*." R. C. C. 3078.

In *Long vs. Robinson*, suit was brought to annul a transaction on the ground that there was great inequality in their respective shares and interests, and the Court held that such a claim was unfounded, and

declined to listen to evidence in support of it. What is "a force equal to the authority of things adjudged?"

"A thing adjudged is said of that which has been decided by a final judgment, from which there *can be no appeal*, either because the appeal did not lie, or because the time fixed for appealing is elapsed; or because it has been affirmed on appeal." R. C. C. 3556, No. 31.

If, then, as learned counsel admit, "there is no doubt of a married woman's right to enter into a compromise," or to make a transaction, "solely with the consent of her husband," we submit, on the authorities cited, that his question must be answered in the negative.

There is no precept of the law that requires evidence to support an act or compromise. This would of itself destroy its effect as a transaction. It could not then be said to have a force equal to the authority of things adjudged. It would then be deprived of its character as an unappealable judgment, and reduced to the rank of conventional obligations and commutative contracts. If it be necessary to prove *aliunde* that there was an *adequate* consideration, then it would *eo instanti* cease to be a compromise. If proof is necessary to show that the contract turned to her *advantage*, the provisions of the Code would be violated, and by its reception the jurisprudence would be trenced upon.

Both the Code and the decisions quoted clearly indicate what defendant's remedy and redress are. If there was error in the matters that were transacted, or, if fraud, violence, duress, marital coercion, or restraint were resorted to; or possibly upon proof that the debt did not enure to her separate estate, or was, in fact, that of her husband, she might have been relieved; though it is unnecessary to decide that question now, because there is no averment of marital coercion, or restraint; and no proof whatever of any of the charges we have enumerated. And, in maintaining the transaction in the instant case, we have not gone to the extent of the doctrine that was announced in *Aubie vs. Gill*, above cited.

We have given the questions involved most patient and careful consideration, and feel satisfied that the conclusions announced in our opinion are founded in reason and on authority, and we shall adhere to them.

It is, therefore, ordered, adjudged and decreed that our original opinion and decree remain undisturbed.

Mr. Justice Poché takes no part, and assigns his reasons.

POCHÉ, J. My examination of this case, on the application for re-

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hearing, had led me to the conclusion that our original opinion was erroneous, and that owing to the lack of evidence on the part of plaintiff, to support his claim, the judgment should have been one of nonsuit. I adhere to that opinion; but as I was prevented by sickness from hearing the argument of counsel on rehearing, I take no part in the present opinion and decree.

No. 9913.

JAMES A. RENSHAW vs. ADELINE C. DOWTY AND HUSBAND.

In a suit by a creditor for the nullity of a transfer by his debtor to the latter's wife, of property, as a *dation en paiement* of her paraphernal funds, on the ground that such transfer is simulated and fraudulent, proof on the part of the wife that there was actual consideration, although inadequate, is conclusive against the allegation of simulation. The attack of the transfer as a fraudulent preference over the husband's creditors is the revocatory action of our code, and is barred by the prescription of one year.

A PPEAL from the Twelfth District Court, Parish of Rapides.
Blackman, J.

R. J. Bowman and Henry Renshaw for Plaintiff and Appellant:

The evidence shows that the claim of the wife does not reach \$3600, and the property conveyed is \$3060 more than that amount. Contracts between husband and wife are nullities, non-existent, except to restore the amount due the wife.

Where more than half the price is simulated, the contract is simulated, as well as a nullity, because such a contract is prohibited.

In simulations subsequent creditors can attack. 15 Ann. 177. A simulated transfer will not support prescription. 11 Ann. 265; 10 Ann. 20; 8 Ann. 81. 458; 1 Ann. 132.

The prescription of one year pleaded begins only from date of judgment against the debtor, is inapplicable to sale in execution of wife's judgment. When no debt is due her, it is a mere nullity and transfers no title. 6 Ann. 87.

Presumption, in actions from fraud alone, begins only from date of creditor's judgment. C. C. 1889. One year had not elapsed from date of judgment.

The testimony of married women, in proof a paraphernal claim against husband in a sum exceeding \$500, uncorroborated by circumstances, is insufficient to establish the claim. 37 Ann. 857.

Value of property in this case determines jurisdiction. 37 Ann. 136.

James Andrews for Defendant and Appellee:

1. The husband and wife can make a legal contract of sale, or *dation en paiement*—1st, whenever the transfer is for the purpose of paying the rights of one of the spouses judicially separated from the other; 2d, whenever the transfer from the husband to the wife has a legitimate cause, such as the replacing of her dotal or other effects by him alienated. This contract may take place whether the spouses be separated in property or not. Voorthies, C. C. 2446; Rev. C. C. 2421.
2. The wife may, during marriage, petition against the husband for a separation of property when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims. Voorthies, C. C. 2425; Rev. C. C. 2399.

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3. A *dation en paiement* made by the husband to the wife in settlement of her paraphernal rights, if in good faith, is valid, though her judgment of separation against him be null. 30 Ann. 746.
4. A suit to annul a *dation en paiement* made in execution of a wife's judgment as collusive, fraudulent and simulated, can be viewed in no other light than a revocatory action. 6 Ann. 87, 494; 11 L. 424; 14 Ann. 106; 30 Ann. 966; 34 Ann. 347.
5. The correctness of a judgment of separation, or the sufficiency of the evidence upon which it was rendered, cannot be inquired into by a creditor of the husband whose claim arose subsequent to its rendition. C. C. 3434; 6 Ann. 391; 4 R. 336; 24 Ann. 49; 22 Ann. 49; 23 Ann. 619; 10 Ann. 564; 14 Ann. 49.
6. The husband's transfer to the wife in satisfaction of her paraphernal claims is not subject to the ordinary rules governing the revocatory action. By our settled jurisprudence neither his pecuniary embarrassment or actual insolvency, nor injury to the rights of creditors, present any obstacle to transfers in satisfaction of such claims, when shown to be real and genuine. 8 Ann. 485; 30 Ann. 745; 33 Ann. 536; 34 Ann. 992.
7. Actions to annul a wife's judgment and a transfer thereunder are prescribed in one year from the date of the transfer or *dation en paiement*. 6 Ann. 87; 11 L. 424; 34 Ann. 347; 30 Ann. 966; 14 Ann. 106.
8. He who alleges simulation must establish it, and to do so must disclose an intention to defraud and injury to himself. 18 L. 338; 2 R. 92; 12 Ann. 739; 13 Ann. 474; 30 Ann. 966; 22 Ann. 619.
9. The wife may introduce other proof when her judgment against her husband is attacked by the husband's creditors other than that upon which it is based, and show that his indebtedness is greater than the price stipulated in the *dation en paiement* made to her. 28 Ann. 546.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff's object is to annul and set aside a *dation en paiement* made by the defendant husband to his wife as fraudulent and simulated, and as injurious to him as a judgment creditor of the husband.

The defense is a general denial, an averment that plaintiff was not a creditor of the husband at the date of the transfer, and the prescription of one year.

Plaintiff appeals from an adverse judgment.

The transfer from the husband to his wife was preceded by a judgment of separation of property, condemning him in the sum of \$5320.60 in favor of his wife; and the property transferred was appraised at \$5663. While in his petition plaintiff charges absolute simulation in the proceedings which he attacks, on appeal he concedes that the moneyed claim of the wife amounted at least to the sum of \$2583.37.

It follows, under his own admission, that there was a real and valid consideration to the extent of that sum for the transfer. Hence the transaction was not a simulation, and that feature of the action fails. *Brown vs. Brown*, 30 Ann. 966.

Wilson & Belanger vs. Hanna & Bro.

This leaves plaintiff in the attack with his allegation of fraud to the detriment of his rights as a creditor.

Conceding *arguendo* that he was a creditor at the date of the transaction, his action must be characterized as an attack on a real contract, alleged to have been made in fraud of creditors.

This is the revocatory action proper, which is barred by the prescription of one year from the date of the attacked transfer. C. C. 1987; Britto vs. Favre, 34 Ann. 347, and authorities therein cited; Powell vs. O'Neil, 24 Ann. 522.

The *dation en paiement* was made in December, 1883, and plaintiff's action was brought in January, 1886; it is therefore barred by the prescription of one year.

Judgment affirmed.

No. 9791.

WILSON & BELANGER VS. W. R. HANNA & BRO.—W. H. BROWN,
INTERVENOR.

Where the issue in a case is one of fact, such as fraud or simulation, and the testimony is conflicting, it is a safe rule not to disturb the judgment of the lower court, unless after careful research and patient weighing of the jarring testimony, there is a thorough conviction that the judgment is wrong.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

P. E. Théard & Sons for Plaintiffs and Appellants.

W. S. Benedict and *A. J. Murphy* for Intervenor and Appellee.

J. A. Seghers, Curator *ad hoc*.

The opinion of the Court was delivered by

TODD, J. The parties to this litigation are all residents of Nicaragua.

The plaintiffs, merchants of Bluefields, sue the defendants on balance of an account for \$3,523.35, before the Civil District Court of New Orleans, and caused to be attached fifty-five bales of rubber as the property of the defendants, which had been shipped to this port and consigned to Messrs. Schmidt & Ziegler, of this city. An order was procured by plaintiffs contradictorily with the curator *ad hoc* appointed to represent the defendants, for the sale of the property attached, during the pendency of the suit, and it was sold for \$2,334.

On the day before the sale, W. H. Brown intervened in the suit,

claiming to be the owner of the property by virtue of a purchase of the same from the defendants.

The plaintiffs, in answer to the intervention, alleged that the sale of the property to the intervenor was a fraudulent simulation.

There was judgment in favor of the intervenor and the plaintiffs appealed.

The sole controversy is between the plaintiffs and the intervenor, touching the ownership of the property seized—there being no contention about the debt.

As usual in litigations of this character, we find the evidence in the record, which is extensive, painfully conflicting, rendering the issue in the case difficult of determination.

Were we to be guided by the evidence on behalf of the plaintiffs alone, we would readily reach the conclusion that the sale in question was a pure simulation, as by that evidence it is made to appear that the intervenor went to Nicaragua entirely without means, and was for some time employed by the defendants as clerk at a moderate salary, and that such was his apparent condition at the date of the alleged transfer of the rubber.

On the other hand, it is shown that soon after quitting the employment of the defendants as clerk, the intervenor purchased at a nominal price the lease for a long term of years of a large tract of land, and established thereon a banana plantation, estimated to be worth at the time of the trial in the lower court, about \$8,000. That he was assisted in the improvement of this plantation and his business generally by a merchant doing business at Bluefields, a town in the Mosquito Reservation in said State. The price purporting to be paid for the rubber by the intervenor was \$800 in cash and \$208.34 in merchandize. This price the intervenor swears that he paid, and another witness swears that he was present when the payment was made and counted the money himself, and also that he negotiated for the intervenor a loan or advance from the merchant above mentioned of the funds or means to make the payment.

The testimony of these witnesses is corroborated by that of the merchant referred to—named Ebensberger—who stated that he had made advances of money and merchandize to the intervenor exceeding \$3000, and spoke of him (the intervenor) as meriting the credit he had given him and confidence bestowed from the reputation he had established for industry and probity and exceptional morality.

In cases of this kind, where the mind is liable to be embarrassed with doubt, under the effect of conflicting testimony, we think it the

Succession of Benjamin.

wiser and safer rule not to disturb the judgment of the lower court, unless after a careful study of the evidence and a patient weighing of the jarring testimony we are thoroughly convinced that the conclusion reached by the judge of the first instance is wrong. In the instant case we have reached no such conclusion.

Judgment affirmed.

No. 9823.

SUCCESSION OF ALEXIS BENJAMIN.

A conventional mortgage, under our law, can result only from contract.

Where such a mortgage is claimed, under the terms of an ambiguous writing, two things are essential, viz: (1) The intention to create a mortgage on the part of the parties thereto; (2) in order to have effect with regard to third persons, the expression of that intention with sufficient clearness to serve as notice to them, when the instrument is recorded.

Finding both these essentials wanting in the instrument under which the mortgage is claimed, the right is denied.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Alfred Grima, for the Administratrix, Appellee.

Braughn, Buck, Dinkelspiel, & Hart, for the Opponents, Appellants.

The opinion of the Court was delivered by

FENNER, J. Loeb & Schoenfeld, holding a judicial mortgage on the immovables of the deceased, oppose the account herein filed by the administratrix, because, in distributing the proceeds of sale of the only immovable of the succession, the property No. 222 Baronne street, the administratrix awards a preference thereon in favor of Jules Aldigé, as a superior mortgage creditor.

Aldigé's claim to a mortgage rests on the following anomalous instrument:

(Face of Note.)

"\$477.79.

New Orleans, July 17th, 1882.

"On demand, after date, I promise to pay to the order of J. Aldigé, four thousand four hundred and seventy-seven 79-100 dollars, for like amount advanced by him in payment of property, No. 222 Baronne street, in my name. Interest 8 per cent till paid. Value received.

"(Signed)

A. BENJAMIN."

Succession of Benjamin.

And the reverse of the note reads:

"STATE OF LOUISIANA, }
Parish of Orleans. }

"Before me, Charles G. Andry, a notary public, duly commissioned and qualified, in and for the parish of Orleans, State of Louisiana, personally came and appeared Mr. Alexander Benjamin, of the city of New Orleans, who being duly sworn by me, notary, declared and said that he is justly and truly indebted unto Jules Aldigé, Esq., also of the city of New Orleans, as set forth in the note, which is on the reverse hereof, in the sum of forty-four hundred and seventy-seven 79-100 dollars, which have been advanced by the said Aldigé to him, the affiant, and applied by him, the affiant, to the payment of a certain piece of property, situated in the First District of the city of New Orleans, in the square bounded by Baronne, Dryades, Julia and St. Joseph streets, and bearing the municipal No. 222 on Baronne street.

"That in order to secure the payment or reimbursement of the said sum to the said Aldigé he, the affiant, does hereby recognize and acknowledge, in favor of the said Aldigé, a privilege and lien on the above described property, and he does also authorize the recording of the said lien and privilege in the office of the Recorder of Mortgages for the parish of Orleans.

"(Signed)

A. BENJAMIN.

"Sworn to and subscribed before me at the city of New Orleans, this thirteenth day of September, 1884.

"(Signed)

CHAS. G. ANDRY,

"Notary Public."

The foregoing was recorded before the judgment of opponents, and if it be either a privilege or a mortgage, it ranks their judicial mortgage.

It is apparent that no privilege exists; and the only question is whether the writing creates a conventional mortgage.

It purports to "recognize and acknowledge" a "privilege and lien."

Under our law, the term "privilege" has a well defined meaning, different and distinct from the term "mortgage."

In a recent case we said: "The distinction between mortgages and privileges is too elementary and well understood for us to extend the plain significance of a statute nominating privileges only, so as to cover and include mortgages also." State ex rel. Jackson vs. Recorder, 34 Ann. 178.

The only kind of incumbrances on property known to the law of Louisiana are mortgages and privileges.

Succession of Benjamin.

The term *lien* is not used in our law as significative of any particular sort of incumbrance. It is a legal term used generally to signify any incumbrance on property, but, we may say, usually employed in connection with privileges, and rarely with mortgages.

Indeed, it is quite common to use the tautological expression of *lien and privilege* as applied to a mere privilege, *e. g.* the vendor's lien and privilege, the lessor's lien and privilege.

From this it is clear that the use of the term *lien* in addition to that of *privilege* does, by no means, of itself, indicate the intention to create or recognize a mortgage, or indeed anything in addition to a *privilege*.

It is to be borne in mind that if there is any mortgage here, it is a conventional mortgage, or one resulting from a contract.

The terms of this contract being ambiguous, we must endeavor to determine what was the intention of the parties. *Miller vs. Shotwell*, 38 Ann. 890.

Benjamin expressed his intentions to the notary who prepared the writing indorsed on the notes. Can it be supposed that, if he had expressed or even hinted a desire to grant a mortgage, that experienced and able notary would have drawn up such a writing as is here presented ?

From the terms of the writing itself, it is perfectly clear to our minds that, from the fact that the note was given for money advanced by Aldigé, and actually applied in payment of the price of the property bought by Benjamin, the latter supposed that Aldigé had acquired a vendor's privilege on the property ; and his simple object was, by the indorsement, to put the evidence of this privilege in proper shape to be recorded.

The whole language indicates this purpose, and is as far as possible from indicating an intention then and there to create a new and original right.

Such would be the purpose suggested from the reading of the instrument. It was the evident interpretation put on it by the Recorder of Mortgages himself, who, when he furnished his certificate, reported this, not as a mortgage, but as a privilege.

We have not a shadow of doubt that it was so regarded by the notary, by Benjamin, and even by Aldigé, until, under the necessities of his case, his learned counsel suggested this far-fetched theory of its being a mortgage. Nay, we note that even he, in suing on this note, originally brought a simple personal action, and the claim of mortgage is only asserted, as an afterthought, in a supplemental petition.

Mr. Aldigé, though examined as a witness, does not pretend to

Succession of Benjamin.

assert that he accepted this contract as a mortgage, or ever regarded it as such.

To create a conventional mortgage, two things are essential, viz: the intention to create it on the part of the parties to the contract; and, in order to have effect with regard to third parties, the expression of that intention with sufficient clearness to serve as notice to them when the instrument is recorded. Both essentials are wanting in this case, and we are bound to overrule the conclusion of our learned brother of the lower court.

It is, therefore, ordered, adjudged and decreed that judgment appealed from, dismissing the opposition of Loeb & Schoenfeld, be annulled, avoided and reversed; and it is now decreed that their said opposition be sustained, and that the account of the administratrix be amended by placing the said Loeb & Schoenfeld thereon as judicial mortgage creditors for the amount claimed by them, with right to be paid out of the proceeds of the immovable property sold, by preference over Jules Aldigé and other creditors; costs of said opposition and of this appeal to be paid by the succession.

DISSENTING OPINION.

BERMUDEZ, C. J. The law attaches little or no importance to the name by which parties designate the nature of their acts or transactions. To assist in finding and carrying out the object in view, it ascertains primarily the intention of the parties, and next determines what rights have been conferred and what obligations are to be enforced.

Among the instances in which courts of justice have applied this conservative principle are found numerous cases in which, for instance, contracts termed *conveyances* have been pronounced to be *mortgages*; in which apparent *sales* have been declared to be *donations*; in which *authentic wills* have been considered as wills *under private signature*, etc.

In the present matter it is glaring that Benjamin intended two things:

1st, to acknowledge, in a solemn form, his indebtedness to Aldigé, giving its origin, or consideration, viz: money lent him for the purchase of the property in question, and,

2d, to secure the payment of that debt by encumbering, in favor of Aldigé, the *very* real estate bought with his money.

It is true that, in the anomalous instrument described, uselessly put in the form of an *affidavit*, he recognizes in favor of Aldigé a *privilege*

Succession of Benjamin.

and a *lien*, instead of a *mortgage* on the property ; but this misnomer practically amounts to nothing.

It is very probable that he did not know the difference between a *privilege* and a *mortgage*, which to many is specious.

It is not shown that the notary before whom he took the oath, informed him of the meaning of the words *lien* and *privilege*, or gave him any explanation on the subject.

It is not unlikely that he thought that the payment of this debt would be better secured by a *privilege* than by a *mortgage*.

There is nothing to show what the notary and the Deputy Recorder of Mortgages *thought* of the nature of the act, and even if there was, their views on the subject could not serve to assist the court in determining a question affecting the character of the deed, and which it alone can solve.

If those views, however, be entitled to consideration, surely those of the district judge, before whom a suit was brought to enforce the debt and mortgage and who recognized the mortgage, ought to outweigh those of the notary and deputy recorder.

Mortgage is defined by law to be a right granted to the creditor over the property of the debtor for the security of his debt. R. C. C. 3278.

In the case of *Thibodaux vs. Anderson*, 34 Ann. 800, this Court said that the word mortgage was not sacramental, but that an instrument to constitute a Louisiana mortgage must contain all the essential elements.

In the case of *Ells vs. Simms*, 2 Ann. 251, germane to the instant one, the mortgage resulted from a stipulation on a note that the drawer recognized, agreed and consented that the party "has a privilege and mortgage for the securing the payment of said sum of money." The mortgage was recognized.

The word *lien* has been used in the sense of *mortgage* in the following cases, viz: *Vincent vs. Merle*, 19 Ann. 529; *Dupuy vs. Bemiss*, 2 Ann. 513; *Leonard vs. Shiff*, 37 Ann. 299, 362; *Williams vs. Duer*, 14 La. 537; *Butt vs. Elliot*, 19 Wall. 547.

This is not a case in which it can be said: *Rei ens dat forma*.

It must be noted that in the present case, Benjamin used the word *lien* beside the word *privilege*. *Lien* is a generic term which means either a *privilege* or *mortgage*. *Bouvier, L. D. Vo. Lien No. 13*.

Has not Benjamin distinctly stated that he acknowledged the indebtedness and in order to secure its payment recognized a *privilege* and *lien* on the property ?

Van Raalte vs. Congregation.

Was not this a formal recognition of a right in Aldigé over the real estate for the security of his debt?

If it was, is not the *name* immaterial by which that right was designated?

Had Benjamin used the word *mortgage*, could it be claimed that he did not intend to hypothecate his property to secure payment of so just a debt?

To say that the debt is not secured by a mortgage, is to hold that Benjamin, who intended to do a just act and to *encumber* his property, did not do so and that, where he did *two* things, (consent and encumber) he did *nothing*.

It is a contemporaneous fact that the instrument was duly and seasonably recorded in the mortgage office. This was done to put third parties on their guard, by notifying them that Benjamin had acknowledged an indebtedness and, in order to secure its payment, had encumbered the real estate bought with Aldigé's money.

There is no doubt that Benjamin could, in this *ex parte* manner, acknowledge the debt and secure it by encumbering his property in favor of Aldigé, though the latter was absent and not a party to the act. *Allain vs. Millaudon*, 2 L. 552; *Hill vs. Barton*, 6 Rob. 150; case No. 7398, N. R., *Lamkin vs. Maxwell*.

The mortgage claimed should be recognized and enforced.

No. 9873.

S. VAN RAALTE VS. THE CONGREGATION OF THE MISSION.

39	617
125	309

An order of seizure and sale must be supported by authentic evidence *exclusively*.

Such an order is improperly granted without authentic evidence of the transfer of notes by indorsement.

In executory proceedings, the judge cannot entertain as evidence matters *in pais*.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Jonas & Nixon for Plaintiff and Appellee.

S. L. Gilmore for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. This appeal is prosecuted by defendant in executory proceedings, and he insists here that the fiat issued without adequate authentic evidence, and that the order of seizure and sale should be annulled and set aside.

In this Court plaintiff and appellee answers the appeal, and avers that it is frivolous and was taken for purposes of delay, and he prays the affirmance of the judgment appealed from, with ten per cent damages.

The appellant assigns as error apparent upon the face of the record that there was *no authentic* evidence before the lower court, at the time it granted the order of seizure and sale, of the *indorsements* on the note; and that the genuineness of same should have been made to appear by authentic evidence.

Plaintiff's petition shows that he is the *bona fide* holder for value of defendant's note, and that it is payable to the order of Mrs. Mary D. Foster, for \$3000 in gold; that said note was indorsed by Mary D. Foster to the order of Dr. J. O. Ducker; and by the latter to the order of Davis F. Ducker; and by the latter to the order of A. D. Sheldon; and by him indorsed in blank; and by Daisy F. Ducker indorsed to the petitioner; and that same is annexed to and made a part of petition, as well as the act of special mortgage securing its payment, in favor of the original payee or any future holder.

The note evidences the various indorsements enumerated, but it bears the impress of but one notarial paraph, and that one is contemporaneous in date with the date of the note and is signed by same notary before whom the act was passed.

The recitals of the act conform with the description of the note and its indorsements above recited.

The record discloses no authentic evidence whatever of the indorsements through which the plaintiff and appellee necessarily traces his title thereto.

This case is an exact parallel with *Miller, Lyon & Co. vs. Coppel & Currey*, 36 Ann. 264, in which the Court say: "There is authentic evidence of the execution of the note, and of the mortgage, but none to show the transfer of the note and of its accessory, the mortgage. * * To justify the order of seizure and sale every muniment of title and every link of evidence must be in the authentic form. In such a proceeding the judge can entertain no matter *in pais*." The judgment and decree of the court annulled and set aside the order of seizure and sale, and dismissed the case of nonsuit.

It is therefore ordered, adjudged and decreed that the order of seizure and sale be annulled and set aside, and that the executory proceedings be dismissed as of nonsuit, and that all costs be taxed against plaintiff and appellee..

Judgment reversed.

State ex rel. Sweeney vs. Judge.

No. 9948.

39	619
48	942
49	1728
39	619
116	683

THE STATE OF LOUISIANA EX REL. JAMES SWEENEY VS. N. H.
RIGHTOR, JUDGE OF CIVIL DISTRICT COURT FOR THE PARISH
OF ORLEANS.

The Constitution guarantees to every person the right to seek redress through the courts for any injury to his person or property, or to enforce any legal demand therein.

So a court is without power to prevent, by an injunction, a person from bringing a suit before another court of competent jurisdiction, to enforce a right claimed or redress a grievance.

APPPLICATION for Certiorari and Prohibition.

T. M. Gill, for the Relator.

Farrar & Kruttschnitt, for the Respondent.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *certiorari* and prohibition.

The relator complains that the district judge has issued against him, at the instance of certain parties, an injunction preventing him from collecting judicially certain wharfage dues from said parties; that he has moved for the dissolution of said injunction, for reasons assigned, and next on furnishing bond; but that these motions were denied.

He further complains that he subsequently pleaded to the jurisdiction of the Court, but that his exception was overruled.

He charges, therefore, that the injunction was improperly allowed, and that the court has exceeded the bounds of its jurisdiction.

In his application before this Court, he prays for a *certiorari* that the validity of the proceedings may be ascertained; that the injunction be annulled and set aside, and that said judge and the parties who obtained the injunction be prohibited from proceeding further with the case.

Under the proceeding in this Court, which we take to be *mainly*, for a *certiorari*, and, *subsidiarily*, for a provisional, and eventually, for a perpetual prohibition—the only questions which can be raised, must involve, either the jurisdiction of the court or the regularity, in point of form, of the proceedings before it.

I.

The grounds upon which the relator apparently rests his plea to the jurisdiction, seem to be:

1st. That the plaintiffs who sought the injunction and obtained it,

State ex rel. Sweeney vs. Judge.

have prayed for no *money* judgment, but have merely asked that the injunction be perpetuated; and

2d. That the Court has only an appellate jurisdiction in certain causes, and no supervisory jurisdiction over inferior courts.

(a) It is true that the plaintiffs have not prayed for a money judgment, but the petition which is verified by oath, avers distinctly that, unless the injunction issue, they will sustain injury exceeding \$1000.

This allegation was sufficient to vest jurisdiction.

(b) Holding, as we do, that the district court could, under the averment of apprehended injury, entertain original jurisdiction, we are at a loss to perceive any force in the second ground alleged.

II.

The relator has assigned numerous reasons for which he claims the injunction ought to be dissolved; but he has made no attack on the *regularity* of the proceedings. Judging from the extracts annexed to the petition, these appear, on the contrary, to have been, in point of form, properly conducted.

It may be that the judge ought not to have issued the injunction, and having done so, that he ought to have dissolved it: but he was vested with a legal discretion in the matter, the proper exercise of which cannot be drawn in question in a proceeding like the present one.

The relator is not left without adequate remedy. If he be right, he may still convince the judge who, before passing on the merits, may reconsider and recall his previous rulings, if he think proper.

We have no authority to decide that the injunction was wrongfully issued and ought to have been dissolved.

It is, therefore, ordered and decreed that the application for a *certiorari* and prohibition herein be dismissed at relator's costs.

ON REHEARING.

TODD, J. The rehearing was granted in this case for the purpose of determining a question which was not considered in our former opinion. It is this: Does a district court possess the power to prevent, by an injunction, a litigant from bringing a suit, or filing a complaint before another court of competent jurisdiction?

The relator opposes the assertion or exercise of such power on the authority of Art. 11 of the State Constitution, which reads:

All courts shall be open and every person for injury done him in his rights, lands, goods, person or reputation shall have adequate remedy by due process of law, and justice administered without denial or reasonable delay."

State ex rel. Sweeney vs. Judge.

This article is the same as Art. 10 of the Constitution of 1868. In the case of Bratt vs. Eager, Ellerman & Co., 28 Ann. 262, that article was appealed to against a similar exercise of power by a district court, as presented in the instant case. There, an injunction had been granted to prevent the lessees of the city wharves from suing to recover, in a justice court, the wharf fees or charges against the owner and master of a steamboat. The injunction was dissolved. Wyly, J., the organ of the court, in his opinion uses the following language :

"The right to claim judicially what one believes he is entitled to, and the right to prosecute a suit in court, are rights which can be denied to no one. They are protected by Art. 10 of the Constitution."

And in a previous case, Butchers' Association vs. Cutler, 26 Ann. 500, where an injunction had issued to prevent a party from prosecuting twelve suits before a justice court, the injunction was dissolved, the court stating: "A party cannot be enjoined from prosecuting suits for claims whether well founded or not. On the defense the parties can be heard and their rights adjusted. The intimation that a party fears that he may not obtain justice before the particular judicial officer, or that he should be sued in a court of higher jurisdiction, is no ground for an injunction."

And in the recent case of State ex rel. Hirsch vs. Judge, not yet reported, the present Court held that a district court was powerless to grant a writ of prohibition to stop the proceedings in a suit pending in another court.

Apart from the constitutional question, the manifest reasons for these rulings is in that case the court has jurisdiction of the subject matter of litigation pending before it, or threatened, it is to be presumed that such court will determine the suit as justly and as intelligently as the court that is appealed to judge the matter in advance, and prevent the other court to which the controversy is submitted from trying it at all. And, though complaint should be made that the judge of the inferior court would fail to do justice through some improper or corrupt motive, yet as he is the judge *de facto* and *de jure*, in the full exercise of his judicial functions, his condemnation in this collateral manner, and in a proceeding of this character and to which he is no party, would be wholly without warrant of law. Within the sphere of his jurisdiction the judge of the inferior court complained of is the peer of the judge asked to exert authority over him. If the charge made against the judge, of incompetency, partiality or corruption, is well-founded, the Constitution and laws afford to all litigants aggrieved a convenient remedy, which we need not point out. But, as long as he

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remains in office and presides in his court, a litigant has the right to take his case before him, whether just or unjust, if the demand belong to his jurisdiction; and resort can only be had to the prescribed modes of relief from the judge's errors or malfeasance. It is true that authority may be found to support the proposition that a court of equity may in some instances enjoin a party from resorting to a court of law to prosecute his demand; but, upon examination, it will be seen that such an exceptional proceeding is based on the reason that a court of common law cannot, under its restricted or prescribed powers, afford the relief that the party complaining may be entitled to. Under our system such a reason cannot exist, since all our courts possess equally law and equity powers. And, in this instance, the city court from which the relator is sought to be debarred from bringing his suits, within the bounds of its jurisdiction, possesses those joint powers as amply as the district court whose aid and authority is invoked for the purpose stated.

We are satisfied that no authority or precedent can be found warranting one court of equity to enjoin the proceedings in another court of equity, or to restrain a party or suitor from filing his complaint therein.

It is, therefore, ordered, adjudged and decreed that the previous decree of this court in this case be annulled and set aside; and it is now ordered and decreed that the writ of prohibition be and the same is made absolute, and the respondent judge prohibited from proceeding further with the injunction suit referred to, and further, that the proceedings in said suit be and the same are hereby quashed and annulled.

Mr. Justice Poché, being absent when this case was argued on rehearing, takes no part in this decree.

No. 9973.

THE STATE OF LOUISIANA EX REL. WILLIAM MADISON VS. E. J. BERMUDEZ, JUDGE OF THE THIRD CITY COURT OF NEW ORLEANS.

A. ticle 246 C. P. is applicable to the City Courts of New Orleans, and when the garnishee under *fi. fa.* has confessed that he is indebted to the judgment-debtor in a sum of money, the judge is authorized to order him forthwith to pay such amount into the hands of the constable.

Where such order is made after three days from service of notice of the seizure on the judgment-debtor, who has made no opposition thereto, he cannot, under *certiorari* in this Court, have such orders annulled on the ground that the money seized was due for

State ex rel. Madison vs. Judge.

wages and, therefore, exempt. He had the opportunity to raise this issue in the lower court, and, having failed to do so, the judge was not bound to raise it for him. The order was regular and authorized by the law.

A PPLICATION for Certiorari.

Wm. L. Thompson for the Relator.

T. F. Maher and *L. F. Bouchereau* for the Respondent.

The opinion of the Court was delivered by

FENNER, J. The record shows that Catherine McGivney, having a judgment against relator, Wm. Madison, issued a *fi. fa.*, under which, on March 25, 1887, it seized the rights, credits, etc., of the judgment-debtor in the hands of the Southern Pacific Railroad Company. The notice of seizure and interrogatories in garnishment were served on the company on March 25th, and on the same day Madison was personally served with notice of the seizure.

On March 28th, the garnishee filed its answers confessing an indebtedness to Madison in the sum of \$21.35. On March 30th, the plaintiff made a motion for an order of the court directing the garnishee to pay the amount confessed to be due to the constable of the court forthwith, which order was made. On the same day the money was paid to the constable, who paid it over to the attorney of plaintiff.

Relator, thereafter, on March 31st, appeared and filed what he calls an answer to the notice of seizure served on him, setting up that the amount seized in the hands of the garnishee was wages due him as a laborer, and exempt from seizure. Upon the issue raised by this answer no further proceedings have been taken.

Relator now applies to this Court for a writ of *certiorari* and for a decree thereon annulling the order made by the respondent judge, directing the garnishee to pay over to the constable the debt confessed to be due.

The judge only complied with the express mandate of the law under Art. 246 C. P., which provides, with reference to garnishments under *feri facias*: "In case such third person shall confess in his answers that he has property or effects in his possession belonging to defendant, or is indebted to him in any sum of money, the court shall order him forthwith to deliver up said property or to pay such sum to the sheriff," etc.

Relator had had due notice and ample time to assert his right of exemption, and it is his own fault if he has failed to do so until after the delay allowed by law has expired. C. P. 655, 657. The judge was

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not bound to raise this issue for him. His proceeding was regular, and in accordance with law.

We have no case before us in which a judge has decided that a laborer's wages are subject to seizure, because no such issue has been presented except under the untimely answer of relator, on which no ruling has been made.

It is, therefore, ordered that the demand of relator be rejected, at his cost.

Bermudez, C. J., takes no part.

No. 9912.

THOMAS MIX VS. HIS CREDITORS.

The plea of *lis pendens* is a declinatory exception, and cannot be permitted in an answer to the merits; and if incorporated in an answer, it is thereby waived and loses its efficacy as an exception.

An exception to the jurisdiction of the court *ratione personæ* is likewise a declinatory exception, and must be pleaded *in limine litis* and before answering the merits.

The terms and stipulations contained in act of mortgage consented, as a collateral security for an anticipated indebtedness for advances to be made in aid of the cultivation of the crop of cotton, must control the destination of the proceeds thereof; and same cannot be otherwise imputed or applied without the consent of the debtor and mortgagor.

A PPEAL from the Fifteenth District Court, Parish of Pointe Coupée. Yoist, J.

Olivier O. Prevosty for Plaintiff and Appellee.

James Vignes, Jr. and *Martin Voorhies* contra.

The opinion of the Court was delivered by

WATKINS, J. Thomas Mix made a *cessio bonorum* in March, 1885, and obtained the usual order staying all proceedings against his person and property.

He filed schedules of his property and lists of creditors, privileged and ordinary. At the meeting of his creditors he was chosen his own syndic. He was duly qualified, and on the 10th of October, 1885, obtained an order for the sale of the immovables, and the property was advertised to be sold on the 7th of January, 1886. An order was subsequently obtained by *ordinary* creditors, postponing the sale, and thereafter the present rule was taken by the plaintiffs, who are *ordinary* creditors of Mix, the insolvent, figuring on his schedule, against P. G. Gibert, the syndic, and recorder of mortgages of the parish of Pointe

39	624
44	521
39	624
46	1498

39	624
118	780

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Coupée, for the erasure and cancellation of his (Gibert's) special mortgage inscribed against the immovable property surrendered by the insolvent and advertised for sale, as above related.

The defendant, Gibert, is a recognized creditor of Mix, and appears on the schedule as a creditor with mortgage on the property referred to.

The ground on which the plaintiffs in rule demand the cancellation and erasure of Gibert's mortgage is that it has been paid; that the property surrendered is not sufficient to pay fifty cents on the dollar of the insolvent's debts that are due them, and that they are interested in the property, thus *apparently* encumbered, selling for the best attainable price.

They further represent that unless this mortgage inscription be erased, it will prejudicially affect its sale value to their prejudice and by diminishing the assets of the insolvent's estate applicable to *ordinary* debts.

The amount of Gibert's mortgage debt is \$5000, while the estimated value of the property is only \$3000.

I.

To this proceeding defendant filed an appearance, which he considered an exception, but which plaintiffs ask the court to treat as an answer.

It is of the following purport, viz: That in the rule to show cause, Gibert appears, stating: "Now comes P. G. Gibert, one of the defendants in the rule taken by E. Marqueze & Co., ordering him to show cause, on the first Monday in April, 1886, why the inscription of his mortgage against Thomas Mix, insolvent, should not be erased and the same declared extinguished, and who, for *answer* thereto, excepts on the following grounds, namely:

"1st. The respondent is a citizen of the Republic of France, and has brought suit in the United States Circuit Court, entitled, P. G. Gibert vs. Thomas Mix, syndic, to establish the validity of his debt and mortgage, and which is still pending in said court.

"2d. That said mortgage is good and valid, as it was given to secure payment of two promissory notes and advances made to said Thomas Mix in 1884, which are still due and unpaid.

"3d. That proceedings to *annul* and erase mortgages bearing on an insolvent estate cannot be brought by the *ordinary* creditors by rule, on motion, as in this instance; but must be by direct action, especially when they have other remedies.

"4th. That respondent can only be cited at his place of domicile, and can only be compelled to answer when properly cited."

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The sheriff's return shows that the defendant was personally served on the 11th of February, 1886.

The evidence was taken on the exceptions and rule to show cause at one and the same time.

Testimony was offered for the purpose of showing the pendency of the suit in the United States Circuit Court when the rule was filed, to which objection was urged by plaintiff, to the effect that by pleading to the suits defendant *waived his dilatory pleas*.

This objection was overruled by the court, and the plaintiff reserved a bill of exceptions.

In treating of declinatory exceptions, the Code of Practice says:

"There are two kinds of declinatory exceptions—

"1st. When the exception is taken to the competency of the judge, pursuant to the rules above prescribed.

"2d. When it arises from the fact of *another suit* being pending between the same parties, for the same object, and growing out of the same cause of action, before *another* court of competent jurisdiction." C. P. 335.

The *declinatory* is a species of *dilatory* exception. C. P. 331.

On the subject of *litis pendens* the Federal jurisprudence harmonizes with our own. 93 U. S. 554, Staunton vs. Embry; 99 U. S. 169, Gordon vs. Gilford.

Since the opinion of this Court was announced in Chaffe vs. Ludeling, 34 Ann. 966, no dilatory exception has been permitted *in an answer*, "unless, at least, the exception was pleaded *prior* to any plea to the merits." That decision quotes from Act 53 of 1839, whereby the conflicting provisions of C. P. 333 and 336 are reconciled. 35 Ann. 281, Boone vs. Carroll.

The defendant's second exception is an answer to the merits. It avers that the mortgage and debt are good and valid, and the debt is still due and unpaid.

Under the authorities quoted, the dilatory exception was thereby waived, and plaintiff's objection should have been sustained.

The same is perfectly true, in respect to plaintiffs' right to proceed by rule, as they did. It was competent for the defendant to waive any valid objection there may have been, to such proceeding, other than the want of jurisdiction of the court *ratione materiae*, which is not claimed.

While treating of the effect of defendant's exceptions, we may just as well dispose of the want of jurisdiction of the lower court, *ratione personæ*, that is urged.

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It is a general rule that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where the defendant has his domicile or residence. C. P. 162.

But, if he be sued before a judge whose jurisdiction does not extend to the place of his domicile, and he plead to the merits, the judgment rendered will be valid. C. P. 93.

This is not an open question. 31 Ann. 90, Phipps vs. Snodgrass; C. P. 93; 333; 334; 335 and 336; 31 Ann. 582, Goodrich vs. Hunter; 29 Ann. 194, Marqueze & Co. vs. LeBlanc; 33 Ann. 655, Stevenson vs. Whitney.

In the instant case the defendant excepted and answered at one and the same time. He could not possibly plead to the jurisdiction of the Court *ratione personæ*, and at the same time tender an issue for it to try. C. P. 333.

The case is thus left standing on the answer.

II.

The material facts to be considered are the following:

On February 20, 1884, Gibert rendered Mix an account current of transactions of 1883, showing a debit balance of \$7529 20.

Mix executed two promissory notes—one for \$3000 and the other for \$5421 64—payable to the order of Gibert, on the 1st and 15th of November, 1884; and, therefore, Gibert gave him a receipt "*in full settlement of account rendered this day, showing balance due of \$7539 20.*"

There was added into these notes the sum of \$882 44, what, doubtless, represented the discount.

A new account was opened, and the debit balance against Mix on March 25 was \$1189 10; on June 30, 1884, \$879 12; on August 23, 1884, \$3281 73; on November 22, 1884, \$8103 12; on February 7, 1885, \$5066 80.

With this last balance the account is closed.

On the 1st of May, 1884, Mix executed a mortgage in favor of Gibert, on his plantation and improvements situated on False river, in the parish of Pointe Coupée, to secure the payment of two other promissory notes, of *even date therewith*, one for \$2500, due and payable on the 1st of February, 1885; and the other for \$3000, due and payable on the 1st of March, 1885. Said notes were delivered to Gibert, who is designated in the act as payee and mortgagee.

The consideration of those notes is set out fully in the act, to be to enable Mix, the mortgagor, to cultivate and gather his crop of cotton of that year, and to carry on his mercantile business, for which pur-

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pose he would require advances of supplies and ready money to the extent of \$5000, which Gibert, the mortgagee, undertook to furnish.

The act recites: "Now, therefore, in liquidation of said advances *to be made* by the said P. G. Gibert to the said Thomas Mix, to the extent of the aforesaid amount of \$5000, in such sums as he, the said Mix, shall deem proper; and in order to facilitate to said P. G. Gibert the negotiation and collection thereof, the said Mix has presented his two promissory notes dated this day," etc.

As a further security for their payment, Mix obligated himself to ship to Gibert the entire crop of cotton to be raised on said plantation, and such other cotton as he should control in his business during the then current year.

The act contains the further clause, viz: "It is further stipulated and covenanted that if any advances be made *beyond those herein stipulated*, they are to be paid out of the *first* proceeds coming to hand, and that *imputation of payment shall be first made to all open accounts that may be existing between the contracting parties*, leaving the liabilities herein represented by the promissory notes to be paid out of *subsequent* proceeds."

Recurring to the various accounts that Gibert rendered to Mix, at different dates, it appears that there was at no time a debit balance against Mix until the 22d of November, 1884, when it was \$8103 12.

An examination of that account shows that on November 4, 1884—the date when Mix's \$3000 notes went to maturity—the amount of it, with interest, was debited to Mix; and on the 18th of the same month, when the note for \$5431 64 became due, the amount of it, with interest, was debited to him also.

These amounts and interests aggregate \$8450 42.

Deducting the balance of *debit* against Mix, on account of date November 22, 1884, and there would be a *credit* balance of \$347 30; or, in other words, there was not only nothing due by Mix, at that date, on his 1884 account—represented by the two notes and mortgage of May 1, 1884—but there should be, and really was, a balance to his credit of \$347 30.

An examination of Gibert's subsequent account, rendered February 7, 1885—and which shows a *debit balance* against Mix of \$5066 80—and there appears the debit balance from last account brought forward \$8103 12, and he is also *charged*, on February 7, with his note of \$2500 and interest.

It is perfectly manifest that both of these debits are erroneous. The

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former has been explained, and the latter was only held as a collateral security for whatever balance Mix might owe on account.

These two items aggregate \$10,605 34. Deducting the balance of *debit* against Mix, on account of date February 7, 1885, and there would be a *credit* balance in his favor of \$5538 50.

To this should be added the credit balance ascertained to be due Mix on November 22, 1884, of \$347 30, which would make the credit balance due Mix on the 7th of February, 1885, of \$5885 80.

According to this calculation, Mix has not only satisfied his account for 1884, to secure which the notes and mortgage of May 1, 1884, were given; but he has a balance to his credit on that account of \$5885 80.

It is obvious that the notes and mortgage held as collateral security therefor, on the theory presented, possess no value whatever, and the inscription should be canceled and erased.

III.

It became necessary, to a proper elucidation of the question argued in reference to the imputation of payments, to *transpose*, and *first* present the *status* of Gibert's account against Mix.

There is nothing in the act of mortgage authorizing Gibert to enter in Mix's 1884 account the amount of his two notes, he had given "in full settlement" of his 1883 account, in the manner he did. The clause we quoted above is to the effect that if Gibert made any advances "beyond" those stipulated therein, they were to be first paid; and that the proceeds of crops should be imputed to the *open account*, in *excess* of that specified therein, in *preference* to that *specifically secured thereby*. Inasmuch as there was no open account in *excess* of that secured, the clause in reference to the imputation of payment is without signifi-
cance.

Mix, as a witness, says: "I never authorized Gibert, or consented in any way to his imputing the proceeds of cotton, etc., shipped to him to the payment of the debt on the notes."

In the absence of any consent on the part of Mix to thus apply the proceeds of cotton shipped to Gibert, the *other provisions* of the act should be enforced. They are a law between the parties. The act recites: "For the same purpose, and for the entire amount, the crops made and grown on said plantation, this current year, is hereby pledged and pawned." The crops became thereby consecrated to the payment of the 1884 account, by contract as well as by law, and their proceeds could not take any other destination without Mix's consent. The terms of the written act must control the inference to be drawn from the implied "admission by account rendered."

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In our opinion the mortgage indebtedness, or that the mortgage was intended to secure, has been fully paid, and Mix has a balance to his credit of the notes he executed in settlement of his 1883 account.

The judgment appealed from should be reversed.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be avoided, annulled and reversed; and proceeding to render such judgment as should have been rendered in the court below:

It is ordered, adjudged and decreed that the mortgage in favor of P. G. Gibert, of date May 1, 1884, be cancelled and erased, and the notes and accounts intended to be secured thereby are satisfied and fully paid.

Judgment reversed.

ON APPLICATION FOR REHEARING.

Counsel for Gibert insist that our decree is *ultra petitionem*.

He says: "The demand relates to extinguishment of *the mortgage* by a process of imputation of payments different from that made by Gibert, leaving him, as a consequence, an *ordinary* creditor for the full amount claimed by him, and for which he is placed by Mix himself on his schedule as a mortgage creditor."

The language of the petition is "that said mortgage, if it ever existed, has been *extinguished by payment before the institution of these proceedings in insolvency.*"

We simply decided that the inscription of Gibert's mortgage must be canceled and erased, because the debt it secured had been paid. The opinion did not treat or dispose of any other debt. They remain open to future controversy.

Rehearing refused.

COMMENCEMENT OF CASE

No. 9843.

MRS. F. K. PHILIPS AND HUSBAND VS. A. LEHMAN & CO. ET ALS.

Creditors who, pending a proceeding in insolvency, elect a syndic who sells under judicial sanction the property mentioned in the bilan, cannot be held in damages, though the proceeding be subsequently annulled and dismissed, when the petition is barren of the charge of malice and want of probable cause.

Forced into court by the debtor, they had a right to protect themselves. If any injury has been sustained in consequence by such debtor, it is *damnum absque injuria*, for which no recovery can be had.

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A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Gus A. Breaux for Plaintiff and Appellant:

Where a claim for damages for tort, done by legal proceedings, is based on such unlawful proceedings, prescription of the action commences to run only from the final termination of the suit. *Rogas vs. Juillard*, 25 Ann. 347; *Harvey vs. Pfug*, 37 Ann. 906; *Wentz vs. Bernhardt*, 32 Ann. 637.

The doctrine of *damnum absque injuria* does not apply where the tortious acts are shown to have been done in proceedings decreed absolutely null and void, and as "having never had any existence."

All proceedings in *Phillips vs. Her Creditors*, for a cession, declared null, void and of no effect. *Phillips vs. Her Creditors*, 36 Ann. 904; 37 Ann. 701.

The litigation between plaintiff and defendant as to the validity of the forced cession finally determined July, 1885. 37 Ann. 701.

Suit brought December, 1885.

(a) The court will notice its own decrees in the case. *Minor vs. Stone*, 1 Ann. 283.

Braughn, Buck, Dinkelspiel & Hart, W. S. Benedict, F. D. Chrétien
and *Chas. Louque* for Defendants and Appellees.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action sounding in damages. It is brought to recover: 1st, the value of property which the defendants, it is charged, have taken and converted to their own use, without any justification; 2d, for injury done to reputation and business.

On the exceptions filed, the Court ordered the plaintiff to amend, so as to state more specifically the nature of her claim for the value of the property, and dismissed the suit for damages alleged to have been done her credit.

The plaintiff appealed from the entire judgment; but *here* states that she merely complains of the dismissal of her suit, so that we are not called upon to pass upon the appealability of the case on the first branch, and have only to determine whether the suit, on the second branch, was or not properly dismissed.

The exceptions set up urged no cause of action and prescription.

It appears that the plaintiff, in the beginning, applied for a respite, which was refused by her creditors. The proceeding was then converted into a *cessio bonorum*. A suspensive appeal by plaintiff from the decree of the court putting her in insolvency, having been dismissed by this Court, she afterwards applied for a devolutive appeal. She subsequently, also, appealed from a judgment homologating a tableau of distribution, proposed by the syndic. Considering that the proceeding for a cession was a nullity, and that all subsequent

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proceedings, based thereon, had to share the same fate, this Court dismissed the application for a respite and afterwards reversed the judgment of homologation. 37 Ann. 701; see, also, 36 Ann. 904.

In the meantime, the syndic elected by the creditors had procured an order of sale, under which the stock of plaintiff, mentioned in her *bilan*, was sold.

The defendants were creditors of plaintiff. Forced into court by her, they had a right to protect their interest. The cession having been decreed, they could elect a syndic to liquidate her affairs under judicial authority.

Surely, as the proceedings were annulled and the distribution of the funds by a tableau presented and offered, was denied, the plaintiff has a standing to demand, the value of the stock taken possession of and sold; but she certainly cannot claim damages for whatever injury she may have sustained in consequence of such acts.

She makes no charge on the defendants to draw in question their good faith and honest intentions. This was essential. To hold them responsible, averment and truth of the charges are indispensable. No improper motive is alleged against the defendants, who appear to have acted for their own protection only.

If the plaintiff has thereby sustained any injury, the damage is *damnum absque injuria*. Louque vs. Drez, 37 Ann. 84.

This view of the case renders unnecessary a consideration of the plea of prescription, which was not, however, passed upon below.

Judgment affirmed.

No. 9814.

STAUFFER, MACREADY & CO. VS. HENRY R. MORGAN.

The presumption of law is that property purchased during the marriage, whether in the name of both or either spouse, is community property.

When, however, the property is bought in the name of the wife, she has the faculty of rebutting this presumption by showing that she purchased the property by the investment of her paraphernal funds, which were administered by her separately and apart from her husband.

She carries the burden of proof of three crucial facts: (1) Paraphernality of the funds; (2) administration thereof separately and apart from her husband; (3) investment by her.

Where a man, on the eve of marriage, gives to his intended spouse a check for \$20,000 on a banking firm, the donation may be incomplete and revocable at any time before actual collection of the check by the donee; but when she has presented the check and the drawees have honored the same by placing the amount to her individual credit, under her instructions, the donation is complete, and the funds are her paraphernal property. The case is not affected by the fact that the husband was a member of the banking firm.

39	632
46	1222

39	632
50	1227

39	632
107	83

39	632
116	480
111	779

39	632
123	480

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The firm is a legal entity, separate and distinct from its members, and the possession, custody and obligation resulting from such deposit were those of the firm, and not of the husband, as a member.

When the account thus opened with the wife is kept in her name and subject to her exclusive order and control, without interference by her husband, this constitutes a separate administration by her.

The property here in controversy, having been bought in the name of the wife, by her consent and direction, and having been paid for by her check against her account with the bankers, and having always been regarded and treated as her separate property, it cannot be subjected to the debts of the husband or of the community.

The purchase price of property acquired by an agent in the name of a married woman, with her husband's authority, is considered as paid out of her funds, although the agent drew on the husband for the same, when the evidence shows that the check was endorsed by the husband to be paid out of his wife's money, and she herself directed her bankers to do so, and that it was thus done.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Farrar & Kruttschnitt for Plaintiffs and Appellants:

I.

Property purchased in the name of either spouse during marriage becomes an asset of the community (C. C. 2402); and the fact that a title is taken in the name of the wife does not make even a beginning of proof that the property is paraphernal.

II.

In order that property acquired during the community in the name of the wife be considered paraphernal, it is absolutely essential that three crucial facts should concur, viz:

- (a) Paraphernality of funds.
- (b) Separate administration by wife.
- (c) Investment by her. *Bachino vs. Coste*, 35 Ann. 570; *Santmanat vs. Souk*, 33 Ann. 612; *Shaw vs. Hill*, 20 Ann. 531; *Gonor vs. Husband*, 11 Rob. 526; *Terrell vs. Cutrer*, 1 Rob. 367.

III.

A mere promise to give cannot be enforced under any system of jurisprudence. Delivery and acceptance are the essence of a donation. *Succ. of Depouilly*, 22 Ann. 97; *Burke vs. Bishop*, 27 Ann. 466; *Byles on Bills*, p. 198, § 123; *Waite on Actions and Defences*, vol. 3, p. 489.

IV.

While the law is undisputed that the husband may be the agent of the wife for the administration of her paraphernal funds, the law is equally well settled that the agency in such a case must be express, public and clearly proved. The husband must act unequivocally *jure mandati* and not *jure mariti*. *Miller vs. Handy*, 33 Ann. 164; *Trezevant vs. Sheriff*, 38 Ann. 146.

Nicholls & Carroll for Mrs. P. O. Morgan, Intervenor and Appellee:

When a husband, having large means and being entirely solvent, makes a donation of money to his wife, which she reduces to possession, and when years afterwards a partnership to which he belongs becomes insolvent, a creditor of that partnership, holding a claim which arose long after the donation, has no interest in and cannot attack or question the precise form or manner in which the donation was made or the money paid. 5 N. S. 196; 11 Ann. 401; 12 Ann. 733; 10 Ann. 540; 13 Ann. 377; 21 Ann. 343; 10 Ann. 575; 21 Ann. 118; 24 Ann. 597.

Where a husband, prior to his marriage, gives to his intended wife a check on a banking

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firm of which he is a partner, and where this check is honored by said firm and the amount thereof is placed to the individual credit of the wife, who draws on it at will on her own signature, solely, such action on the part of the husband constitutes a full and complete donation, and the action of the firm operates a complete payment of the check, and the amount represented by the check becomes the paraphernal property of the wife. 26 Ann. 189; 32 Ann. 1252; 6 Ann. 547.

And where, under these circumstances, property is purchased in the name of the wife with funds standing in her name on the books of the partnership, such property becomes her paraphernal property, and creditors of the partnership on a claim arising subsequent to such purchase—creditors who make no pretense of fraud, simulation or injury of any kind—have no right to question or attack the wife's title. 6 Ann. 547; 17 Ann. 27; 19 Ann. 516; 21 Ann. 5; 33 Ann. 894; 5 N. S. 196; 11 Ann. 401; 12 Ann. 735; 32 Ann. 1252; 26 Ann. 189.

A donation need not necessarily be by notarial act. 2 L. 31, 41; 14 Ann. 96; 17 Ann. 231; 33 Ann. 163.

An act, though void as a sale, because without a price, may, when there is no just cause for its annulment, be valid in another form, as an exchange, donation or pledge. Nor can it be questioned by third persons, unless, not only simulated or fraudulent, it also prejudices. *Henn. p. 1336, No. 12; Wolf vs. Wolf, 12 Ann. 429.*

Where a partnership to which a husband belongs honors a draft drawn by him and opens an account with the payee, who draws against the same at will and has absolute control over it, and where there is no charge of fraud, simulation or injury, the partnership and its individual members (and their creditors) are estopped from contesting the title of the payee to the funds, particularly on a question of form.

Where a party undertakes to act for another and takes title to property in the name of such person, and where such action is approved and ratified, neither the party acting nor any third party (not charging fraud, simulation or injury) can question the authority of the party acting or the evidence upon which he acted. 4 M. 447; 6 N. S. 511; 13 Ann. 18.

Where a person creates an interest on behalf of another, he cannot destroy that interest without giving the other party an opportunity to accept or reject it; and when it has been accepted, no third person (not charging fraud, simulation or injury) can contest such interest. 14 Ann. 632; 4 M. 409; 33 Ann. 324.

The question of the administration of the paraphernal property of the wife is totally irrelevant, except where that question affects the ownership of the funds invested by the wife in her name.

The opinion of the Court was delivered by

FENNER, J. Plaintiffs, creditors of the insolvent banking firm of M. Morgan's Sons, of New York, whereof defendant was a member, sued the latter by attachment, under which two pieces of real estate standing in the name of Mrs. Penelope O. Morgan, wife of defendant, were seized.

Mrs. P. O. Morgan intervened in the suit, claiming the property under seizure as her paraphernal property.

Plaintiffs answered her intervention, averring that the property had been acquired during marriage under the *regime* of the community of acquets and gains, and formed part of the community and was liable for its debts.

From a judgment in favor of the intervenor maintaining her separate ownership of the property attached, this appeal is taken.

The plaintiffs' case presents no feature of the revocatory action or the action *en déclaration de simulation*. It rests simply on the proposition that the property belongs to the community and is liable for its debts, *because* purchased during the marriage. Such is undoubtedly the presumption of the law, whether the purchase was made in the name of both or either of the spouses.

But when, as in the instant case, the purchase is made in the name of the wife, she has the faculty of rebutting this presumption by proof that she purchased the property, as her separate property, by the investment of her paraphernal funds, which were administered by her separately and apart from her husband.

As tersely stated by plaintiffs' counsel, the crucial facts are: (1) paraphernality of the funds; (2) administration thereof by her separately and apart from the husband; (3) investment by her. Of these facts she carries the burden of proof.

So far as one of the properties, known as the coal yard, is concerned, her proof is so conclusive that plaintiffs abandon the contest as to it.

The other, designated as the Ocean Saw-mill property, is alone left in dispute.

The evidence shows that on December 29, 1880, Henry R. Morgan, at that time a millionaire, being about to leave New York for New Orleans to marry the intervenor, drew a check on his firm of M. Morgan's Sons, of which he gave notice to the firm, stating that it was intended as a present to the lady whom he was about to marry.

On January 15, 1881, the day of the wedding and before the ceremony, he presented and delivered this check to her.

She endorsed the check and forwarded it by mail to the firm of Morgan's Sons, with request to honor the same and place the amount at her individual credit.

The firm took up the check, opened an account on their books in the name of Mrs. Morgan and passed the amount to her credit.

On the 25th of April, 1881, defendant made another present to his wife of \$15,000, which was placed by the firm, under his orders, to the same account.

The evidence is positive and undisputed that in the conduct of this account the firm dealt with Mrs. Morgan precisely as with any other depositor, allowed her interest on her balances, and honored her checks, which she drew at will in her own name without any authorization of her husband, and that he never, in any manner, controlled or interfered with it.

In June, 1881, defendant, being in New Orleans, was informed of an

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opening for an investment in this Ocean Saw-mill property, and concluded to make it. He authorized Mr. Jno. C. Morris, president of the Canal Bank, to accept the sale and draw on him for the price. But, after reaching New York and seeing his wife, it was determined that she should purchase the property and pay for it as an investment of her separate funds. Accordingly, Mr. Morris was instructed to take the title in the name of Mrs. Morgan, and this was done and he accepted it as her agent. He drew on Mr. Morgan for the price, and when the draft reached New York, Mrs. Morgan wrote across the face of it: "M. Morgan's Sons will please pay this draft, and charge to my account. (Signed) P. O. Morgan." The payment was made accordingly and charged to her account, which then had at its credit the amount of \$35,597.62.

The property yielded no revenues, and Mr. Bradish Johnson, who was a co-owner, attended to the paying of taxes and expenses on it, and she repaid him the amount of her share by checks on her own account.

On these facts, the plaintiffs contend:

1st. That the funds from which the payment was made, to wit: the amount at her credit with M. Morgan's Sons, were not paraphernal funds, because there was no valid and complete donation thereof by the defendant to his wife, because the manual delivery of a check of the donor to the donee is not a completed donation but a mere power of attorney to collect the check, revocable at any time before actual collection or by the death of the donor, and that the donation did not become effective until the check had been actually collected and the proceeds reduced to possession by the donee.

Granting the correctness of the proposition of law, we are satisfied that the presentation of the check to the firm on which it was drawn and the placing of the proceeds, under her instructions, to her credit, was an effective collection of the check and a reduction of the proceeds to her possession.

Counsel for plaintiffs admit that if the check had been drawn on any third person, or on a firm of which defendant was not a member, the presentation of it and passing of the proceeds to credit as instructed would have been a delivery to the donee. But he contends that the credit on the books of M. Morgan's Sons did not divest the possession of defendant, which continued, as a partner, jointly and severally with the other partners, and, therefore, did not constitute delivery. This is to ignore the elementary principle that a partnership is, in contemplation of law, a legal entity, separate and distinct from the individual

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members; and that partnership possession, custody and obligation are different from those of an individual member. The distinction sought to be drawn by plaintiffs' counsel has no foundation in law and as little in reason.

2d. It is claimed that, for the same reason, the funds remaining in possession of a firm, of which the husband was a member, could not have been under the wife's administration, separate and apart from him. This position is equally unsound with the former one, and only serves to expose more forcibly the unreasonableness of the contention. Certainly, a wife who has paraphernal monies in her possession is not bound to carry them in her pocket. She may deposit them with any banker, and, if there is a bank or banking firm with which her husband is connected, that should be a reason for preferring such one to another. Her funds, at her credit with such bank or bankers, remain as much under her control and administration as elsewhere. Her husband, though a member of the firm, would have no power or authority to destroy the right of his wife to control the funds, or the duty of the firm to respect her orders.

3d. Plaintiffs claim that the investment in this property was not made by the wife, but by the husband. It is true, no doubt, that the original design was that the husband should purchase. But it is perfectly clear that, before the consummation of the transaction, with the joint consent of both husband and wife, this design was changed into an actual and *bona fide* purchase by the wife, for her separate account, and with her paraphernal funds. There is nothing in the slightest degree suspicious about this transaction; no suggestion of, nor motive for, any fraud, simulation or concealment. The husband was a very rich man, entirely free from financial embarrassment. Circumstances which, in a different case, might furnish ground for suspicion, have here no significance whatever. On the face of the transaction and under the uncontradicted evidence, the purchase was made in the name of the wife, under her authority; the price was actually paid by her with her paraphernal funds, and the property has, ever since, been regarded and treated as her own.

We think she has fully discharged the burden of proof resting on her and has successfully rebutted the presumption of law that this property purchased during the marriage was community property.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. The only ground on which the application rests

Klotz vs. Macready et al.

is that the property was acquired with the funds of the husband, obtained on his credit, and that even if the obligation of the husband was subsequently extinguished with the funds of the wife, still the acquisition was made with the funds of the husband and the property belongs to the community.

The evidence shows that, to reimburse himself, Morris drew on Morgan, the check passed through the Canal Bank, who endorsed it over to Morgan's Sons for collection, who collected the amount, not from Mr., but from Mrs., Morgan.

When the check got to New York, Mr. Morgan, instead of paying it, endorsed it: "*Charge Mrs. P. O. Morgan's account. Henry Morgan.*" It was also endorsed by Mrs. Morgan: "*Morgan's Sons will please pay this draft and charge to my account. P. O. Morgan.*"

The account of Mrs. Morgan then balanced a larger amount in her favor.

The check was accordingly paid and charged up to her account.

The fact is insignificant that the check was endorsed by Henry Morgan, directing it to be charged to his wife's account. It repels all idea that the check was paid out of *his* funds, and as it was honored out of Mrs. Morgan's funds, the fact of payment by her is conclusive in her favor and against all adverse interest.

Rehearing refused.

No. 9607.

BERNARD KLOTZ VS. CHARLES MACREADY ET AL., EXECUTORS.

- . A surviving partner, bound by the articles to liquidate the concern within six months after the dissolution of the partnership by death, and who has no rights, after the expiration of that term, to prolong the liquidation, is liable for the value of all the assets at the termination of the delay, when they cannot be returned *in integrum*.
- . Such partner cannot shield himself from responsibility by showing that those assets have been sold by judicial authority, when it is shown that the property apparently adjudicated to outsiders, and which never left his possession, has been transferred to him for the same prices, on the same day, or shortly after, conformably to a previous understanding.
- . Where part of such assets is not thus transferred, in consequence of a deception, the partner will nevertheless be responsible, when it appears that bidders were deterred from bidding for his benefit.
- . The succession of the deceased partner is entitled to recover, after deducting the liabilities from the assets, the share to which the deceased is, by the articles of partnership, authorized to claim in the residue, with legal interest from the expiration of the delay allowed for the liquidation of the concern.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Klots vs. Macready et al.

T. J. Semmes & Legendre, T. Gilmore & Sons and J. Ad. Rozier for the Executors, Appellants:

Land purchased by a commercial partnership belongs to the individual members as joint owners, and not to the partnership. 30 Ann. 869; 35 Ann. 839.

The partner who makes advances beyond capital agreed on is entitled to interest. 129 Mass 518; 2 Lindley Part., sec. 787; 2 Lansing, 366.

Partner has no right to withdraw his capital during the partnership. C. C. 2858; 129 Mass 518; 2 Lindley Part., sec. 611.

The partner who, after the dissolution of the firm, uses partnership assets in new business is liable for profits or interest, at the option of the plaintiff. 2 Lindley Part., secs 977-9 25 Gratt. 536; 1 Giffard, 86; 4 Myl. & Craig, 41; 9 Hare, 141; 8 Ch. App. 323 (n).

Co-partner in the new business not a necessary party unless a judgment is sought against him for knowingly participating in the breach of trust. 1 Giffard, 86; 2 Lindley Part., sec. 979; 58 N. H. 449.

W. S. Benedict and A. J. Murphy for Plaintiff and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action for the settlement of a partnership once existing between Margaret Haughery and Bernard Klotz for the bakery business. It was originally formed to last ten years, but it expired at the death of the former partner, which occurred on February 9, 1882.

While on the one hand the surviving partner tenders \$3360 86 as the share accruing to his deceased partner, the executors of the latter insist that the real sum due is \$40,997 02, for which there ought to be judgment with interest.

After hearing a large number of witnesses and considering a mass of written evidence, the district court found that the residue consisted of real estate and an oven, and a sum of \$22,030 59, which it directed should accrue equally to the parties, or \$11,015 29 to each partner, besides half of the property. From this judgment defendants appeal.

Answering the appeal, plaintiff prays that the judgment appealed from be amended so as to conform with his accounts.

It appears that by the articles of partnership the survivor was, in case of dissolution thereof by death, to be allowed six months to wind up the affairs of the concern; that at the expiration of that delay, however, Klotz had himself appointed liquidator, inventorying the property in his hands and disposing of the same, under the provoked direction of the court which had appointed him.

On appeal from the different decrees rendered in the course of the proceedings, this Court held that Klotz had no right to enter upon another term of liquidation, in the face of the opposition of the executors; that his appointment, as well as all the orders procured by him

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to sell out the property of the partnership, were unwarranted and ought to be (and they actually were) annulled, and the application was rejected. 35 Ann, 596.

The record shows that, notwithstanding the appeal which, it is claimed, operated suspensively, Klotz had the property offered for sale by an auctioneer, and that it was adjudicated to certain parties, at prices far below its valuation in the inventory. The real estate, though adjudicated, however was not taken by the bidders, and remains in kind. The property otherwise bid off, in all instances, save one, appears to have been transferred by the adjudicatees, on the same day, or some short time after, for the same prices to Klotz, or the partnership, which he had formed with Joyce, a former clerk of his.

The account which Klotz presented, pending the suit, is open to many attacks which were actually made upon it.

It implies the validity of all the proceedings had by him as liquidator; but as his appointment was annulled, and as there are no *third* persons concerned, those proceedings must be considered as though they never existed; the more so, as all the property said to have been sold, except in one instance, is now, from Klotz's own standpoint, in his possession *as owner*.

The parties, at least, two of them, to whom the property was so adjudicated, and who afterwards passed it to Klotz at the same prices, appear as sureties on the latter's bond as liquidator. They must have known that he was acting in a fiduciary capacity, at least as agent, and that as agent, he could not buy the property of his principal, directly or indirectly.

It is claimed that they acted in good faith; but it seems strange that they undertook to buy objects for which they had no use, which they did not care about, which never came to their possession, and which they subsequently passed to Klotz at the prices of adjudication. This is the more singular when it is considered that it appears that bidders were deterred at the sale, in some cases, on the representation, expressly or impliedly made, that Klotz was buying or intended to buy.

It is remarkable that the property thus bid off, at prices frightfully below the appraisement thereof, appears, after the transfer by the adjudicates, to have been acquired by Klotz's new firm at prices surprisingly superior.

The decrees appealed from and reversed, under which those transactions took place, may well be assimilated to a judgment appealed from and reversed, under which, in the meanwhile, the judgment

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creditor acquires property of his judgment debtor and detains possession of the same. In such cases, the rule, well founded on reason, equity and law, is that the defendant is entitled to restitution of the thing itself *in integrum*, for none is injured, save the wrong-doer himself.

From this standpoint, which is the correct one, the assets comprising the active mass of the partnership must be viewed as in the possession of Klotz, and must be dealt with as though no proceeding whatever had taken place, after the expiration of six months, within which he was to have wound up and done what the articles required of him, viz: "Make and render a true, just and final account for all things relating to the business and a true adjustment and division of the stocks and profits thereof."

Although, in legal contemplation, the property is or ought to be there *in integrum*, it does not, however, follow that, by surrendering it to-day, *as it is*, Klotz can relieve himself from the consequences of his illegal acts and persistent dereliction of duty.

That property is surely not, at *present*, in the condition, in point of worth, in which it was at the expiration of the delay allowed for winding up. It has been used by Klotz for the purposes of the new firm. Unavoidably, it has considerably deteriorated, after a use exceeding four years. Being more or less worn out, it cannot be tendered at all, as property in *integrum*.

This condition of things is brought about by Klotz himself. It is the legitimate result of his failure to perform his obligations, *in time*, as the surviving partner. He would have no one to blame but himself, if any injury has been sustained; but the evidence shows that, by using that property, in the business of his new firm, he has realized profits, comparatively quite large.

The value of the property at the end of the six months, less debts and charges of the old partnership, must serve as the basis of his accountability, and the residue, actual and constructive, must be equally apportioned between the partners.

Among the property offered for sale by the auctioneer, were two fine boilers, which had cost \$1000 two years before. These were adjudicated for \$275, but were afterward sold to a boiler maker for \$800, without being moved.

It appears that they were being bid on by a by-stander, who stopped bidding, because told, by the party to whom they were subsequently adjudicated, that he was purchasing for Klotz. It also appears that

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there had been, previous to the sale, an understanding between the latter and this adjudicatee, to that end, and that after the sale Klotz, who had expected a return of the boilers, complained that the adjudicatee had not treated him right.

Leaving out of view the question whether the order of sale was or not suspended by the appeal, it is manifest that from the incipency throughout, Klotz was impelled by selfish considerations, the object of which was to enrich himself *per fas et nefas*, at the expense of the estate of his deceased partner, and that had it not been for the deception practiced on him, and of which he bitterly complained, the boilers, like the rest of the property, would have gone back to him.

Had such been the case, he most assuredly could be held for their value, but the difficulty is removed by the consideration that had he not combined as he did, the boilers would have realized their value.

We, therefore, deem that he should be responsible for the boilers, as he is for the other property.

The parties have taken much trouble and pains to show what amount accrues to the succession of Margaret Haughery. We have patiently followed them in their respective theories and computations, and considered their conclusions; but cannot justify the result to which either side has arrived, particularly that presented by the surviving partner, who has operated upon foundations of no solidity, and which have entirely given way, with the structure erected upon them.

He has been unable to convince us that a most prosperous partnership which, from June 30, 1879, to August 9, 1882, realized as profits \$61,066 61, and the assets of which aggregated at that last date (which is that of the expiration of the six months to wind up), \$58,857 28, nets actually \$3360 86 only, as the share of the succession therein—a share for which he himself, about that time, had offered to the executors, \$32,000, but which the latter declined, as inadequate.

The theory of the executors and their computations of the rights of the parties appear, to a certain extent, more consonant with the law governing in such cases and with the accounts and facts disclosed by the record.

They admit the conclusions of the lower court, in a measure; but they complain that the judge has entirely omitted to debit Klotz with the large amounts which he has drawn and with which he ought to have been charged.

We find that this complaint is well founded.

After deducting from the assets, which include Klotz's debit, as well as the value of the real estate and oven, and a mortgage note of \$10,-

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000 paid, and the other liabilities of the partnership, the executors conclude, rightfully we think, that the rights of Margaret Haughery's succession ought to amount to \$31,341 65; but they err when they assume that the succession is also entitled to one-half of the profits realized by the new partnership, viz: \$9653 37— the total of these two amounts being the \$40,997 02 mentioned in the beginning of this opinion.

We feel no hesitation in adopting the correctness of the former conclusion as to the \$31,341 65, as that sum is less than that which Klotz had offered to the executors as the value, put by himself, on the share of the succession in the partnership, but which the executors, under a commendable sense of duty, did not deem themselves authorized to accept.

This amount, had it been seasonably paid, would have realized fruits in some form in the hands of those whom the testatrix had designated as the worthy objects of her charity; but it was not paid. It was retained by Klotz, utilized by him and is represented as having assisted in enabling him to realize for his new firm profits nearing \$20,000.

If it were true that the succession is entitled to half of that sum, under the law, it would be because the succession was a partner in the concern. Such being the case, would it not likewise be true that, if instead of realizing profits the concern had become involved, the succession would have had to bear half of the debts and liabilities, and thus possibly put into insolvency?

To recognize this theory as a proposition authorized by law would be to promulgate quite a dangerous doctrine, for which no precedent has been shown in this State. The reason for repudiating this theory is that successions cannot be considered as beings, susceptible of forming a partnership. The object of the law regulating the settlement of successions is to liquidate them promptly and prudently, so that when this is accomplished the residue passes at once to the heirs, whoever they be, testamentary or legal. When this is done the succession, as such, exists no more.

Although the executors cannot share the profits of the new firm, it does not follow, however, that the amount which they ought to have received at the expiration of the six months allowed to wind up and which has served to enrich that firm, shall remain barren and impoverish the recipients of the bounty of the testatrix. They are entitled to legal interest from the 9th day of August, 1882.

It is, therefore, ordered and decreed that the judgment of the lower court be amended so as to entitle the succession of Margaret Haughery

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to recover from Bernard Klotz thirty-one thousand three hundred and forty-one dollars (\$31,341 65), instead of eleven thousand and fifteen dollars and twenty-nine cents (\$11,015 29), with legal interest from the 9th day of August, 1882, till paid, and costs of suit in both courts, besides the undivided half of the real estate and oven mentioned in this petition, and that thus amended said judgment be affirmed.

ON APPLICATION FOR REHEARING.

WATKINS, J. We have been presented with quite an elaborate application for a rehearing of this cause, and but for counsel's disclaimer, should feel disposed to consider it censorious and disrespectful.

We sincerely trust that we shall not, in the future, feel constrained to *mention* to attorneys their obligation of courtesy to the Court.

We have carefully examined and considered the application for rehearing; read all of the briefs of counsel again; made a careful inspection of the two transcripts, and compared them with our opinion, and have reached the conclusion that the principles of law therein announced are entirely correct.

For the purpose of being accurate and of better condensing the statement of the case, we will cite a few of the salient facts we have gleaned from the record:

On the 29th of June, 1878, Margaret Haughery and Bernard Klotz formed a partnership for the purpose of conducting a bakery business for a term of ten years.

They were full and equal partners, and the profits or losses were to be shared by them equally, and all the expenses of the business were to be borne by each proportionately.

Margaret put into the partnership merchandize, etc., valued at \$20,000, as the capital stock, and donated to Klotz one-half interest therein; and this donation constituted his part of the capital invested in the business.

The partnership did quite a profitable business until the 9th of February, 1882, when Margaret died.

Klotz, as surviving partner, was, under the articles of partnership, entitled to retain control and continue the *administration* of the partnership *affairs* for a period of six months thereafter.

On the 15th of October, 1879, Margaret and Klotz purchased of John T. Moore the real estate which figures on the inventory and on which the partnership business was conducted, then and since, for the price of \$15,500.

On the 20th of February, 1882, the defendants, as the testamentary

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executors of Margaret, caused an inventory and appraisement to be made of all the *partnership* effects. It covered, substantially, the following values, viz :

Goods and personal effects.....	\$20,268 81½
Real estate.....	14,000 00
Book accounts.....	14,990 00

Total value.....	\$49,258 81
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Of this, \$1500 was in cash.

At this date the six months' term of Klotz's administration as liquidator began, and it closed on August 20, 1882.

There were large profits made by him during that term.

Mr. Chapotin, one of the persons chosen by the executors to examine the books of the firm, and upon whose reports all parties seem to rely—as witness for the plaintiff says, on this subject :

Question. “Mr. Chapotin, from your examination, that you have made of the books, can you tell us whether or not the firm of Margaret Haughery & Co. made any money or profits since the ninth of February ?”

Answer. “Certainly.”

Q. “Well, what profit did they make ?”

A. “I took a memorandum from the 9th of February, 1882. They made sales, \$87,948, and made a profit of 31% = \$27,197 gross.”

Q. “That was for four months ?”

A. “Yes sir ; for four months.”

This witness shows what had been the *net* profits of this partnership during previous years, as follows, viz :

Mr. Klotz's share of the <i>net</i> profits of the first year was.....	\$ 9,184.23
The second year.....	7,989.38
The third year.....	3,487.97
The fourth year (to June 20).....	9,326.02

Total amount of Klotz one-half interest in the partnership profits from its establishment to June 20, 1882...	\$29,987.60
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These were *actual* profits realized, as will be shown by the report of the experts and the testimony of Mr. Chapotin, in which is given the amounts that Klotz withdrew from the cash of the firm, on his private account, thus :

Question. “ Well, take the report and say how much Mr. Klotz has drawn since he has been a member of the firm of Margaret Haughery & Co.”

Answer. “ The different items ? ”

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- Q. "Yes, each year."
- A. "Well, he has drawn—he has had profits on the 30th of June, 1882. Mr. Klotz had to his credit, all told, \$3097 42."
- Q. "What has been the drawing of Mr. Klotz since he entered the partnership?"
- A. "Let me see. The first statement I have will tell you."
- Q. "He commenced with a capital of \$10,000?"
- A. "Yes, sir."
- Q. "Donated by Margaret?"
- A. "Yes, sir."
- Q. "Now, what has he drawn since that partnership, each year?"
- A. "He began with a capital of \$10,000. He has drawn the first year \$4934 48; the second year he has drawn \$11,903 39; * * * the third year \$8072 89."
- Q. "And the fourth year?"
- A. "The last year, it was only up to the 20th of June (1882)."
- Q. "Well, up to the time the *last report was made* what had been drawn?"
- A. "Six thousand seven hundred and seventy-nine dollars and eighty-eight cents."
- Q. "He had drawn for the year 1882, up to the 20th of February?"
- A. "Six thousand seven hundred and seventy-nine dollars and eighty-eight cents."
- * * *
- Q. "I am simply asking you what his draft has been."
- A. "Well, you want me to take it from the 'trial balance,' and it cannot be done."
- Q. "Well, will you look at the ledger and tell us?"
- A. "Well, yes, sir."
- Q. "Well, look at the trial balance of June."
- A. "At the end of June the trial balance shows Bernard Klotz's private account \$11,997 32."
- Q. "That is up to the 30th of June?"
- A. "Yes, sir."
- Q. "Of this year?"
- A. "Yes, sir."

Up to and including the 30th of June, 1882, Klotz is shown, by this indubitable evidence, to have withdrawn the total sum of \$36,908 08, *more than three and one-half* times the amount of his original capital, within four years.

We have, then, this statement:

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Klotz's capital.....	\$10,000 00
Klotz's profits.....	29,987 60—\$39,987 60
Cr.	
Klotz's drawings.....	36,908 08

Balance to his credit.....\$ 3,079 52

This is upon the hypothesis that the stock had been kept up to the original standard of \$20,000.

The significance of these figures, when considered in relation to the plaintiff's *present* contention, appears the more manifest from the fact that they were selected from transcript 8661, and were therein relied upon to establish his claim to a new term of liquidation, upon the theory that his administration, as such, had been profitable.

In taking this standpoint in which to *review* this case, we do the plaintiff no injustice. If injustice has been done him—and we do not think there has—it proceeds from evidence *he has furnished*.

Let us see, in this connection, what Margaret's drawings were, and the state of her account at her death:

She drew during the first year.....	\$ 6,674 54
She drew during the second year.....	4,456 23
She drew during the third year.....	4,580 36
She drew February 9, 1882.....	3,321 57

Margaret's drawings are.....	\$19,032 72
Her capital (<i>original</i>) and profits.....	39,987 60

She has to her credit.....\$20,954 88

An inspection of the report of the experts will show that Klotz is indebted to the balance on stock account of \$5750 72 instead of \$3079 52, as stated in this report. But that results from the fact that the experts did not take into their account *his* drawings, or profits of the year 1882, to June 20, as we have done.

On the other hand, Margaret is entitled to an additional allowance for the additions she made to her capital, from time to time, as shown by the report of the experts, viz:

From collections from sundry old accounts—

To June 30, 1880.....	\$4,332 43
To June 30, 1887.....	1,443 50
To part of last year (1882).....	240 00

Total.....\$6,015 93

This would increase her share to \$26,970 81.

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The statement of the assets on hand at Margaret's death, made by the experts shows the following facts, viz:

Stock on hand.....	\$14,000 00
Bills receivable.....	159 82
Cash	2,359 89
Sundry debtors.....	16,270 10
Machinery.....	12,312 99
Lafrya stock.....	250 00
Total.....	\$45,352 80

As we have, in our preceding calculation of the respective interests, proceeded upon the basis of \$20,000 of capital stock, that sum should be deducted from the total amount of assets; and this would leave a surplus remaining of \$25,352 80. But the report of the experts shows that the firm liabilities were \$19,622 62. They include the \$10,000 mortgage note that the firm negotiated; sundry creditors, as per ledger; rent; wages, interest on note, etc.

Deducting this sum from the balance of the assets, and there remains \$5,730 18. Adding *one-half* of this balance to the share of Margaret, previously ascertained, and she will have \$29,835 90, and Klotz will have \$5944 61.

This statement does not include the real estate, \$16,436 21; nor the Reed oven No. 1, \$900; nor the profits of the partnership, from the 20th of June to the 20th of August, 1882, the date at which the term of six months' liquidation ended.

The difference between the present computation, made from the transcript and expert testimony and reports, and the amount awarded in our decree, is \$1,505 75. If the items above mentioned, except the real estate, were taken into the account, there would be no difference whatever.

The district judge fixed the value of the partnership prop-

erty at	\$58,857 28
Including real estate.....	16,436 21
Net value, less real estate.....	\$42,421 07
He then deducted liabilities.....	19,622 34
And found a balance of.....	\$22,798 73
And gave half to each	\$11,399 36

The learned judge of the lower court was certainly incorrect in

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making an *equal* apportionment between the parties; and we think our statement of the values is near the proper figure.

In support of the theory announced, we have the uncontradicted statement of Mr. Macready, one of Margaret's executors. He says, on p. 390 of transcript No. 9607, viz: "We (the executors) had the books thoroughly examined by an expert—in fact one or two experts—and we came to the conclusion that Margaret's interest, at the end of the partnership, which would be six months after her death, ought to be worth in the neighborhood of \$40,000,

"Knowing there was a depreciation to some extent in the machinery, and bad debts to a certain extent, we made an allowance of \$10,000, one-half of which was to be borne by Mr. Klotz, and one-half by Margaret Haugbery's estate—and her interest would represent \$35,000.

"We authorized our lawyer to make an arrangement on that basis."

On May 24, 1882, Klotz proposed to pay \$32,000 for Margaret's interest, including her half interest in the real estate, valued at \$7000.

If we deduct the \$7000, value of the real estate, from the \$32,000, Klotz's offer would be \$25,000; and the judgment rendered is just about a *meane* between the two offers of settlement made by the respective parties.

The defendant's counsel have entered, in this Court, a formal *remititur* of the sum of \$624 42, to which the plaintiff is entitled a credit. Our former opinion is correct.

Rehearing refused.

No. 9858.

ALEXANDER MOSES VS. LOUISVILLE, NEW ORLEANS AND TEXAS
RAILROAD COMPANY.

39	649
107	369
39	649
118	819

It is the legal duty of railway companies, as carriers of passengers, to provide platforms and other accommodations for passengers who desire to take these trains at stations where passengers are usually taken on or put out; to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches, etc., and to furnish at night sufficient lights to securely guide the way and the steps of their passengers, as well as servants necessary to inform them and instruct them as to the location of the trains and as to the usual and safest mode of reaching them.

This rule, which courts must rigidly enforce, is violated by a railroad company which, for any reason, leaves one or more coaches of a passenger train outside of the depot yard or station grounds at which the train stops to take on and put out passengers, and which thus obstructs at night the lights so placed by the city as to lighten both sides of the track on which the train stands.

Hence, a railroad company is responsible for injuries received by a passenger seeking to board one of its trains at night, who finds no one to inform him how to reach the sleep-

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ing car attached to the train, which is left standing outside of the yards, and to which a sidewalk, erected by the company under a contract with the city, leads in a direct route, which the passenger follows, and from which he falls by reason of defective or insufficient lights at that part of the station approach.

It is not contributory negligence in a passenger who goes outside of the station yard to enter the coach which he desires, when that coach is left standing outside of such yard, and when a sidewalk, erected by the company and under its control, leads directly to said coach.

Damages allowed by a jury will not be increased on appeal, unless manifestly inadequate.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

D. C. & L. L. Labatt for Plaintiff and Appellee.

Farrar & Kruttschnitt for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff claims damages in the sum of \$20,000 for personal injuries received by him while boarding a train of the defendant company, at the city of Vicksburg, Miss., during the night of January 14, 1885; which he attributes to the negligence and want of care of the defendant and of its employees.

The defense is a general denial, a special denial of negligence on the part of the company, and a charge of contributory negligence on the part of plaintiff.

The jury found in favor of plaintiff, to whom they allowed \$1000 damages. Defendant appeals, and plaintiff prays for an increase of the allowance for damages in the sum of \$7000.

The undisputed facts of the case are as follows:

Plaintiff, who is a resident of New Orleans, purchased a ticket at the defendant's office in Vicksburg, from that point through to this city, to be used at the date above stated, on a train leaving Vicksburg at 9 o'clock at night.

Within twenty minutes of train time he reached the station or depot of the company, and remained with a companion who was to make the same trip, in a waiting-room within the building used as a passenger station, until the arrival of the train.

That building is situated at the northwestern corner of a square of ground owned and occupied by the company for its purposes as a common carrier. The south-bound trains enter the depot yard at the intersection of two streets known as Levee and Depot streets; the first of which runs north and south, and the latter east and west. Down to that point the railroad track is on Levee street, and thence it diverges from that street, in a southeastern course, into the square of ground

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owned by the company. The depot yard, which is bounded on the west by Levee street, and on the north by Depot street, is enclosed by a fence, leaving at the junction of the two streets an opening through which the trains enter into the yard. On Levee street the fence extends from the station-house, which fronts thereon, to the intersection of Depot street. The depot yard, which is on both sides of the track, is usually approached by passengers, either on Depot or Levee streets, through gates provided for the purpose; the Levee street gate being situated near the station-house. It was at that gate that plaintiff and his companion alighted from a carriage, and through it they walked into the depot yard and into the waiting-room or ticket office, which opens into the yard in the rear or east end of the building used as a station. The depot yard, on that side of the railroad track, is a wooden platform, several feet above the ground or level of the adjoining streets, and extending as far as the street proper on Levee street, the sidewalk being of the same grade and of the same material; and marked out of, or separated from, the railroad yard proper by the fence above described—and ending on to the Depot street corner. The construction of the sidewalk by the railroad company, as well as its dimensions and grade, were stipulated in a contract between the city council of Vicksburg and the company.

Now, it happens, owing to the length of some of the trains, when going southward, that one, and sometimes two, of the passenger coaches are stopped and left standing outside of the depot yard, across Depot street, and that on the night of the accident to plaintiff the sleeping car, which was the last coach of the train, was entirely outside of the yard. And it was in his attempt to reach that coach, with a view to secure accommodations for the night, that plaintiff met with the accident on which he predicates his claim.

As he stepped out of the waiting-room on the arrival of the train, he saw that the sleeper was at the end of the train, and walking towards it he passed out of the gate herein above described near the station, to the sidewalk and on the latter, at the end of which he fell to the ground and broke one of his legs.

From that period of the case, all other facts bearing on the issues involved are hotly contested, and the truth must be sought out of a mass of conflicting testimony.

Our reading of the record has satisfied us that the preponderance of the evidence shows:

That the principal cause of the accident must be attributed to the lack of sufficient light to guide the passengers in their efforts to board

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the train, and that it was owing to the darkness which prevailed that plaintiff fell off the sidewalk.

The effect of a city gas-light, situated on Depot street, at the left side fence of the yard, was entirely lost to persons who were on the right hand side of the train, by the sleeper which stood in its way and entirely out of the depot yard; and the railroad lamps, in which oil was burned, and which were situated immediately around the station-house, were not strong enough to be of any use to persons walking to the rear of the train on the sidewalk.

But at this point and in this connection must be noted the charge of contributory negligence made against plaintiff by the defendant, who says that the usual and the safe mode of boarding its trains was to walk directly east from the waiting-room to the track, only a short distance, then to ascend the steps of the first coach in the way, and thence to walk through two or more coaches, as the case might be, to the sleeper, in case the passenger desired sleeping accommodations; and that the existence of the fence above described was a sufficient indication of the extent of the depot grounds, and a sufficient caution to passengers not to venture outside if they wished to avail themselves of the company's protection. It is also urged that the city sidewalk from which plaintiff fell, was no part of the company's platform, that the company had no control over the same, and was therefore not responsible for any accident which might occur thereon or therefrom.

The first answer to that contention is found in the record, which shows that plaintiff who had never before been at the place, and had arrived there for the first time on a dark night, with very dim lights to guide his steps, was not aware of the distribution of the road's appliances and facilities, and that no employee or servant of the company offered to instruct or guide him in the proper course to pursue. Hence he cannot be considered as negligent or legally imprudent in following the route which in his judgment was the safest and the shortest for the purpose of reaching the sleeper which was his objective point.

The second answer comes also from the record which shows that passengers approached and left the trains indifferently on either side of them; it appears that the driver of the hack brought plaintiff and his companion, without instructions from them, or either of them, to the sidewalk in question; and that carriage drivers, watching for customers on the arrival of trains, stood on either side, of the depot yard, the very hackman who helped to raise plaintiff after his accident was standing on that side with his carriage in expectation of customers.

From our understanding of the contract between the city and the company as to the construction of the sidewalk, we consider that the defendant is under the legal obligation to keep it in good order and repair as one of the approaches to its station. It is used by the company to receive all baggage, whether going to or coming from trains, and an inclined platform connects it with the street below, at the gate through which plaintiff went in and out of the depot-yard on the night of the accident. It is clear to our minds that the defendant would be responsible for any injury occasioned on that sidewalk by reason of a rotten plank, to any of its passengers, either going to or leaving one of its trains. It is indeed used by it as one of its appurtenances.

But in law and in justice, why should this company be heard to charge negligence, imprudence or recklessness to any of its passengers for going out of its inclosures to reach the coach which he desires, when that coach itself is out of the company's yard, and actually intercepts the street which crosses at that point? From the description which we have already given of the grounds, it is undeniable that if a coach of the company had not stood in Depot street, the city gaslight, the best and the only gaslight on and around the grounds, would have been amply sufficient to lighten the sidewalk, separated from it only by the train, and it is as clear that if the sleeper had stood within the depot yard, plaintiff would have gone directly to it, without going outside of the yard; and in either case the accident would not have occurred. Hence, the conclusion is inevitable that the accident is solely attributable to the fact that the sleeping car was not pulled inside of the yard; and that in consequence of its standing in the way of the city gaslight, it deprived the depot and its approaches of the light necessary to securely guide the passengers who desired to take the train, and to occupy that identical coach. It is not proper management in a railroad company to require passengers to go through a series of coaches, and to pass over several platforms, in order to reach the particular coach which they may desire to occupy, because that coach is left outside of the depot yard, which contains the balance of the train to which it is attached. *Turner vs. Railroad Company*, 37 Ann. 648.

The management of the company, on the night of the accident, including the distribution of its lights around the station, the location of its train, with the most important coach left standing outside of the depot yard, thus blocking up an important thoroughfare and shutting out the best light around the premises; its omission to provide sufficient lights on the right hand side of the train, particularly

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at the end of the sidewalk pavement, hereinabove described; its omission to instruct, by servants or other employees, its passengers as to the safest course to pursue in order to reach the sleeping car of the train, are so many distinct and reprehensible violations of the rule recognized as indispensable to the safety of travelers, and so uniformly enforced in jurisprudence, and which requires railway companies "to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches," etc., and "to furnish at night ample and sufficient lights to safely guide their passengers to and from such trains, platforms, station approaches," etc., and which, under those circumstances, exacts the obligation of procuring the employees and other servants necessary to inform passengers of the correct location of their trains, and to instruct them as to the safest mode of reaching the same. *Peniston vs. Railroad Company*, 34 Ann. 777, and authorities therein cited.

The courts of last resort in most of our sister States have, with remarkable uniformity, rigorously enforced the rule, particularly in its intended and humane protection of persons whose business or other wants require their presence around railroad stations at night. While it is true that the rule is intended to afford protection to the public in general, it stands to reason, and it is consonant with justice, that it should apply with exceptional fitness to passengers on the trains of the company, or at its stations, with the object of boarding one of its trains. A lucid writer on railroad jurisprudence has formulated the rule as follows: "It is also the duty of railway companies, as carriers of passengers, to provide platforms and other reasonable accommodations for such passengers at the stations upon such roads at which they are in the habit of taking on and putting out passengers. Their public profession as such carriers is an invitation to the public to enter and to alight from their cars at their stations, and it has been held that they must not only provide safe platforms and approaches thereto, but they are bound to make safe, for all persons who may come to such stations, in order to become their passengers, or who may be put off there by them, all portions of their station grounds reasonably near to such platforms; and for not having provided such station accommodations and safeguards, railway companies have frequently been held liable for injuries to such persons." *Hutchinson on Carriers*, pp. 417, 418.

Another writer on the same subject has very succinctly traced a line to be followed by railway carriers, as follows: "It is the duty of the corporation to have its stations open and lighted, and its servants

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present for the accommodation of those who may wish to leave its trains or to depart by the same." *Thompson's Carriers of Passengers*, p. 108.

Numerous decisions of courts of last resort have contributed the material for the rules thus formulated: and it may not be amiss to refer to a few of such adjudications.

A passenger, waiting for a train, found the station so uncomfortable by reason of tobacco smoke that she undertook to enter the cars before they were drawn up to the platform from which passengers generally entered them, and by reason of which she was injured, recovered damages for such injuries. *McDonald vs. Railroad*, 26 Iowa, 124.

In another case, damages were allowed to a person who intended to board a train, and who was injured while running along the line of the road to reach the train in time, on account of darkness. *Martin vs. Railway*, 16 Com. B., 179.

It has also been held that: "When, by reason of the insufficiency of the station, or length of the train, or negligence in the operation of it, passenger cars are brought to a stand at places where there is no landing or other conveniences for getting off the train, if it is reasonable to suppose that no better opportunity will be granted for this purpose, the passenger may alight, although the position is inconvenient or slightly dangerous. If the company's servants have given the passenger an express invitation to alight, or their conduct is such as to imply an invitation, the passenger will be justified in making the attempt." *Thompson's Carriers of Passengers*, p. 268, § 4—and authorities cited by him.

The following rule also rests on undisputed judicial sanction:

"Wherever a railroad company is in the habit of receiving passengers, whether at a station or some point outside, or if by the regular operations of trains it is necessary to traverse portions of the premises outside of the station-house, passengers have a right to assume that such parts of the premises are in a safe condition for such purpose, even on a dark night." *Thompson's Carriers of Passengers*, p. 269—and decisions therein quoted.

In the case of *Railroad Company vs. Thompson*, *Southern Reporter*, Vol. 1, p. 840, the Supreme Court of Mississippi, in sustaining a verdict of \$15,000 damages against this very company, for injuries sustained in one of their station yards by a person who had gone there on business, and was hurt while passing through a gap in a freight train usually open for people to pass through, used the following vigorous language: "Appellant is answerable for damages in the cause unless

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a railroad company, in the prosecution of its business, may set a trap for people, and after a man has been caught in it and killed or injured, escape liability by assuming the position that he ought to have had more sense than to have been deceived or misled by the contrivance."

In the instant case, the record shows that during the winter months one or more of the night train coaches were not pulled in the depot yard, but were left standing across the intersecting street, that trains were entered indifferently on the right and left hand sides thereof, that the sidewalk wooden pavement which was flush with the station platform had been constructed by the defendant company as part of the considerations for the franchises obtained by it from the city, and no evidence shows that the control of the same has ever been resumed by the city. *Quimby vs. Boston and Maine R. R. Co.*, 69 Maine, 340.

It also appears that the sidewalk in question is one of the important immediate approaches to the company's station, it being used as the only place for the handling of the railroad baggage; that it afforded the most direct route for plaintiff to reach the sleeping car, and that no servant of the company informed him otherwise, whereas a large gate wide opened gave him free access to it. All these circumstances must be construed as an invitation and an inducement held out to him by the company to use the sidewalk as he did. He is, therefore, fully justifiable in law for having followed the course which was thus so naturally suggested to him by the acts of omission and commission of the company.

Hence, he is not amenable to the charge of contributory negligence. And the facts herein recited lead, on the other hand, to the clear conclusion that the company must be held responsible for the accident. But we do not feel warranted to favor plaintiff's prayer for an increase of damages. The verdict of a jury fixing the *quantum* of damages must not be disturbed on appeal unless it be manifestly erroneous and palpably inadequate. The evidence on this point in the record does not justify such a conclusion. Hence the verdict must remain unchanged.

Judgment affirmed.

DISSENTING OPINION.

FENNER, J. With due respect to the able and vigorous opinion adopted by the majority of the Court, I am unable to assent to its conclusions.

At its station in Vicksburg, Miss., the defendant railway company had provided depot grounds, with appropriate buildings, for the reception and accommodation of passengers, which were lighted and

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wholly enclosed by a substantial fence to designate the boundaries of the company's premises, Through this inclosure, by an opening in the fence just wide enough to admit the train, defendant's tracks ran.

One side of defendant's enclosure was bounded by Levee street, a public street of the city of Vicksburg, running towards and extending to the railroad, and outside of the enclosure and running along the fence was the sidewalk or banquette of the street, which was an elevated wooden structure, built by defendant under direction and instructions of the city authorities, and forming the public highway for foot passengers. This sidewalk intersected and crossed the railroad outside of defendant's grounds.

Arriving to take the train, plaintiff entered defendant's enclosure through a gate in the fence on Depot street, at a point near the corner and farthest away from the track, and went into the passenger waiting room, where he awaited the arrival of the train.

What was the plain significance of this inclosure and of this waiting room within it, fronting the railroad track? What was the object of them, and why did plaintiff enter them? Obviously for the purpose of awaiting and boarding the train. Would anyone have supposed, under such circumstances, that he was expected, in order to board the train, to go back to the gate by which he had entered, and then approach the train by the public street? I think not.

The train arrives. The engine and several passenger coaches enter the enclosure, and halt in front of the waiting-room; but the sleeper and part of the coach immediately in front of it are left outside the fence.

What was the course plainly indicated to the waiting passengers? Clearly, to go forward to the train and there to enter one of the coaches and pass back to the sleeper, or else to have sought information as to how to reach the sleeper. Such was the plain invitation and inducement held out by the company. If, on reaching the train and passing along it toward the sleeper, he had encountered an open gate at the track and had passed through it, and been hurt, he might claim that such an open gate at such a point, with the sleeper beyond it, was an inducement or invitation held out by the company to pass through it. But plaintiff went away from the train to a gate more remote from the track than the waiting-room, entered the public street, and chose to pass to the train by that route, outside of the company's grounds. In so doing, I consider he acted on his own responsibility, in opposition to the plain course dictated by the surrounding circum-

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stances, and passed out of the company's protection, which was no more responsible for his safety than for that of any other passer on that public sidewalk.

The complaint made of absence of employees to give directions has no force. No directions were necessary to prompt a passenger, in a waiting-room thus enclosed, to pass to the train which has halted in front of him and within the enclosure, for the purpose of boarding it.

The gate to which plaintiff went was the passage way for arriving as well as departing passengers, and for all persons going in or out of the enclosure on that side; and had any employee been there he would naturally have taken plaintiff to be an arriving passenger, or other person going away from the depot.

If it were negligence in defendant to halt its train in such manner as to leave its sleeper outside the enclosure, and thus to require its passengers to enter another car and pass through it to reach the sleeper, that might render it liable for accidents happening in such passage; but it has no causal connection with an accident resulting from the unusual course pursued by plaintiff in this case, which was in evident opposition to that contemplated by defendant and indicated by all the surrounding circumstances.

I consider the law well settled that when a party disregards the sufficient provisions made by the railway company for ingress and egress to and from its trains, and chooses to adopt a different method, he does so at his own risk. As was said in a leading case: "We hold, on these principles, that the company's liability could not be fixed for the injury consequent on the choice of a passenger, in disregard of the provisions made by it for his safety and convenience. It was not negligence on the part of the company that it did not, by force of barriers, prevent the parties from leaving on the wrong side. People are not to be treated like cattle; they are presumed to act reasonably in all given contingencies, and the company had no reason to expect anything else in this case." *Penn. R. R. Co. vs. Zebe*, 33 Pa. St. 318; *id.* 37; *id.* 420.

These principles are fully applicable here, where the company had actually provided *barriers* within which plaintiff had been received for the purpose of entering the train, from within which he could have entered it, and was manifestly expected and intended to enter it. Plaintiff's act in going out of those barriers and seeking to get to the train by the public street, was a voluntary disregard of the provisions made by the company, and the consequent injury should not be attributed to the company.

No. 9527.

29 659
45 1297BALTIMORE AND OHIO TELEGRAPH COMPANY VS. LOUISIANA WESTERN
RAILROAD COMPANY.

A suit for the expropriation of property cannot be tried in vacation, but only at a term of the court.

A PPEAL from the Fourteenth District Court, Parish of Calcasieu.
Reed, J.

J. R. Beckwith and G. H. Wells for Plaintiff and Appellee.

Leovy & Leovy and J. P. Blair, Bayne & Denegre, D. Caffrey, G. Clark and A. J. Kearny for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. From a judgment rendered in an expropriation proceeding, instituted before the judge of the Fourteenth Judicial District, Parish of Calcasieu, the defendant company has appealed.

Among the exceptions filed in the lower court was one to the effect that the judge could not proceed to try the case in vacation, but that it could only be legally tried in term time.

This exception was overruled.

It seems to us that this ruling was a manifest error. The State courts were established by the Constitution. They were established for the judicial determination of all suits and controversies.

The full and complete organization of the courts and the terms thereof are provided and fixed by law. These terms are thus fixed for the trial of *all* cases and suits instituted before the court. They cannot under the elementary and positive provisions of the law be tried at any other than the regular term of the court, except in special instances expressly declared.

The case in hand forms no express exception to this general and inflexible rule, and it is so admitted by the opposing counsel, and it is further admitted that no adjudication of any court can be found that would warrant in the slightest degree such an exceptional proceeding. The counsel, however, addresses a strong and forcible argument to the court of the wisdom and apparent necessity of such a proceeding, by reasons of public policy and the paramount importance of a speedy determination of questions involving the exercise of the rights of eminent domain. This argument would doubtless prove irresistible if addressed to the legislative department of the government, but it is a matter in which the courts can afford no relief. They must be controlled by the law as they find it.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and the case remanded to be proceeded with according to law.

Baldey & Lightner vs. Brackenridge.

No. 9815.

BALDEY & LIGHTNER VS. E. A. AND E. F. BRACKENRIDGE.

The plea of no cause of action must be judged by the averments of plaintiff's petition.

When a rule, taken upon the adverse party to show cause why certain depositions should not be read, has been made absolute, as shown by the minutes of the court, it is too late to urge objection to the service of the rule after the trial has begun and the evidence has been offered. Rule should have been taken to have the minutes corrected so as to conform to the facts.

Parties, though not partners *inter se*, may be such as to third persons.

When persons occupying relations to others as partners, have obtained undue advantages of the latter, by means of false representations and unlawful acts, they are answerable *in solido* for whatever loss has been incurred thereby, irrespective of their obligations as partners.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Chas. S. Rice for Plaintiffs and Appellees.

Gibson & Hall for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. Plaintiffs allege that their business consists in searching for, inspecting, obtaining information about and locating for purchasers, government lands, with a view to its uses for timber, agriculture and stock-raising.

That for furnishing the information, thus obtained, to purchasers, and in assisting them to procure titles, they received a price or consideration per acre.

They represent that, during the years 1883 and 1884, they had a contract with defendants—a firm or partnership, engaged in a similar business—whereby it was agreed that each firm “should share equally in the payment of the expenses in the search for, inspection of, obtaining information about and locating *certain lands* situated in Washington parish, in this State; and such other expenses as should be incurred in finding purchasers,” and in securing them titles to their lands.

That it was further stipulated in said contract that the price, consideration or commissions paid by each purchaser for the services, information and assistance received, should be equally divided between the contracting parties.

The plaintiffs claim that, under this contract, large tracts of timber lands were located, inspected, and the necessary information in respect thereto furnished, and purchasers secured and titles obtained for them.

39	660
47	1392

39	660
109	1045

39	660
117	410

That amongst others, Byron D. Hamlin purchased on February 8, 1884, 26,909.66 acres.

Henry Hamlin purchased on April 1, 1884, 9165.08 acres, and on the 15th of April, 1884, 5576.74 acres.

They charge that defendants received from said purchasers the price or consideration of $27\frac{1}{2}$ cents per acre, aggregating \$11,454 16, as compensation for services and information aforesaid, less \$2082 57; but falsely represented to them—the plaintiff's herein—that they had only received from the said purchasers, as compensation, the sum of \$7082 59, and out of which they paid to them \$2500 01, and which they received and receipted for, acting under the belief that defendants' representations were *true*.

They now represent that same were false representations. They have been *cheated and defrauded* out of the sum of \$2185 78 by defendants; they pray judgment for that sum, and interest, against the defendants as a firm and against the individual members thereof *in solido*.

The defendant, E. A. Brackenridge, tendered *in limine* the following exceptions, viz:

1st. "The petition discloses no cause of action.

2d. "That petition is vague and indefinite, as it does not set forth the terms of the *alleged contract* in so far as the services each party thereto was to perform," etc.

The exceptions were overruled, and E. A. Brackenridge filed an answer, in which he pleads the general issue, and denies that he is bound as a partner *in solido* with E. F. Brackenridge, and also denies that he was a partner of his.

He disclaims the *contract* set up by plaintiffs, but admits that all the lands alleged to have been sold were sold to the parties alleged, but the trades and sales were "entirely negotiated, arranged and effected by E. F. Brackenridge, and that plaintiffs did not pay, and have not paid, *one-half the expenses* incurred, and rendered no services in connection with said land business up to the time of effecting its sale."

He then alleges that a "full and fair settlement of said land business, in which plaintiffs and defendants had any material interest, was made after *careful explanation* and *full information given to plaintiffs*; and that the land could not and would not have been sold to said parties if plaintiffs had not agreed to take the sum of money *that they* received; and that plaintiffs were informed that such sales could not and would not be effected unless they would accept the sums that they receipted

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for, and *which they agreed to, after full information and the true statement of fact to them.*"

I.

In this Court defendants' counsel presses upon our attention his exception of no cause of action.

He argues that this is a suit by one partnership against another—the two forming a third—for the division or result of a *single partnership* transaction; and that it cannot be maintained, for the reason that the *only* right of action one partner has against another is for a full and final settlement of the affairs of the partnership, *inter sese*.

The *cause* of action must be ascertained from an inspection of the the plaintiffs' petition alone.

The quotations we have made from it clearly show that this is a suit for the revocation of an alleged fraudulent settlement, and for the recovery from the defendants of a difference due plaintiffs in pursuance of a commutative contract.

The exception was properly overruled.

II.

During the progress of the trial defendants' counsel objected and excepted to the reading in evidence of certain depositions of E. H. Darrah, B. D. Hamlin and Henry Hamlin, on the grounds that same had not been properly authenticated and filed.

The minutes of the court show that a rule to show cause had been seasonably taken by plaintiffs, and that same had been made absolute some months preceding the trial. If, as answered by the defendants' counsel, that rule had not been regularly served upon his client, it was his plain duty to have had the minutes corrected before the trial had begun. His silence amounted to a tacit admission of their correctness.

III.

The record furnishes the following information with regard to the partnership existing between the defendants:

1. They occupied an office with this sign over the door, viz: "E. A. & E. F. Brackenridge, dealers in pine and cypress lands."
2. They had blotting-paper, cards and envelopes in use, on which a similar announcement appeared.
3. They advertised themselves as partners in a newspaper called the "Northwestern Lumberman."
4. One of the plaintiffs testified that in all of his dealings with the defendants they spoke of themselves as partners.
5. Other witnesses who dealt with them testified that their transactions were with E. A. & E. F. Brackenridge, and not with the individuals.

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6. They testify that in the course of their land transactions E. A. & E. F. Brackenridge gave them written guarantees, protecting them against loss, etc.

7. Charles Brackenridge, the son of E. A. and brother of E. F., swears, as a witness on part of defendant, thus:

Question. "Who was interested in the sale of that land outside of the government?"

Auswer. "E. A. & E. F. Brackenridge."

Notwithstanding these *indicia* of the existence of a partnership between them, both defendants swear there was none.

In point of fact, there may have been no partnership, but that cannot affect the rights and claims of plaintiffs, who dealt with defendants as partners, and upon the faith of their own acts and representations to that effect.

"Parties, though not partners *inter se*, may be such as to third persons." 4 R. 300.

"If one suffers his name to be used as an *ostensible* partner, although he be no partner, he becomes liable for partnership debts." 18 Ann. 631.

We think the liability of the defendants, as partners, clearly made out, and that there can be no allowance made in favor of E. F. Brackenridge for services, it is claimed he rendered, in the negotiation of the sales to the purchasers named.

IV.

The defendant's answer expressly admits that all the lands alleged to have been sold, were sold to the parties named; and it does not deny that they received as commissions $27\frac{1}{2}$ per cent per acre on all lands sold, aggregating the sum of \$11,454 16.

But this fact is impliedly admitted. He claims that he made a full and fair settlement of the land business, after careful explanation and full information had been given to plaintiffs; and that the land could not and would not have been sold, if plaintiffs had not agreed to accept the sum they did receive.

The controversy is thus narrowed to the truth or falsity of the statement made with plaintiffs.

The defendant claims that plaintiffs bound themselves to pay, among other things, such expenses as might be incurred in procuring purchasers; and alleges that E. F. Brackenridge and Charles Brackenridge rendered such services, and were entitled to the compensation paid them therefor.

Now, it is admitted in plaintiffs' petition, that E. H. Darrah was paid

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five cents per acre, for such services, a sum aggregating \$2500, and they urge no complaint against it. They admit that Charles Brackenridge was entitled to the compensation of \$6 per day, for his services in hunting up and locating lands, and making estimates of them. But they dispute the payments claimed to have been made to Charles and E. F. Brackenridge for *other services*.

Our study of the record has led us to doubt that any such payment was ever made; but, if it was made, to believe that it was not a serious, real discharge of a recognized and valid debt, actually due; but only intended to defraud and deceive the plaintiffs.

Under this view of the evidence, plaintiffs are entitled to the additional amount they claim as their legitimate share of the profits of the joint adventure.

V.

The defendants were, *quoad* their contract with plaintiffs, partners; but we are inclined to the opinion that it was an ordinary one, though possessing some of the features of a commercial partnership. But their relations, as partners, in respect to the plaintiffs, exercise control only over the relative rights of the parties as to the shares they were entitled to receive of the profits, and the portion of the expenses each was bound to pay.

But their obligation as partners is not the limit of defendants' liability in this case.

The proof has convinced us that defendants induced the plaintiffs, by false representations as to the price, and consideration paid by purchasers as commissions, to accept a smaller sum than was actually and really due, by \$2,685.18; and on the plea of having made large expenditures, which had not in fact been made.

The district judge regarded the acts of defendants as unlawful; and that as both of them were shown to have participated in their commission, they were answerable *in solido* to the plaintiffs for the damages they had sustained thereby. R. C. C. 2324.

In this view his judgment was correct, and it is therefore affirmed.

Judgment affirmed.

No. 9874.

THE STATE OF LOUISIANA EX REL. THE BOARD OF ADMINISTRATORS
OF THE CHARITY HOSPITAL VS. F. A. MONROE, JUDGE OF THE
CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

Mandamus will not lie to compel a judge of the Civil District Court to rehear a cause which, in the exercise of undisputed jurisdiction, he has heard, and in which he has

39	664
45	1046
39	664
47	1523
39	664
49	1087

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rendered a final judgment disposing of the whole merits of the cause, and forming *res adjudicata* between the parties, on allegations of the insufficiency and illegality of the reasons on which such judgment was based.

A PPLICATION for Mandamus.

J. R. Beckwith, for the Relator.

The opinion of the Court was delivered by

FENNER, J. The Board of Administrators of the Charity Hospital brought a suit against the vessel "Lucy P. Miller," her captain and owners, in the First City Court of New Orleans, to recover the sum of \$100 claimed under the provisions of Section 2705 of the Revised Statutes, viz: "If any vessel, inward or outward, bound to the port of New Orleans, shall employ as a pilot a person who is not a duly licensed branch pilot, when a duly licensed branch pilot offers, the said vessel, her captain and owners, shall forfeit the sum of \$100, with privilege on said vessel, to be recovered before any court of competent jurisdiction, in the name of the Charity Hospital of New Orleans, for the benefit of the Hospital."

Judgment was rendered in favor of the hospital, and an appeal was taken to the district court and was allotted to Division C, presided over by the respondent judge.

After due hearing, the following decree was rendered by the latter court: "For the reasons assigned in the written opinion this day delivered and filed, it is ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is further ordered that the writ of sequestration herein issued be quashed and that the plaintiff's demand be rejected, with costs in both courts."

This judgment, after refusal of a new trial, became final.

Thereafter, the relator presented this application for mandamus, in which he avers that the respondent judge, in violation of law, declined to hear and determine the said cause on its merits, but rendered judgment on the ground that neither the First City Court nor the Civil District Court had power to entertain said action, because said courts are of civil jurisdiction only, and that said suit could only be heard and determined in a court having criminal jurisdiction; and they pray for a mandamus, ordering the respondent judge to proceed and decide said cause on its merits. The return of the judge sets forth substantially that, in the exercise of undisputed appellate jurisdiction, he has heard and decided the cause referred to on its merits; that his judgment has become final, and is the property of the party in whose favor

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it was rendered ; that the said cause is no longer pending in his court ; and that to command him to proceed with further trial thereof, will be to ignore and virtually annul the final judgment therein rendered, without affording the parties in interest an opportunity to be heard ; and to command respondent to proceed with the trial of a cause which he was competent to decide, and has long since decided, and which is not now pending in his court.

It is impossible to evade or overcome the conclusive force of this return.

The jurisdiction of respondent to hear and determine the appeal is not disputed, but is affirmed by relators.

In the exercise of that jurisdiction, he had full authority to affirm, amend or reverse the judgment appealed from and to render such judgment as should, in his opinion, have been rendered by the inferior court.

He has fully exercised that jurisdiction, and has rendered a final judgment, disposing of the whole case and forming *res judicata* between the parties, which has become the property of the defendants in that cause, which is not absolutely null, and which cannot be set aside without notice to them.

The authority of such a judgment is not affected by the merit or demerit of the reasons which prompted the judge.

Referring, however, to the written reasons of the judge, we find therein no such declension of jurisdiction as is averred by relator.

We find that the defendant had filed an answer setting up various special defenses to the action, amongst which are the two following:

1st. That the sections (R. S.) relied on to inflict a penalty which can be recovered only in a proceeding by and in the name of the State;

2d. That plaintiffs, though claiming for themselves, have no interest in the full amount herein claimed, even if entitled thereto, which is denied.

These are the defenses which the respondent, in his reasons, sustains. It is obvious that they are not, necessarily, jurisdictional in their character, but are defenses to plaintiffs' right of action.

If there was error in sustaining them, the writ of mandamus affords no remedy therefor in the situation of this case.

We might as well be called on to compel a court to rehear and determine a cause anew, because the first judgment was based on an erroneous determination on a plea of prescription or want of proper parties, or any like plea. State ex rel. Berthoud vs. Judges, 36 Ann.

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982; State ex rel. Cupples vs. Judges, Id. 1016; State ex rel. Insurance Company vs. Judges, 36 Ann. 316.

When any court shall render a judgment declining jurisdiction of a suit like this, under Art. 2705 of the Revised Statutes, on the ground that such jurisdiction vests in criminal courts alone, we might revise such ruling under our supervisory jurisdiction; but we cannot correct a final judgment on the merits of the cause on allegations of error in the reasons therefor.

Mandamus refused.

DISSENTING OPINION.

BERMUDEZ, C. J. The complaint is that the district judge reversed the judgment of the city court and rejected the plaintiffs' demand; and that, in justification of his action, the judge ruled that as the city court had no jurisdiction, his own court sitting on appeal has none; and that if this ground is insufficient, then that the action was improperly brought by the trustees as beneficiaries and should have been instituted by the State herself.

To obtain relief the relators have prayed for a *certiorari*, that the validity of the proceedings below be ascertained, and for a *mandamus* to compel the district judge to determine the case in a different form or pass upon the merits.

I.

The judgment is irregular on its *face*. If it be true that the city court had no jurisdiction and that the suit was improperly brought by the trustees, the judgment ought *not* to have *rejected* the demand, for that is a judgment in favor of the defendant. It ought to have been one of *dismissal* only.

II.

It is clear that the city court had jurisdiction, for the claim was for a sum of money not exceeding one hundred dollars, which, if due, could not have been recovered by direct suit before any civil court, still less before a criminal court, which has no civil jurisdiction. If the city court had jurisdiction, the district court ought to have determined the case in a different form, or on the merits. Refusal to do so, however conscientiously announced, is a proper cause for a *mandamus*.

The judgment of the district court ought to be annulled and that court directed to rehear and to determine the cause in another form or on its merits.

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DISSENTING OPINION.

WATKINS, J. Relators are plaintiffs in the suit entitled *Board of Administrators of the Charity Hospital vs. Henry Galt, master and owner of Steamship Lucy P. Miller*, instituted in the First City Court of New Orleans, under the provisions of R. S. Sec. 2705, for the recovery of the fine of \$100, specified therein, against defendants; and the enforcement of this privilege on the vessel. Said master was regularly cited, and the vessel sequestered. Dilatory and declinatory exceptions were filed and overruled.

In answer, defendant urges the implied repeal of R. S. 2705 by Act 63 of 1877; and that, if unrepealed, the same is unconstitutional. Further, that the provisions of that law are in restraint of commerce and trade, and, therefore, in violation of the Constitution of the United States. That "section of the Revised Statutes, under which the plaintiffs claim, inflicts a *penalty* on respondent, in an *ex parte* proceeding, and that the *proceeding* to mulct respondent, could only be *instituted by the State of Louisiana, or in her name and behalf*.

Finally, he denies that plaintiffs have any right "to the *full* amount herein claimed;" and disavow any indebtedness. Judgment was contradictorily rendered in favor of plaintiffs for amount claimed, with recognition of privilege on vessel. Citation of appeal was served on September 10, 1885.

The cause was submitted, in the court of the respondent, on December 21, 1885.

In the record there is an agreement of counsel, in which are admitted the following facts, viz:

1st. That a duly licensed branch pilot did offer his services to the master.

2d. That said offer was declined.

3d. That said demand was made on pilotage grounds, at time stated.

4th. That the master availed himself of the services of another person, who was not a licensed branch pilot, for carrying his vessel out to sea."

Those are *all* the matters of *fact* essential to a recovery under the statute, quoted in opinion. Upon those pleadings and facts the case was examined; and this respondent's decree recites that "for reasons assigned in the *written opinion* of the court, on this day delivered and filed," the judgment appealed from is annulled and reversed, etc.

From an examination of the *written opinion*, referred to in the judgment of respondent's court, and made part of his return, it appears

that he simply decided that, in his opinion, the "ground of defense" to the effect that "the provisions of the law relied on by plaintiffs, inflict a *penalty in the nature of a fine*, which is not recoverable in this form of proceeding," is well taken.

What are the *reasons assigned* in the respondent's *written opinion*, above referred to, and *made part of his return*? He says: "If these propositions were correct in the case cited—and I imagine they will not be disputed—*à fortiori*, are they correct in the case at bar, since here the *penalty is imposed by law, for a violation of law, and the liability therefor can be ascertained and fixed only through the medium of a prosecution by the State, and not at the suit, in a civil court, of the third person named, as the beneficiary of the fine.* * * * * *

"The law is essentially *penal* in its character, and, if the *penalty* of the forfeit can be enforced in this court, at the *suit* of the plaintiffs, there could be no reason why the *penalty of imprisonment* might not be enforced in the same way, if the statute had contained that word.

"For these reasons, it is ordered, adjudged and decreed that the judgment appealed from be reversed, and plaintiff's demands rejected, with costs of both courts."

What is the complaint made by relator's of respondent's proceedings?

That he refused to take cognizance of the *merits* of said cause, and held and decided that the statute invoked imposed a *penalty*, and that liability therefor could "be ascertained and fixed *only* through the medium of a *prosecution by the State*," and could not be recovered in a civil court."

They claim that, in so deciding, respondent was guilty of a denial of justice, because the *civil courts* have jurisdiction of such suits; and he should have proceeded to try and decide the cause on its *merits*.

The statute provides that, under the circumstances recited "the said vessel, her captain and owners, shall forfeit the sum of \$100, with *privilege on the vessel*, to be recovered before any court of competent jurisdiction, in the name of the *Charity Hospital of New Orleans, for the benefit of the hospital.*"

It is too obvious to require the aid of argument that courts of *civil jurisdiction only* could enforce the *privilege on the vessel*; and same could *only* be enforced by *suit*.

Here we have under consideration no *penalty*, in the sense of respondent's opinion.

The words of the statute are: "The vessel, her captain and owners, shall forfeit the sum of \$100, with *privilege on the vessel*," etc. It is

State ex rel. Board of Administrators vs. Judge.

recoverable "in the name of the Charity Hospital of New Orleans, for the benefit of the hospital."

That is a State institution, which is fostered by it and furnished with aliment. It is a *charity* hospital in *fact*, as in name. The Legislature had the right to give this *particular* destination to the funds when recovered, as it had the undeniable right to create liability for them. It had equally a right to confer upon relators the power to sue for their recovery, as it did to secure their enforcement by privilege on the vessel.

I do not think there is any reasonable doubt of relators' right to relief by mandamus. As I have shown, the respondent's court was vested with *undoubted* jurisdiction to try and decide the *merits* of the controversy on appeal; and the First City Court had undoubted jurisdiction in the first instance.

Having jurisdiction of the cause, it was the plain constitutional duty of respondent to exercise it and decide it on its merits. There was no contention as to the facts. They were admitted. Respondent's failure to try and decide said cause on its *merits*, under the circumstances detailed, was, in my opinion, practically a denial of justice, for which there could be no other *adequate* remedy than mandamus.

"The writ of mandamus is expressly authorized for the purpose of directing a court of inferior jurisdiction to perform some certain act belonging to the place or quality with which it is clothed, which is the precise relief sought here." C. P. 829; 32 Ann. 774, *State ex rel. Cobb & Gunby vs. Judges*; 33 Ann. 358, *State ex rel. Harper vs. Judges*.

In *State ex rel. Dupereir vs. Judge*, 35 Ann. 736, this Court say: "A mandamus lies to compel the trial of a cause, when the judge has *illegally refused to go into the merits of the action*, upon the erroneous construction of some question of *practice preliminary to whole case*." High's Ex. Legal Rem., secs. 150, 151.

Mandamus "may be directed more particularly to judges of inferior courts, commanding to render justice," etc. C. P. 837.

It matters not that respondent was only exercising appellate jurisdiction; it was the *same* jurisdiction that had been exercised by the court of first instance in a different way.

The respondent failed to decide, *on its merits*, a cause of which he had undoubted jurisdiction.

The effect of respondents decree was to oust the jurisdiction of the First City Court, and leave the relators without remedy. That was a denial of justice, which should be remedied by mandamus.

State vs. Broussard.

No. 9998.

THE STATE OF LOUISIANA VS. ELOI DELUC BROUSSARD.

Proof of the disparity between the size and strength of the prosecutor and the accused, is inadmissible unless there has been a *prima facie* case of self defense laid by the defendant, or it has been preceded by proof that the accused was the attacking party.

The statement made by the trial judge in the bill of exceptions, must be our guide in determining a dispute as to what was the purport of an *oral charge delivered* by him, and of which the accused complains.

A motion for a new trial on the *sole* ground that the verdict is contrary to the law and evidence, will not receive any consideration at our hands.

A PPEAL from the Twenty-fifth District Court, Parish of Vermilion.
DeBaillon, J.

M. J. Cunningham, Attorney General, and R. C. Smedes, District Attorney, for the State, Appellee.

J. A. Chargois and O. C. & J. Mouton for Defendant and Appellant.

I.

The opinion of the Court was delivered by

WATKINS, J. The defendant, Eloi Broussard, was tried and found guilty of inflicting a wound less than mayhem, with intent to kill, upon the person of one Columbus Broussard, and sentenced to two years imprisonment in the State penitentiary. From this verdict and judgment he has appealed. The matter complained of by him are set forth in several bills of exceptions to the refusal of the judge to allow certain testimony of the witnesses to go to the jury; and one bill of exceptions to the charge given by the judge to the jury. The testimony sought to be introduced was listened to by the judge *a quo* out of the presence and hearing of the jury. This testimony was offered to prove: first, that Columbus Broussard was a man of more strength than Eloi Broussard, the accused, in order to justify the wounding; secondly, to prove that Columbus Broussard, the party wounded, inflicted a wound with a brick-bat upon the accused, *after* he, Columbus Broussard, had been wounded by Eloi Broussard; and that, after inflicting the blow upon Eloi Broussard, he, Columbus Broussard, went into his house to get his gun.

To determine whether or not the judge *a quo* ruled correctly in refusing to allow evidence, showing that in this case the party wounded by the accused was a man of more strength than the accused, or a man of vicious character to go to the jury, we must first find out under what circumstances the law permits such evidence to go to juries.

The decisions are clear that a party, in order to introduce evidence

39	671
46	1016

39	671
51	1197

39	671
104	595

39	671
112	335

State vs. Broussard.

as to the character or disparity in size and strength, must lay a proper foundation, and show that at the time he, the accused inflicted the wound as charged, he was attacked by the wounded party.

On this question Wharton says: "In England we have no authority direct to this particular point. Intimations, however, from eminent judges would lead us to believe that evidence would not be refused when there is a *prima facie* case of self-defense laid by the defendant." Whar. on Hom., p. 503, sec. 607.

The same learned author says: "The general principle then is this: not that it is lawful coolly to attack and kill a person of ferocious and blood-thirsty character, for it is as much murder in such manner to kill the most desperate of men as to kill the most inoffensive; but that, whenever it is shown that a person *honestly believed, himself attacked*, it is admissible for him to put in evidence whatever could show the *bona fide* of his belief. Whar. Crim. Ev., sec. 69.

These principles have been crystalized into our jurisprudence. 30 Ann. 679, State vs. Burns; 32 Ann. 1177, State vs. Vance; 33 Ann. 1087, State vs. Jackson,; 35 Ann. 71, State vs. Claude; 36 Ann. 148, State vs. Watson. 37 Ann. 644, State vs. Janvier; 38 Ann. 20, State vs. Spell.

The trial judge furnishes a statement of the facts proved on this point, viz:

"Columbus Broussard, seeing that the accused had been drinking, replied: 'Deluc, you had better get in your buggy and go home, and leave me in peace.' Numa Menux then again requested the accused to come on with him. Accused stepped back as if he would leave the place, but immediately returned and *shoved* Columbus Broussard against the yard gate, nearly throwing (him) down to the ground—the yard gate arresting his fall. As soon as he (Columbus Broussard) recovered himself, he faced (the) accused. Both then advanced simultaneously on each other with uplifted hands, Columbus Broussard striking at (the) accused on his left shoulder with his naked fist, while (the) accused *plunged a knife into Columbus Broussard's side.*"

Further: "I ruled out evidence going to show that *after* he had been stabbed, Columbus Broussard had run off, stopped, stooped, picked up a brick, and struck accused with it, and then went into his house and got his gun."

His ruling was in exact conformity with the authorities we have cited.

All of this evidence was irrelevant, as it definitely related to transactions occurring *after* the conflict was over. Such evidence could only apply to a charge preferred against Columbus Broussard.

State vs. Primeaux.

II.

Another bill was reserved to that part of the judge's charge, which was delivered to the jury orally. He delivered a charge to the jury in writing, and which is included in the transcript; and in addition he gave them the additional oral charge, viz :

"Gentlemen, your verdict must be unanimous. You must all agree upon it. That verdict may be one of 'Guilty' or 'Not Guilty.' You cannot separate. You must remain together in charge of the sheriff.' You may appoint one of your number to act as your foreman, and who will deliver your verdict, should you agree to one. If you agree, or, if you desire further instructions, you will inform the court, through the sheriff."

The judge further states, officially, in the bill, that this is the only part of the charge which was given orally. "If I committed an error in this case, I want it righted; but I *emphatically and distinctly disclaim that I delivered the charge* which counsel say I did."

The counsel for the accused incorporated into his bill what he claims was the substance of the *oral* charge he complains of as trenching on the facts proved on the trial.

We must take, as our guide, the statement of the judge, made over his official signature, affixed to the *very* bill of exceptions on which defendant relies for the reversal of his ruling.

The record is our safest and only guide. It was the plain duty of counsel to have promptly interposed his objections to the charge when it was given, and at that time caused the bill to be signed.

We cannot consider the charge counsel has appended in his bill in *direct opposition* to the judge's certificate of its incorrectness. 45 Ann. 770; State vs. Riculfe & McClung.

III.

A motion for a new trial on the *sole* ground that the verdict is contrary to law and evidence is not entitled to notice in this court. 38 Ann. 301, State vs. Joseph Smith.

We think the accused is without just ground of complaint.

Judgment affirmed.

No. 9999.

THE STATE OF LOUISIANA VS. JOSEPH PRIMEAUX.

This Court has frequently signalized its indisposition to interfere with the large discretion necessarily confided to trial judges in matters of continuances, except in cases manifestly arbitrary and unjust.

A continuance is properly refused, when the accused fails to comply with the rule of court

39	673
44	334
39	673
45	299
45	1044
39	673
49	1009
39	673
52	1356
39	673
109	349
39	673
113	730
39	673
116	33
117	386

State vs. Primeaux.

requiring the address and locality where witnesses can be found and served, and otherwise fails to use due diligence; also where the facts intended to be proved by the absent witness, can be and is testified to by a witness present, or even the defendant, availing himself of the provisions of Act 29 of 1886, and the testimony would be cumulative only.

A trial judge is justified in refusing to read to the jury the text of a law which has no bearing on the prosecution and can therefore find no application.

Doing so would be uselessly charging abstract propositions of law.

A charge is not improper or illegal; that it was unnecessary that, a person named in the information, as the owner of the property stolen, should be brought to court to testify as to that fact, where the ownership is established to the satisfaction of the jury by other proof and that, if such ownership is not thus proved, the jury should acquit the accused.

Such charge is rather favorable, than injurious, to the accused.

A PPEAL from the Twenty-fifth District Court, Parish of Vermilion.
DeBaillion, J.

M. J. Cunningham, Attorney General, and *R. O. Smedes*, District Attorney, for the State, Appellee.

J. A. Chargois and *O'Brian & White* for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from the verdict and sentence on a charge of larceny.

The record contains three bills of exceptions:

I.

The first bill is to the refusal of the district judge to two motions for a continuance, based on the ground of the absence of two material witnesses.

The motions were denied because the accused had not used due diligence to secure the attendance of the absent witnesses, and that their testimony would have been cumulative only.

The want of due diligence consists in not having given seasonably, as is required by the rule of court, the address or locality at which the witnesses could have been found or served.

On this point, and on other grounds, the district judge has assigned, in support of his refusal, elaborate reasons, in which he shows that the directions were not given, and that had the defendant acted as he ought to have done, he could have secured those witnesses. We deem it unnecessary to reiterate those reasons, which appear sufficient to justify the refusal.

Besides, the testimony proposed to be elicited from these witnesses would have been cumulative only.

State vs. Primeaux.

The defendant, under the provisions of Act No. 29 of 1886, thought proper to testify on his trial.

What he expected to prove by the absent witnesses, says the judge, he himself then testified to.

The jury would no more have believed those witnesses, who were relatives of defendant, than they gave credence to his own statements.

On the subject of refusals of continuances, on the ground of absence of witnesses, this Court has frequently held that it would not interfere with the large discretion necessarily confided to trial judges, unless in cases manifestly arbitrary and unjust. V., 37 Ann. 775, and authorities there cited.

The complaint shows neither of these features, in the present instance.

II.

The second bill is to the refusal of the district judge to read to the jury Sec. 832 of the Revised Statutes.

This section defines the crime and punishment of "*receiving stolen goods, knowing them to have been stolen.*"

The accused was not prosecuted under this section, which was therefore entirely foreign to the issue and was not properly asked to be brought to the notice of the jury.

A court cannot be called on to charge on propositions of law which have no reference to the prosecution in progress before it, and which under the evidence adduced can find no application. 34 Ann. 1084; 38 Ann. 41.

Had the jury, under the charge of *larceny* made in this case, found a verdict of "*receiving goods,*" etc., such verdict would not have been responsive to the charge. State vs. Moultrie, 33 Ann. 1846.

III.

The last bill is to the charge of the district judge, who is represented as having told the jury that it was not necessary that a named person should have been brought into court to testify.

The bill does not justify this complaint, for it does not appear that the judge thus charged the jury absolutely.

The judge charged substantially, that if the jury are satisfied from the evidence that the property alleged to have been stolen belonged to Mrs. Ursin Broussard, without her testimony, it was not necessary that she should have been brought into court; while on the other hand, if they are satisfied that the ownership has *not* been satisfactorily proved, without the testimony of that person, it was necessary that she should

State vs. Dubois.

have been brought into court—for the State must not leave any reasonable doubts on the mind of the jury as to the ownership, who must give the accused the benefit of such doubt and acquit him.

This, it would seem, is a charge rather favorable than prejudicial to the accused.

Judgment affirmed.

No. 9971.

THE STATE OF LOUISIANA VS. GILBERT DUBOIS.

In an appeal by the State from a judgment sustaining a motion to quash an indictment rulings made in favor of the State cannot be discussed, as the accused who has not yet been tried could not appeal.

Act No. 8 of the Extra Session of 1870, entitled an act relating to crimes and offenses, is not unconstitutional. Reaffirming *State vs. Taylor*, 34 Ann. 796.

A PPEAL from the Twelfth District Court, Parish of Rapides.
Blackman, J.

M. J. Cunningham, Attorney General, and *John C. Wickliffe*, District Attorney, for the State, Appellant.

M. C. Moseley for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. The State appeals from a judgment quashing an indictment which charged that the accused did "wilfully, feloniously and maliciously conspire, combine, confederate and agree together with one William Smith to commit and procure the commission of the crime of murder by wilfully, feloniously and of his malice aforethought to kill and murder one William Hull, and to procure said William Hull to be wilfully, maliciously and feloniously killed and murdered." * * *

The grounds of the motion were :

1. That conspiracy is an offense at common law, which in its nature cannot be committed by a single individual, and this defendant is the only person charged with this conspiracy.

2. That the indictment is void for duplicity.

3. That the Act No. 8 of the Legislature of 1870, approved March 16, 1870, under which the indictment was framed, is violative of Art. 114 of the Constitution of 1868, as it does not contain in its title the object or objects for which it was enacted.

The first two grounds were overruled, and cannot be reviewed in an appeal taken by the State, and because the defendant, having not yet been tried and convicted, could not appeal from that ruling.

39 676
47 375
39 676
48 1020
39 676
50 1158
51 1222

State vs. Darrow.

The question involved in the third ground was once presented to this Court, where it was decided adversely to defendant's present contention, and directly to the reverse of the district judge's ruling in the instant case. We refer to the case of the State vs. Taylor, 34 Ann. 978, in which, after mature consideration of the subject, we held that "Act No. 8 of the Extra Session of 1870, entitled an Act relating to crimes and offenses, is not unconstitutional." A second examination has satisfied us of the correctness of our views in the case referred to, which we hereby reaffirm without repeating them, nothing more being now necessary than to refer them to the attentive consideration of our learned brother of the district bench, who it seems had not yet had the opportunity to become informed of their tenor and effect. In his brief the district attorney informs us that the opinion in question was not read to the judge. "There being no annals in the court-room, the district attorney could only state to the judge that such a decision had been rendered." It might enhance the administration of justice, and it might be in the interest of the parishes which are burdened with heavy costs incurred in the prosecution of crimes, if the trial judges and district attorneys could have at hand the books and other authorities necessary to a correct solution of law-points raised during such trials.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; and it is now ordered that the motion to quash the indictment be overruled, and that this cause be remanded to the lower court for further proceedings according to law.

No. 9979.

THE STATE OF LOUISIANA VS. JAMES K. DARROW.

A motion for a new trial, unaccompanied by any bill of exceptions to the ruling thereon, will not be examined. Unless the record contains either a bill of exceptions, motion in arrest of judgment, assignment of errors, or error patent on its face, the judgment will not be disturbed.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee.

J. J. Foley for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant appeals from a sentence of one year's

39	677
45	441
45	840
39	677
52	1255
39	677
104	187
104	445
39	677
106	269

Hawthorne vs. Clark et al.

imprisonment at hard labor, having been convicted of inflicting a wound less than mayhem.

His only complaint here is that the trial judge refused to grant him a new trial. The motion, therefore, was founded on the separating of the jury after retiring to deliberate upon their verdict.

It suffices to say that no bill of exceptions was taken to the overruling of the motion. In the absence of such bill, containing the evidence or a statement of facts upon which the judge based his ruling, this Court is powerless to review the matter. *State vs. Wire*, 38 Ann. 685.

Judgment affirmed.

39 678
112 274

No. 9859.

THOMAS P. HAWTHORNE VS. MRS. MARY CLARK ET AL.

Where a man conveys an immovable to a woman and subsequently marries her, there being no marriage contract respecting the property conveyed, he cannot, during the marriage, though living apart from his wife, maintain an action against her to have said conveyance declared a simulation, nor can he by passing a simulated title to another person, enable such person to have the conveyance to the wife annulled on the ground of simulation or other cause.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Wm. B. Lancaster for Plaintiff and Appellant.

J. S. & J. T. Whittaker for Defendants and Appellees.

The opinion of the Court was delivered by

TODD, J. William Clark on the 17th of December, 1875, conveyed the property described in the pleadings being an immovable situated in the city of New Orleans, to the defendant, then a Mrs. Mary Quirk. A few weeks subsequently he married her. The parties afterward separated and are living apart.

On the 29th of December, 1885, Clark purports to have sold the the same property to the plaintiff, his son-in-law, for \$2800, on a credit of one, two and three years. The instalments represented by the promissory notes of the plaintiffs for \$100 each.

A short time after this conveyance to him, the plaintiff brought suit against Mrs. Clark, the defendant, to have the title to her of the property made by Clark declared simulated and himself recognized as the true owner of the same.

To this action Mrs. Clark excepted, on grounds substantially as follows:

"That the plaintiff was without interest in the subject matter of the

Hawthorne vs. Clark et al.

suit. That his title to the property was simulated; and that he was but a person interposed for the purpose of this suit."

This exception was sustained and the suit dismissed, and the plaintiff appealed.

We see no reason to disturb the judgment appealed from.

Clark and his wife, defendant herein, though living apart, have never been separated by judgment, or divorced. During the existence of the marriage Clark could bring no suit against his wife to have the sale annulled. We are satisfied that this conveyance was made to the plaintiff, with a view to enable him to do what Clark could not do himself.

Both the plaintiff and Clark were on the stand as witnesses, and this fact was virtually admitted by both of them.

In answer to a question asked him, the former said (quoting):

"He (referring to Clark) turned the property over to me, I suppose to make this suit."

Then the question was asked: "He turned the property over to you to make this suit?" Answer: "Yes, sir."

Clark, as a witness, was asked substantially: "If it was not his idea when he conveyed the property to Hawthorne that he (Hawthorne) would bring a suit against Mrs. Clark, and if he succeeded in the suit, would return it to him."

To which he answered (quoting): "I don't know, but I might take back the property from him if he got a title to the property * * * and wanted his notes back."

"Q. Did you not tell him that?"

"A. Admitting I did, I will say yes."

Again, when questioned about what property he owned, Clark answered to the effect that all he owned was this property—showing that he still regarded himself as the owner of it, notwithstanding his conveyance of it to plaintiff.

In addition to this, the long terms of credit given, the fact that the property stood mortgaged for more than it was worth, and that the notes had not been negotiated, and other circumstances needless to mention, all argue against the reality of the sale to Hawthorn.

Thus, concluding that Hawthorn was entirely without interest, it is unnecessary to discuss the abstract question presented whether, even had the sale to him been real, he could have any better right to maintain this suit than Clark himself had.

Judgment affirmed.

Mehle et al. vs. BenseL.

No. 9856.

CAROLINE MEHLÉ AND HUSBAND ET AL. VS. BALTHAZAR BENSEL.

Notwithstanding a plea of *res judicata* is sustained, and a portion of plaintiffs' demands are dismissed, leaving others in controversy, involving less than \$2000, this Court is not necessarily divested of jurisdiction thereby.

The usufructuary is bound to keep the things of which he has the usufruct, and take the same care of them as a prudent owner would; and he is answerable for such losses as are produced from his default or neglect.

He is liable for all the expenses for the preservation of the property and the payment of taxes.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

John Bay for Plaintiffs and Appellants.

Braughn, Buck, Dinkelspiel & Hart for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. Plaintiffs, as sole surviving heirs of Magdalena Aaron and issue of her marriage with Philip Mehle, instituted this suit against the defendant—who was her second husband, and survived her—for the possession of a certain piece of improved real estate in the city of New Orleans, and \$800 damages done the property and \$2750 rents and revenues thereof.

They represent that soon after the death of their mother, on the 21st of April, 1875, the defendant took illegal possession and control of said property, as usufructuary, and has been receiving and using the revenues thereof, and that they amounted to \$25 per month.

That defendant claims to be usufructuary by virtue of a testamentary disposition to that effect in the will of their deceased mother, in pursuance of which he was put in possession of said property; but they aver that, if same was ever done, it was done in an *ex parte* proceeding and without notice to them, and without giving bond, as required by law, and same are null as to them.

They charge that defendant caused no inventory to be taken of the property subject to the usufruct, *contradictorily with them*, and that *that* was necessary to entitle him to take possession as usufructuary.

That since defendant has taken possession of said property, he has abused it by suffering it to go to decay for want of repairs, and some of the improvements thereon to be removed or destroyed, so that, in consequence, its value has been diminished fifty per cent, and on which score they claim \$800 damages.

That he has failed to pay the State and city taxes for several years,

as it was his duty to have done, if he was usufructuary, and on that account said property is liable to be sold at any time.

That he has failed to insure said property against loss by fire.

They allege that the will under which the defendant derives his title as usufructuary, is null and void, in so far as same gives him the usufruct of her *entire* estate, because she had children of a former marriage, and she was legally prohibited from giving to her second husband more than *one-fifth* of her estate in usufruct, to which, in any event, they claim it should be restricted.

They pray, in the alternative that, if the court should hold, and treat defendant as usufructuary, that said usufruct be annulled and set aside, and that the property be restored to them.

I.

In limine the defendant tendered a plea of *res judicata*, predicated upon a previous suit between the same parties, on the same causes of action, and which was finally adjudged and determined between them, and he claims that it is a bar to all the demands set up in this suit.

This plea was sustained by the judge *a quo* "so far as to dismiss all portions of the petition of the plaintiffs that allege the nullity of the will * * * giving the usufruct to the defendant, or *calling in question, in any manner the legality or regularity* of said usufruct.

It was overruled as to that portion of the petition that alleges *abuse* by the usufructuary of the property; its waste and dilapidation; and their claim for resulting damages.

The plaintiffs urge in this court—neither in argument, plea, or brief—any complaint of that decree; nor did they reserve a bill.

II.

Here defendant's counsel insists that this court is without jurisdiction *ratione materiae*, because the claims and demands of the plaintiffs are in amount much less than \$2000.

On the contrary, plaintiff's counsel argues that, while the judgment entitles defendant to the usufruct, it does *not* dispense him from compliance with the law entitling him to it; that he may be legally entitled to the usufruct, yet, if he does not comply with the law authorizing him to be put in possession, he has no right to the *enjoyment* of it.

Hence defendant is bound to the plaintiffs for the revenues of the property during the period of his occupancy of the premises.

. This argument is clearly untenable. The interlocutory decree of the court below not only dismissed plaintiffs' suit in so far as it called "in question in any manner the *legality or regularity* of the usufruct;

Mehle et al. vs. BenseL.

but the issues remaining in the suit were enumerated and particularly specified, viz:

- 1st. The abuse of the property subject to the usufruct.
- 2d. Its waste and dilapidation.
- 3d. The resulting claim for damages.
- 4th. The question of bond.

The demand for \$2750 revenues was thereby eliminated from the plaintiffs' petition, and they did not reserve any bill of exceptions to the ruling of the court.

While the effect of this interlocutory order was to *reduce* the demand to a sum less than \$2000, *pendente lite*, it does not result therefrom that this Court is deprived of jurisdiction.

III.

The property subject to the usufruct, which has been terminated by the death of the defendant since the institution of this suit, was of small value at the death of the testatrix.

It consisted of a small lot of ground in the Fourth District of the city of New Orleans, on which there were, at the time, two small tenement houses or cottages, constructed of flatboat lumber, and not plastered within. This property was usually rented by the defendant at \$25 per month; since his death at \$14 per month.

The roof is shown to be in a bad condition, but that is in part referable to the fact that the slate used, originally, was of an inferior quality.

The defendant is shown to have defaulted in payment of taxes for several years; but the plaintiffs contributed to his default by having fraudulently procured a sale of the property for taxes, under which they received and used its revenues for more than a year, when it was judicially annulled and the defendant restored to possession.

The proof shows that defendant, representing the matrimonial community theretofore existing between himself and the testatrix, furnished the means for the construction of the tenements on said property, and for his share of one-half, he obtained judgment against the plaintiffs in prior litigation for about \$500, and no part of same has been paid.

The judgment appealed from condemned the defendant to pay the delinquent taxes on the property; to restore an awning that had been permitted to decay, or pay its value, which was fixed at \$25; to rebuild a wood-shed that had been torn down, or pay its value, which was fixed at \$25; and required him to furnish security in the sum of \$500,

 State vs. Segura et al

as usufructuary, and rejected and disallowed plaintiffs' demand for damages.

At the time of his death the defendant is represented to have been quite an old man. His administrator has been made a party to this appeal.

An examination of the record has convinced us that the judge *a quo* did substantial justice between the parties, and we will not alter his decree.

The effect of defendant's death during the pendency of the appeal will be to dispense the administrator from giving bond and to entitle plaintiffs to be placed in the possession of the property subject to the usufruct.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be amended so as to dispense defendant's legal representative from giving bond, and to entitle plaintiffs to possession of the property subject to the usufruct of the defendant, which terminated at his death, during the pendency of this appeal; and that in all other respects it be affirmed, with costs of appeal to be paid by the plaintiffs and appellants, and those of the lower court as directed in said decree.

Judgment amended and affirmed.

Mr. Justice Todd being absent, takes no part in this opinion.

No. 9982.

THE STATE OF LOUISIANA VS. SEGURA ET AL.

An appeal taken by the State to a judgment quashing the general *venire* of jurors on the ground that the term of court at which it was impanelled was irregular and illegal, and presented here after the jury had been discharged and the term had lapsed, will not be entertained, because any judgment we might render would be utterly futile and inconsequential.

It might be different if the indictment had been found by the grand jury formed out of the *venire* quashed, which, however, is not the case.

A PPEAL from the Twenty-first District Court, Parish of Iberia.
Gates, J.

O. H. Mouton, District Attorney, for the State, Appellant.

A. & C. Fontelieu and *J. A. Breaux* for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. This is an appeal taken by the State from a judgment of the court *a qua* quashing the general *venire* of jurors drawn to serve

Wood vs. Egan.

at a term of court to be held on the first Monday of April, 1887, on the ground that, owing to certain irregularities in the fixing of said term, it was illegal.

The jury has been discharged; the term has passed; and we would be at a loss to conceive of any object in prosecuting such an appeal, if the district attorney had not informed us in his brief that the grand jury impanelled at said term had returned sundry true bills into court, and that he desires the Supreme Court to pass on the question, in order to be advised as to what course he should pursue in reference to them. But those cases are not before us, and the indictment in this case was not found by that grand jury.

As regards the present appeal, the questions presented are of a purely *moot* character, and any decision we might render would be *brutum fulmen* and entirely inconsequential. We must decline to engage in such superfluous and profitless discussion.

It is, therefore, ordered that this appeal be dismissed.

No. 9463.

JAMES WOOD VS. MARY L. EGAN.

A state demand long withheld from presentation or prosecution, until he, against whom it is preferred, has died, is regarded with disfavor. It must be established, when no hindrance was in the way, with *more* than reasonable certainty. The unfavorable presumption, created by the delay, can be removed only by peculiarly strong and exceptionally conclusive testimony.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

J. Duvinéaud and Posey & Ker for Plaintiff and Appellant.

C. H. La Villebeuvre and Carleton Hunt for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit by a former client against the heir of his deceased counsel.

The charge is that B. Egan received, in March, 1874, some \$6500, in satisfaction of a judgment in plaintiff's favor, which, notwithstanding repeated demands, he has failed to pay over.

The claim is increased by others for about \$200, said to have been

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39 684
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109 518

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112 1007
114 608

Wood vs. Egan.

given Egan to defray costs, and which he has likewise failed to account for.

The suit was brought in May, 1883. The answer is a general denial.

The evidence shows that Egan died in December, 1881, leaving property inventoried at some \$150,000, owing no debts; that he was correct individually and professionally; that after his death, the defendant here, his universal legatee, sued the plaintiff, who did not set up as a counter claim, the amount now sued for; that notice to creditors was given by the executrix, and that the plaintiff did not present himself, and that it is only after the case brought against him had been decided, that he instituted this action.

The evidence establishes beyond question, however, that Egan has collected the amount of the judgment mentioned in the petition.

On the trial the plaintiff testified in his own behalf, and then admitted having received \$3500 from Egan shortly after he had collected the judgment.

Some thirty witnesses were heard below, to impeach the veracity of the plaintiff, and asperse his character.

The district judge patiently heard and weighed all this testimony. In an elaborate opinion, in which the evidence is thoroughly analyzed, he states that he has no hesitation to say that the testimony has not in the least disturbed the absolute conviction in his mind that Egan loyally and faithfully accounted to Wood for every dollar that was ever due him.

We have made it our duty to consider the testimony adduced and have reached the like conclusion.

We cannot admit that plaintiff allowed his counsel to retain possession of the amount claimed as not accounted for during so many years and look with destructive suspicion on the reality of his demand.

As was well said in Bodenheimers' case, 35 Ann. 1006 :

A stale claim long withheld from presentation or prosecution, until he, against whom it is preferred, has died, must be established with more than reasonable certainty. An unfavorable presumption is created by the delay. It can be removed only by peculiarly strong and exceptionally conclusive testimony.

The plaintiff has not made his claim legally certain, so as to recover judgment.

These conclusions are supported by good and conservative authority.

Wood vs. Egan.

Davenport's case, 5 Ann. 141; Simpson's case, 7 Ann. 555; Succession of Rice, 14 Ann. 317; Manning's Unreported Cases, p. 98, 121, 339; Cutler vs. Succession of Collins, 37 Ann. 95.

Judgment affirmed.

DISSENTING OPINION.

TODD, J. As stated in the opinion just read, a party must make his case certain—it is not enough that he make it probable. This has become a truism. But in my opinion, the principle involved in it is not applicable to the facts of this case, but another truism should be applied, to wit: That where the existence of a debt has been established by indubitable proof, it is not enough that its discharge be made probable, but it must be made certain.

There is not the slightest doubt that Bentick Egan collected the judgment in favor of Wood. This fact is not controverted, but admitted. When this money thus collected came into Egan's hands, that moment he came under an obligation to pay it over to Wood; that is, that then and there a debt arose on the part of Egan to Wood. This shown, plaintiff's case was fully made out.

The onus, then, was certainly upon Egan or his legal representative to prove a discharge by payment or other mode prescribed by law. There is not the slightest evidence of such discharge to be found in the record. In fact it has not even been alleged, the answer containing only the general denial, which simply put at issue the fact of the money being received by Egan. Had proof been offered of its payment to Wood, it would not have been admissible under the pleadings.

When the existence of a debt, as in this case, has been clearly established, it is surely not enough to relieve the debtor to show one or more circumstances such as the statement of the demand or the ability of the debtor to pay, sufficient at most to raise a mere probability of the non-existence of the debt.

If its existence at one time is clearly shown, its discharge must be made equally clear.

Controlled by these elementary and imperative principles of the law and rules of practice, I am constrained to dissent from the opinion of the majority.

State vs. Brady et al.

No. 10,003.

THE STATE OF LOUISIANA VS. LUKE BRADY ET AL.

An indictment accusing a person of "maliciously, feloniously and willfully assaulting another by shooting at him," prefers a charge within the scope of Section 792 of the Revised Statutes, which contemplates four distinct offenses by means of an assault: one by "willfully shooting at," the second "with intent to commit murder," the third "with intent to commit rape," and the fourth "with intent to commit robbery." In charging the "assault by willfully shooting at," the pleader is not bound to aver or qualify the intent with which the assault was made.

In such a case it is correct to instruct the jury that to convict the accused as charged, they must reach the conclusion from the evidence that if death had ensued from the deed it was manslaughter.

In drawing indictments and informations for statutory offenses, district attorneys would facilitate the administration of justice by confining themselves within the words of the statute.

A PPEAL from the Twelfth District Court, Parish of Rapides.
Blackman, J.

M. J. Cunningham, Attorney General, and *John C. Wickliffe*, District Attorney, for the State, Appellee.

Robt. P. Hunter for Defendant and Appellant.

The opinion of the Court was delivered by

POCHE, J. Luke Brady appeals from a conviction and a sentence to hard labor for one year, under an indictment which charged that Luke Brady and Peter Paul "did willfully, maliciously and feloniously assault one F. O. Nugent by willfully shooting at him," * * *

His complaint embraces four bills of exception, the substance of which, as suggested by his counsel, turns upon a proper construction of Section 792 of the Revised Statutes, under which the indictment rests and which reads as follows:

"Whoever shall assault another by willfully shooting at him, or with intent to commit murder, rape or robbery, shall on conviction thereof, be imprisoned at hard labor not exceeding two years."

In his bill, reserved to the refusal of his motion in arrest of judgment, the defendant urges in substance that the indictment charges no offense known to the laws of the State, that it fails to qualify the intent with which the offense is said to have been committed, and that, if the crime sought to be charged is shooting with intent to murder, the charge is defective because malice aforethought is not averred.

The fallacy of the argument is due to an erroneous construction of the plain language of the statute, and in requiring the qualification of the "willful shooting at" by the word intent, which has no reference thereto.

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State vs. Brady et al.

The leading idea or expression in the statute is in the words "whoever shall assault another," and not in the words "willfully shooting."

The statute denounces the offense of an assault by "willfully shooting at," which by itself is a complete and distinct offense without any other qualification than that of intent; it denounces the offenses of assault with intent to commit murder, rape or robbery—which are in themselves and each separately, distinct and complete offenses; and the statute finally prescribes the same penalty for each of the offenses thus denounced. *State vs. Williams*, 38 Ann. 372; *State vs. Simien*, 36 Ann. 924.

Now, as the indictment propounds the charge of a felonious, malicious and willful assault "by willfully shooting at," * * * it is clear that it does contain a charge of an offense known to our laws, since the same is specially denounced in the statute under discussion. And as the language used in the indictment is already redundant by the qualifications of the assault, which were not necessary under the terms of the statute, it is hardly in order for the defendant to suggest an improvement in its confection by adding the description of an intent, which is absolutely unnecessary.

Under these views, it becomes unnecessary to indulge with defendant's counsel in the idle discussion of the words or charges which the pleader should have used, if he had intended to charge the accused with an assault by "willfully shooting at another" with "intent to commit murder."

If such had been his intention, he would in all probability have preferred the charge which is covered by Section 791. The intention of the law-maker in providing for the offense of an assault with intent to commit murder in Section 792, is to define such an assault by any other mode but by "shooting at."

In his other bills the accused complains of the refusal of the district judge to give several special charges to the jury, altogether conveying the general idea that the State had intended to charge the accused with an assault by shooting at with intent to commit a murder. The judge properly refused the instructions requested by him in that sense, and in substance informed the jury that, to convict the accused as charged, they must reach the conclusion that if death had ensued from the deed, it would have been manslaughter. He correctly held that *malice* of itself is not murder in a homicide, and that it is only as *malice aforethought* that it becomes an essential ingredient in the charge and in the proof of murder.

This is conceded by defendant's counsel, as shown by the complaint

in his motion in arrest of judgment, touching the omission of the necessary words, "malice aforethought," if the charge was intended to contemplate murder. The whole difficulty arises out of the clumsy introduction of the words, *malicious, felonious and willful*, by the District Attorney as qualifying the assault charged, and which were not in the least necessary under the requirements of the statute.

District attorneys would doubtless find it an economy of labor to themselves and especially to the courts by following the very words of the statute in the confection of indictments or informations for statutory offences.

There is no force in the complaint that the judge erred in charging the jury that they could find either of the three following verdicts:

1. Guilty as charged.
2. Guilty of assault.
3. Not guilty.

We can see no advantage to the accused himself, and no interest of justice to be subserved, by charging, as requested by defendant's counsel, that the jury could have returned some one of an almost infinite variety of verdicts. "Sufficient unto the day is the evil thereof."

We find no error in the proceedings to the detriment of the accused, who has had the benefit of a most ingenious defense conducted by a mind of prolific resources.

Judgment affirmed.

No. 9923.

JOHN I. ADAMS & CO. VS. BOARD OF LIQUIDATION OF THE STATE
OF LOUISIANA.

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It is the obvious purpose of the State funding law No. 11 of 1875 that the *status* of each issue of State bonds or warrants, the legality of which is questioned, should be settled in a single suit by any holder of such securities; and, for this purpose, the law authorizes all other holders of like bonds or warrants to intervene in such suit and assert their rights.

Whatever relaxation might be made in favor of a bondholder who had been ignorant of the pendency of such a suit, it would be inequitable to permit one affected with full knowledge thereof to take the chances of a favorable judgment which would settle his rights, and then, after an adverse decision, raise, in a new suit, issues contradictory of those presented in the first. In any event, even if not estopped by *res judicata*, the plaintiff, in such new suit, would certainly be compelled to overthrow, by conclusive proof, the case which had been made in the former one and on which the decision as to

 Adams & Co. vs. Board of Liquidation.

the status of the bonds rested; and the defendant was authorized to offer and have received the whole record of such former case, including the evidence.

Weighing the whole evidence as thus made up, the facts on which the former decision was based are not disproved, and plaintiff's bonds must be denied the privilege of being funded for the same reasons for which like bonds were rejected in the case of *Sage vs. Board of Liquidation*, 37 Ann. 412.

Moreover, these bonds were not included in the Auditor's Report of 1874, which this Court held in the *Pacific R. R.* case, 30 Ann. 980, was the basis of the funding scheme, within which, consequently, they were not embraced.

The case is not affected by any equities which plaintiffs, as transferees before maturity, may have under the law of negotiable instruments. The Court determines, not all their legal rights, but only their right to *fund*, which right must submit to the conditions imposed by the funding law, applicable to all obligations of whatever nature and by whomsoever held.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

B. J. Sage and *E. W. Robertson* for Plaintiffs and Appellants.

M. J. Cunningham, Attorney General, for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. Plaintiffs are holders of four bonds, for \$1000 each, of the same series and character in every respect as the bonds which were involved in the case of *B. J. Sage vs. The Board of Liquidation*, decided by this Court, and reported in 37 Annual 412. Although we held in that case that the bonds therein involved were not fundable, plaintiffs, represented by *B. J. Sage* as attorney, claim, in this proceeding, that their bonds, though standing precisely in *consimili casu*, are fundable, and demand judgment to that effect.

The bonds in both cases belong to a series of one hundred and eighty-four thousand dollars, issued at one time to the same person, Montfort Wells, in the same manner and for the same consideration, under Act No. 16 of 1864, passed by the Legislature of the State, which professed allegiance to the government of the Confederate States.

We find in the record the following admission: "The four bonds sued on in this case and the five bonds sued on in the *Sage* case were all part of the 184 bonds acquired by Wells from the State at the same time and in the same transaction."

Mr. Sage, as a witness in this case, testifies as follows: "I think I know where the bonds that were issued to Wells are. I have been connected with and interested in these bonds for twelve or fifteen years. Have been the attorney and professional adviser of the

original holders of these bonds for fifteen or twenty years. These bonds are placed where they are now by me, either as owner or agent of the owners, with the understanding and reservation that I am to act as agent of the present owners in any settlement with the State that may be made. When the State sees proper to settle the matter I am fully authorized to represent the owners. I have made considerable efforts to settle or collect these bonds with the Legislature and public officials. In these efforts I represented the whole of these bonds, except a few which have been lost.

"In my own right I own, I think, about one-third of these bonds, with the obligation to attend to the settlement and litigation attending them, except those that have been transferred, and as a part of the consideration referred to is a long list of arduous services for many years as attorney and agent, and whatever I do for any of these parties is to be justly compensated. The efforts I have made in these respective suits have been confined to them, and any advantage to other interests would be incidental, though I have wished to promote the interest of all by any success I might attain. I am now attorney or agent for six or seven different holders of these bonds under the reservation above mentioned, and only to that extent, with the control to settle with the State, if the State will make proper terms."

The bonds in this case were transferred to plaintiffs, during the pendency of the *Sage* suit, with the endorsement, "M. Wells, per pro B. J. Sage," said M. Wells being the registered owner, as appears from the Auditor's certificate of registry on the back of the bonds.

The following is the power of attorney under which this transfer was made:

"MR. B. J. SAGE, New Orleans:

"*Dear Sir*—You are hereby authorized to endorse or transfer any of the bonds issued by Henry W. Allen, late Governor of Louisiana, belonging to my wife, but issued in my name to my order, for any purpose you may deem proper. He can sign my wife's name, also, when it is required in the management of said bonds.

"[Signed]

"MONTFORT WELLS,

"JEANNETE WELLS.

"*Authorized by her said husband.*

"MONTFORT WELLS."

Plaintiffs themselves testify that, after the transfer, "the bonds were left in Sage's hands to be collected by him as our attorney and agent."

In the petition in the first suit Mr. Sage alleged "that he holds as

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the assignee and agent of Mrs. J. D. Wells and other parties five certain bonds of one thousand dollars each," etc.

The foregoing statements, grouped together, plainly and conclusively indicate that, at the time when he instituted the first suit, Mr. Sage held the bonds now presented by plaintiffs, by the same right and in the same capacity in which he held the bonds then sued upon, i. e., "as the agent and assignee of Mrs. J. D. Wells and other parties," and that when *pendente lite*, he transferred these bonds to John I. Adams & Co., he still retained possession of them and continued to represent the latter as he had the former owners.

Mr. Sage, thus representing the whole of these bonds and being the common agent of all the owners thereof for the express purpose of prosecuting their claims against the State, brought his first suit upon five of these bonds in the declared capacity of "assignee and agent of Mrs. J. D. Wells and other parties." In that petition, verified by his unqualified oath, Mr. Sage alleged that the bonds were issued and delivered in exchange for certain property delivered to the State government.

On the trial the testimony of Montfort Wells, the person to whom the bonds were issued, was taken, and he positively swore that the whole of these bonds were issued to him in exchange for sugar which had been raised upon a plantation belonging to his wife, Mrs. J. D. Wells. His statement was supported by the testimony of E. W. Halsey and of James C. Wise, officers then connected with the State government.

Upon these pleadings and this evidence, we held that the bonds were not "issued in strict conformity to law," as required by the express terms of the supplemental funding Act No. 11 of 1875, and, therefore, that they were not fundable. See *Sage vs. Board*, 37 Ann. 412.

In the present suit the plaintiffs omit the allegations which had been made in the Sage case with reference to the exchange, and content themselves with the general allegation on that point that the bonds were "sold to Mrs. J. D. Wells," and were issued "in strict conformity to law."

The plea of *res adjudicata* was interposed by the State, based on the record and judgment in the Sage case.

We think it would undoubtedly be good against Mrs. J. D. Wells and B. J. Sage, from whom Adams & Co. acquired the bonds now sued on. The case would be assimilated to that where the holder of two promissory notes given in the same transaction had brought suit on

Adams & Co. vs. Board of Liquidation.

one of them which had been defended on the ground of fraud or other vice in the transaction on which both notes were based, and it is held that a judgment on that issue would be conclusive in a subsequent action on the other note. Mr. Bigelow lays down the general rule: "A point once adjudicated by a court of competent jurisdiction may be relied on as an estoppel in any subsequent collateral suit in the same or any other court, when either party, or the privies of either party, allege anything inconsistent with it, and this, too, whether the subsequent suit be upon the same or a different cause of action." Bigelow on Estoppel, p. 45; Johnson vs. Weld, 8 Ann. 126; Gardner vs. Buckbee, 1st Cowen 120; Edgell vs. Sigerson, 26 Mo. 583; Hanley vs. Foley, 18 B. Monroe 519.

And it has been pointedly affirmed by the Supreme Court of the United States, in a very analagous case, where it was held that judgment in a suit upon certain municipal bonds, part of a larger issue, is conclusive on the question of validity of the issue, in a suit between the same parties on other bonds of the same issue. *Beloit vs. Morgan*, 7 Wall 619.

It is a grave and doubtful question whether Adams & Co., acquiring these bonds from the parties to that suit *pendente lite*, and leaving them in the hands of the principal party thereto, as their agent and attorney, thus affecting them with his full knowledge of the pendency of the suit, have not thereby become privies and subject to the same estoppels which operate against their authors. It is not necessary, however, that we should decide this point on general principles, and we do not do so.

It is sufficient to consider it in reference to the peculiar action here involved, which is brought under the special provisions of the Funding Act No. 11 of 1875. That act regulates the duties of the Board of Liquidation touching the funding of bonds or warrants of the State, the legality or validity of which has been, or may be, questioned, and, in such case, it prohibits the funding "until the legality and validity of each and every *issue* of bonds and warrants, as aforesaid, shall have been finally passed upon and determined by the Supreme Court of the State." It evidently contemplates that the question, as to *each issue*, shall be determined in a single suit, and provides that "all costs incurred in any suits under this act, to the extent of *one suit* carried to a final issue, as to each separate *issue* of bonds or warrants * * shall be borne by the State," etc. In order to protect all rights which may be involved in such suit, it expressly provides that all parties concerned, every tax-payer, and any holder or holders of bonds or

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warrants, whose legality, etc., is questioned in any suit or suits brought under the provisions of this act may intervene in said suit or suits, and that the cost of such intervention shall abide the result of the suits."

We have held that, inasmuch as a "final decree" of this Court is an essential prerequisite to the funding, the warrant or bondholder may appeal to this Court even when the judgment below has been *in his favor*. State *ex rel.* Meyers vs. Board, 33 Ann. 126; Charles vs. Board, 37 Ann. 177.

It is clearly the equitable purpose of the law that the rights of all holders of bonds and warrants of the same issue shall be settled by one decision made in a case involving any of such bonds or warrants, and that all parties concerned should appear and vindicate their rights in such suit. Whatever relaxation might be made in favor of a bondholder, who had failed to take cognizance of such a suit through ignorance of its pendency, it would certainly be most inequitable to permit parties situated like the present plaintiffs, who were represented as to the bonds held by them by the very plaintiff in that suit, to lie quietly by and take the chances of the decision, which, if favorable, would have conclusively settled the status of their bonds, and then, after an adverse decision, to come in and raise issues absolutely contradictory of those then presented. Their silence and failure to intervene, under the express authority to that effect, granted by the law, may well be construed as an acquiescence in the issues as made in the suit, and a submission to the judgment rendered thereon.

But the plaintiffs here go much further than this. Not only do they claim exemption from any prejudice, by reason of said judgment, but they seek to exclude from our view the case which was therein made and the evidence on which our decision rested. The State offered the entire record in the Sage case, including the evidence offered therein, to which plaintiffs objected on the ground that it was *res inter alios acta*, and they excepted to the ruling of the judge admitting it. We think the ruling was manifestly correct. No one can read the funding act of 1875 without discovering its clear intention to make the decision of a single suit as to each issue of bonds, at least *prima facie* conclusive as to the fundability *vel non* of all the bonds of that series. We go to the verge of indulgence to holders of bonds not parties to such a suit, if we allow them the privilege of rebutting such presumption by producing new evidence which, if it had been presented in the former suit, would have led to a different conclusion; but, in so doing, the new evidence must be taken in connection with the former, and the whole must be

weighed together, and we must then determine whether, on such consideration, we should reach a different conclusion.

Thus, in the Sage case, upon the evidence then introduced, we held that the issue of bonds, to which those of plaintiffs belonged, was made as an exchange for sugar, and, therefore, not "in strict conformity to law." Now plaintiffs come and ask us to decide the contrary, and to hold that those bonds were not exchanged, but were sold for money as directed by the law. The least that can be required of them is surely that they should make a stronger case in favor of their position than was made in support of the former; and, in order to do so, they must present the whole together; for, while they represent but four bonds, we are called on to render a decision binding on the State as regards 184 bonds, and overthrowing a former decision on the same question.

Under this view, receiving and considering the testimony presented in the Sage case, we are left without a shadow of doubt that the allegations then made were true, that the bonds were unquestionably exchanged for sugar, and were not sold, as directed in the act under which they were issued. Who should have known the fact so well as Montfort Wells, who conducted the transaction, and who most circumstantially testifies that he refused to sell the sugar for the money then current, and would accept no settlement except in bonds? His testimony is supported by that of the other witnesses, and is contradicted by nothing except entries in the Auditor's books of the same character, though a little more extensive, as those which were presented and discussed by us in the Sage case. We are satisfied that these entries are merely formal, made to satisfy the requirements of the State's method of book-keeping. Nothing could be more improbable than the theory that the Governor had paid to Wells \$184,000 in currency for this sugar, with which Wells had bought the bonds. Nor is any showing made that the Governor had such funds of the State in his possession, or any authority of law to so dispose of them.

In addition to the foregoing, we may say that the decision of this Court, in the Pacific Railroad case, 30 Ann. 980, substantially holds that only the issues of bonds and warrants enumerated in the Auditor's report of 1874, were embraced in the funding scheme; and the evidence here shows that these bonds were not included therein. We doubt if they have ever been included, as debts of the State, in any Auditor's report since the reconstruction Constitution of 1868. It would require great hardihood for anyone to say that it was the intention of the Legislatures, which framed these funding laws, to em-

Succession of Sparrow.

brace these bonds or to authorize their funding. We are satisfied there was no such intention. Nor is this case, in the slightest degree, affected by any equities which plaintiff might claim under the law governing negotiable instruments. That question was fully settled in Lord Cecil's case, 30 Ann. 34, where, with obvious correctness, it was held that in proceedings to fund under these laws, the Court was not called upon to determine all the legal rights which transferrees of negotiable bonds before maturity might have against the State, but simply their right to fund, under these special laws, which right could only be asserted on strict compliance with the conditions imposed by the laws, which conditions apply equally to all obligations by whomsoever and under whatsoever title they may be held.

Judgment affirmed.

No. 9917.

SUCCESSION OF MRS. MINERVA SPARROW, ON OPPOSITION TO PROVISIONAL ACCOUNTS OF ADMINISTRATION AND TO TABLEAU OF DEBTS.

JOHN W. DECKER, GUARDIAN, ET AL. VS. CHRISTOPHER CHAFFE, JR., ADMINISTRATOR.

[Consolidated.]

A commission merchant holding funds as the proceeds of products owned by a deceased person, holds the same in trust, and cannot legally pay them to any other but the duly qualified representative of the succession.

A payment to any other will not discharge him from his legal responsibility therefor.

The opposition of one of these heirs to an account of administration is sufficient to submit the whole account to judicial test, although the other two heirs may have approved of the same. In such a case parties in interest, whose claims may be rejected, have their recourse against the heirs who have recognized their claim in due course of administration. It is no longer an open question in our jurisprudence that an executor or administrator cannot, at the risk of the succession, carry on planting operations and contract, in so doing, debts so as to bind the estate.

In such cases the administrator, who has not tried to lease the succession property, will be held liable for the rental value of the same.

Errors of judgment, not amounting to malfeasance, are not sufficient causes for the removal of an administrator, or to authorize one of his securities to withdraw from his bond.

A PPEAL from the Eighth District Court, Parish of East Carroll.
Delony, J.

Chas. S. Wyly, F. F. Montgomery and W. G. Wyly for Opponents and Appellants.

J. W. Montgomery, C. J. & J. S. Boatner and D. B. H. Chaffe contra.

The opinion of the Court was delivered by

POCHÉ, J. This litigation involves the discussion of a first and of

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a second provisional accounts of administration, and of a tableau of debts, of the succession of Mrs. Minerva Sparrow, presented by Chris. Chaffe, Jr., the present administrator of said succession, and it is predicated on the following facts and judicial proceedings:

At her death in December, 1879, Mrs. Minerva Sparrow, who was separate in property by judgment from her surviving husband, Edward Sparrow, left an estate consisting of three cotton plantations, of some town lots, and of movable effects attached as appurtenances to the plantations, amounting altogether, as shown by the inventory, to \$68,421 25.

She died intestate, and left as heirs at law two daughters, of age, Mrs. Kate Foster and Mrs. Fanny Ashbridge, and two orphan grand-daughters, Mary and Kate Decker, issue of a predeceased daughter, Anna Sparrow, wife of John N. Decker.

Having been abandoned by their father shortly after their mother's death and soon after their birth, the orphan twin sisters, Mary and Kate Decker, were taken in charge by their grandparents, Edward Sparrow being appointed as their tutor in August, 1881. In July, 1885, their father appeared and qualified as natural tutor, but he died shortly thereafter, and now they are represented in these proceedings by a *tutor ad hoc*, Chas. S. Wyly, Esq.

In July, 1880, seven months after the death of his wife, Edward Sparrow was qualified as administrator of her succession, the property of which, however, had been in his possession and under his control from the time of her death.

Beginning under his precarious possession and continuing under his administration, Edward Sparrow cultivated on a large scale the plantations belonging to the succession, and extended his operations to other and adjoining lands, which he rented, as well as to a plantation store from which he furnished supplies to the large force of laborers which he employed in his planting enterprise.

He died in July, 1883, without ever presenting an account of his administration.

He was succeeded as administrator by Chris. Chaffe, Jr., a resident of the city of New Orleans, a member of the commercial firm of John Chaffe & Sous, cotton factors, with whom the deceased administrator had carried on all the financial operations of the succession, and who claimed to be creditors of the same in a large amount, as advances for the cultivation of the succession plantations, the correctness of whose account had been acknowledged in writing by Edward Sparrow a short time previous to his death. The new administrator, who was

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qualified on the 4th of August, 1883, continued to cultivate the plantations precisely as his predecessor had done, including the employment of the firm of John Chaffe & Sons as his commercial merchants, but he abandoned the plantation store which had been kept by the previous administrator.

On the 24th of April, 1885, he presented his first provisional account of administration, covering the operations of the years 1883 and 1884, and showing to the credit side of the succession \$54,590 68 and debits amounting to \$45,265 50, striking as balance of assets in his hands the sum of \$9325 18. On the same day he filed a tableau of debts due by the succession amounting to \$40,719 73.

That statement included a debt of \$27,466 68 due to the firm of John Chaffe & Sons, which had accrued during the administration of Edward Sparrow, and an additional indebtedness composed of certain notes of over \$4000, and others aggregating \$7051 32 due by Mrs. Minerva Sparrow to said firm.

The account and the tableau were both opposed by Mrs. Fanny Ashbridge, one of the heirs of age. Before the trial of the opposition the administrator presented a second provisional account, which was filed in April, 1886, in which he covered portions of the years 1884 and of 1885, and in which he was made a creditor of the succession in the sum of \$1682 49, exclusive of his commission as administrator.

That account was likewise opposed by Mrs. Ashbridge, who was joined by John N. Decker, guardian and natural tutor, and subsequently by Chas. S. Wyly, the tutor *ad hoc* of the minors, Mary and Kate Decker.

Engrafted on these oppositions is an action brought by them in July, 1885, for the destitution of Chris. Chaffe as administrator, on the ground of various acts of alleged malfeasance. This suit was consolidated with the main action involving the various accounts of administration. While the record shows that all the items of both accounts and of the tableau of debts were opposed, it appears therefrom that the main ground of attack is the alleged want of legal authority of either of the two administrators to have undertaken large agricultural ventures with the plantations belonging to, and at the risk and expense of, the succession. Alleging that the cotton crop of 1879, left by Mrs. Minerva Sparrow, and shipped to, and sold by, John Chaffe & Sons, was more than sufficient to extinguish the debt which she owed to that firm, and that, therefore, the succession owed no debts, opponents seek to hold the administrator, Chaffe, judicially

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responsible for the rental value of the plantations belonging to the succession.

Under an order rendered by the court on an exception of accountant, opponents, under protest, elected to claim the rents of the plantations, instead of discussing the accounts of the expenses of raising, and of the proceeds of, the crops. The district judge maintained both accounts and the tableau of debts, with some slight amendments. He dismissed the demand for the removal of the administrator, as well as the rule to compel him to furnish a new bond, but he enforced the demand of Mrs. Ashbridge to be discharged as one of the sureties on the administrator's bond. From that judgment the opponents and the accountant have both appealed.

I.

From balance sheets rendered by the firm of John Chaffe & Sons, in February, 1880, it appears that on account of cotton sold by them on account of Mrs. Sparrow, she had a balance to her credit in their hands amounting to \$11,451 61, and that they held her notes aggregating \$11,051 32. Instead of compensating their claim against the succession by the proceeds of the cotton received for its account, they erroneously attempted to charge against the succession and to the proceeds of its cotton a debt due to them by A. M. Ashbridge, the husband of one of the heirs, and also a personal debt which Edward Sparrow owed to them.

As the succession was then unrepresented, and as neither of the debts could, under any circumstances, be charged to Mrs. Sparrow, the settlement was entirely unauthorized, and was absolutely null.

The authority set up by John Chaffe & Sons, as coming from Ed. Sparrow, is of no avail. He was not yet the administrator, and he was powerless to legally bind the succession.

In law John Chaffe & Sons must be held to have never parted with that fund, and in law it must be attributed to the indebtedness of Mrs. Sparrow to the firm.

Either their notes have been compensated by the proceeds, or the fund is yet in their hands. The most equitable horn of the dilemma towards them is to compensate the one by the other, and thus avoid a discussion of the plea of prescription which opponents had set up against these notes due by Mrs. Sparrow. The amount of these notes must, therefore, be stricken out of the tableau of debts due by the succession, as contended for by opponents, by which operation a debit of \$400 29 will stand against John Chaffe & Sons as the difference between the proceeds of the succession cotton and the amount of the notes due by Mrs. Sparrow.

II.

As all the other items contained in the tableau of debts originate from the planting operations of both of the administrators indiscriminately, their validity turns upon the right of either or both of the said administrators to cultivate the plantations for the benefit, and at the expense, of the succession, and that discussion presents the crucial question in the case.

But an incidental question, which affords the most harrassing complication in the whole controversy, must first be disposed of, and that is the authority which the administrator holds up from the two heirs of age, conferring to him the right to cultivate the plantations. The record contains two instruments executed by Mrs. Foster and Mrs. Ashbridge, who therein recognize the indebtedness of the succession of Chaffe & Sons, resulting from their father's planting operations as administrator of their mother's succession, and other evidence added thereto might justify the conclusion that these two heirs had concurred in their father's plan for a large agricultural enterprise. But they were not the only heirs of the succession, and surely their consent cannot be invoked as binding the whole succession. Without discussing now the ultimate legal consequences which may result to them from the acts in question, it is both rational and legal to hold that, as the minor heirs could not be bound otherwise than by operation of judicial proceedings regularly carried on in their behalf, the consent of the heirs of age cannot bind the succession as a legal entity.

It is elementary in our practice that all parties who are cited to show cause why an account of administration should not be approved and homologated, are defendants, and that an opposition is an answer. Succession of Romero, 28 Ann. 607. It follows, therefore, that the pleadings of one party in interest cannot be binding on another.

In this case the minor heirs, through their tutor *ad hoc*, fully authorized to represent them, have filed an answer which contests the legality of the debts charged to the succession, and their right of urging that defense cannot be impaired by the petition of intervention of Mrs. Foster, who alleges the regularity of all the proceedings which are assailed by her co-heirs. No more can their position be affected by any acts or contracts of either or of both of the heirs of age, by which they might eventually be held liable for their virile or respective shares in the debts which are resisted in these oppositions. The question which their pleadings present is one of law and of right which reaches the whole succession, and it cannot be divided or parceled into fragments for the purpose of discussion.

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We shall, therefore, treat the question as affecting the succession as an entirety, irrespective of the special attitude of any particular heir in the premises.

After arguing that there was no necessity for the sale of any of the immovable property of the succession, under the provisions of Articles 1163, 1164 and 1165 of the Civil Code, counsel for the accountant contend that it then became the bounden duty of the administrator to cultivate the plantations, and that, therefore, the heirs are bound for the debts which he may have contracted in furtherance of that duty.

His main reliance is on Article 1168 of the Code, which reads as follows:

"If it is not necessary to sell the property engaged in agriculture, belonging to the succession, in order to pay the debts, it must be preserved and administered by the curator for the account of the absent heirs for one year after his appointment."

But nothing in the record even suggests the slightest pretence that the cultivation of these plantations was undertaken under the authority of that article.

It is in full proof throughout the record that the object of Edward Sparrow was far from the idea of preserving and administering the property on account of the heirs and for a limited time. It appears, on the contrary, that his was a deep-laid programme and a foregone conclusion to undertake an extensive and risky planting venture, as though he was the owner of the entire estate, and for an unlimited time. Hence, he undertook the crops of 1880, 1881, 1882 and 1883, and undismayed by the losses which he encountered, he persevered in his honest intention to work the estate out of debt, for the benefit of his children and grandchildren, up to the very moment of his death. And such was his solicitude that his plan should not be defeated even by death, that in anticipation of an approaching end of his long life, he took great pains to select the present administrator as his successor, and to specially charge him with the execution of his programme. He seemed, indeed, to have entirely lost sight of his connection with the property as an administrator. His convictions on the subject are thus described by counsel for the accountant herein: "It must be borne in mind that Gen. Sparrow had himself, by talent and industry, made all this property, and, morally, was the owner of it."

It was that same misconception of the true conditions of things which has superinduced all the errors which have continued to swell the great complications which beset us on all sides in this controversy. It was manifestly the same misconception which subsequently shaped

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the course of the present administrator, and, therefore, the record shows him honestly, faithfully, but erroneously, following the footsteps of his predecessor in the administration of this large estate.

Far from making any effort to lease the plantations of the succession, Gen. Sparrow actually rented adjoining lands to which he extended his hazardous agricultural enterprise, and no effort was ever made by either of the administrators to lease any one of the plantations. The only letting which was done or even tried was to laborers, known in the cotton regions as "tenants," who pay their rent in cotton or lint, and who are supplied for all their needs by the planter himself, and in this case by the administrator, by and through the plantation store hereinabove referred to. During Chaffe's administration the store has been kept and run by his overseer or manager on his own account. The current of authority in our jurisprudence is to the effect that executors and other succession representatives "cannot at the risk of the succession carry on plantation operations, and contract, in so doing, debts, so as to bind the estate."

The rule is not absolutely inflexible to the extent of annulling or defeating a debt incurred by an administrator in meeting the expenses necessary to save and harvest a crop already begun, or hanging by the root at the date of his appointment. But it is manifestly sufficient in scope to amply cover the case now under discussion. *Miltenberger vs. Elam*, 11 Ann. 668; *Succession of Décuir*, 22 Ann. 372; *Miltenberger vs. Taylor*, 23 Ann. 189; *Carroll et al. vs. Davidson*, 23 Ann. 428; *Forsheim vs. Holt*, 32 Ann. 133.

In the case of *Carroll et al. vs. Davidson*, just quoted, the Court described the very effect which would, in this case, eventually seal the fate of the heirs of Mrs. Sparrow, if the administrator were allowed to go unbridled in the planting venture, so inauspiciously inaugurated by Gen. Sparrow, when it said: "To permit an administrator, indefinitely, to carry on the plantation business and annually increase the indebtedness of the estate, would give him the power to ruin the estate irretrievably."

That utterance is characterized by counsel for Chaffe & Sons as erroneous and inconsistent with previous, as well as with subsequent, rulings of this Court on the same subject. But our researches in this case, which have been long, tedious and thorough, have led us to the same conclusions as are therein announced.

The same rule was clearly recognized and firmly applied by our immediate predecessors, the successors of the bench which rendered the decision so earnestly assailed by counsel.

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In the case of *Forsheim vs. Holt*, 32 Ann. 133, the Court used the following language: "Now, we take it that it is no longer an open question that an executor cannot, at the risk of the succession, carry on planting operations and contract in so doing debts, so as to bind the estate; at all events, certainly not without previous authority obtained." And the opinion then proceeds to demonstrate that the question is not touched by two cases on which counsel for accountant herein place great reliance. *Succession of Wederstrandt*, 19 Ann. 494; *Succession of Brown*, 27 Ann. 331.

The case in hand is a fair illustration of the wisdom of the rule. A succession without debts was run into debt exceeding \$35,000 by means of planting operations which lasted three years and a half.

The recent opinion of this Court in the case of the *Succession of Myrick*, 38 Ann. 611, is in vain invoked by counsel for accountant in support of their contention. The issue in that case involved the right of the heirs to claim of the administrator the value of working animals on the ground that he should have sold them and not have allowed them to die away on the plantation, and to enforce the liability of the administrator for five years' rent of the place.

The court exonerated the administrator from both claims, on the ground that he could not have sold the working animals separately from the plantation to which they were attached; and on the additional ground that, having tried without success to lease the plantation, the administrator was legally justified to cultivate it so as to save it from waste. It must also be noted that the administrator in that case did not seek to bind the succession for debts incurred in his planting operations.

Our conclusion is, therefore, that the accountant was not authorized to carry on planting operations on the account, and at the expense of the succession, and that we have, therefore, no concern with his accounts covering his operations in that line.

And we hold further that, having made no effort to lease the plantations under his administration, he is liable for the rental value of the same during the time that he cultivated them for his own account under the law. We note in this connection the contention of counsel that "there is no law authorizing or recognizing the property of a succession to be leased," and that they support their position by referring to two decisions of this Court. The first is the case in 35 Ann. 858, *Succession of Richmond*; but the authority of that case doubly conflicts with their argument. In the first place the opinion directly recognizes the authority of the administrator to lease succession prop-

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erty; and in the second place the court said, in answer to a claim, that the property should have been leased at public auction: "We know of no law and we have been referred to none, which compels the administrator of a succession to lease property *at auction*." (Italics ours.)

The second is the case of the Succession of Myrick, 38 Ann. 611—but the following quotation from it is a sufficient answer to counsel's contention: "It was his duty to have leased the plantation if he could, but we are satisfied from the testimony of the administrator and of Ed. Myrick, the tutor of the opposing heirs, that this was impossible."

As to the value of the rental of the three plantations we find the testimony very conflicting. But in consideration of the depreciated value of that kind of property and of the low prices which cotton commands on the market, we have adopted a low estimate and we conclude to fix the rent of the three plantations together at the sum of four thousand dollars per annum subject to deduction for taxes levied thereon, and to the administrator's commissions on the rental.

As to the demand for the destitution of the administrator, we find no evidence to justify that measure. It was the firm of John Chaffe & Sons and not the administrator personally who asked a respite from creditors.

And we are satisfied that the faults committed by the administrator do not amount to malfeasance, but at most to errors and honest errors of judgment. "It is well settled that the enforcement of the penalties provided for this and similar defaults of executors and administrators, is a matter within the sound discretion of the court." *Congregation of St. Mary vs. Farrelly et al.*, 34 Ann. 533; *Dickson vs. Dickson*, 23 Ann. 583.

Nor is there such mismanagement in the conduct of this administrator as would justify the withdrawal of any of his sureties under the provisions of Sections 3737 and 3738 of the Revised Statutes.

In conclusion we note the apparently meritorious contention of John Chaffe & Sons, in urging the legal liability of the two heirs of age for their respective shares of the indebtedness acknowledged to be due to that firm by the present administrator, in reimbursement of their advances of money and supplies used in the cultivation of the plantations by Edward Sparrow, the previous administrator.

That liability is alleged to grow out of the written consent of these two heirs to the planting operations of their father, under which they are estopped from repudiating the consequences of the acts which they authorized and sanctioned.

On inspection, these documents which were executed in November,

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1882, some time after the written acknowledgment by Edward Sparrow of the correctness of the firm's account, have the legal effect of a ratification of the father's administration and of his management of the plantations belonging to the succession.

The instruments signed respectively by Mrs. Foster and by Mrs. Ashbridge contain the following very significant declaration: "That the said estate is indebted to the commercial firm of John Chaffe & Sons for supplies furnished and advances made by them to enable the administrator to carry on the plantations. Now, therefore, we, the said heirs, declare that we hold our respective shares in the said estate liable for all just demands of the said John Chaffe & Sons incurred as stated, and for such supplies or advances as may be made hereafter to enable the administrator to cultivate and make crops on said plantations." * * *

It requires no argument to show that such an agreement contains both a ratification of the previous acts and an authorization in the way of the management of the succession plantations, for cultivation of the same in the future. It cannot therefore be denied that such a declaration must have created the legal obligation on these two heirs, to respond to the indebtedness thus incurred under their own authorization, in so far as their respective shares of the estate are concerned.

That obligation is not resisted by Mrs. Foster, who judicially recognizes it to its fullest extent, by means of a petition of intervention filed herein as above stated.

But it is strenuously repudiated by her co-heir Mrs. Ashbridge, who contends in substance that she was not informed of the condition of affairs at or previous to the time at which her signature was obtained, and that she signed the instruments, while she was sick in bed, without reading or taking cognizance of the same.

The tenor of her declaration shows that the intention was to give general and full power to the administrator to carry on planting operations at the expense of her share or interest in the estate, and it follows that the amount of indebtedness thus existing or already incurred, was not a condition precedent of her signature, but that it was a matter of merely secondary consideration. No more can she escape liability through her alleged ignorance of the contents and purport of the instrument before signing it. She states herself that it was sent by mail by her brother-in-law, Major Foster, at the request of her father, to her husband who presented it to her for her signature. She does not set up the slightest pretense, or even intimate that any attempt or effort was made to deceive or to misguide her in the premises. "If

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she failed to read it, it was her own fault and plaintiffs (John Chaffe & Sons) cannot be affected by any error resulting from her own gross negligence." Allen, West & Bush vs. Whetstone et al., 35 Ann. 850. See also Allison & Co. vs. Watson, 36 Ann. 620.

Her subsequent conduct in receiving a monthly allowance of one hundred dollars from the present administrator out of the revenues of the crops made on the plantations; and her judicial demand for such an allowance after it had ceased, as a result of her attitude in this litigation, are circumstances which speak louder than words in explanation of her understanding of matters, and of her intention when she executed the agreement in question. It appears from the record that since his appointment the present administrator has also furnished the means necessary for the maintenance and for the schooling of the minors, Mary and Kate Decker, and that, as they were without a tutor from August, 1883, to the latter part of 1885, the funds were intrusted to Mrs. Foster, who had kindly taken charge of the two minors. All these proceedings were irregular and were carried on outside of the law, but they were manifestly prompted by laudable feelings and considerations of fairness and of humanity, for which the administrator should not be made to suffer if by any legal means he can obtain reimbursement.

We, therefore, deem it our duty to reserve the rights of John Chaffe & Sons and of the present administrator to enforce their respective claims against the two heirs of age, on account of the latter's liability for expenses incurred in the cultivation of the plantations of the succession, by proper proceedings in *due course of administration*, and we also reserve the rights of the administrator to demand reimbursement of all sums advanced by him to the two heirs aforesaid, as well as for similar advances made to the minors, Mary and Kate Decker. As we took occasion to state in the early portion of this opinion, our investigation of the issues presented in this case has been addressed to the rights and obligations of the succession as a legal entity; hence, our decree herein is intended and binding in that sense only, and not as finally adjusting the adverse rights and obligations of creditors and heirs *inter sese* as growing out of their respective personal actions and contracts.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and proceeding to render such a judgment as should have been rendered below: it is ordered, adjudged and decreed that the two provisional accounts of administration herein rendered and filed by Chris. Chaffe, Jr., admin-

Railroad Company vs. Frank.

istrator, and the tableau of debts charged against said succession, also presented by said administrator, be and the same are hereby, each and all, annulled, cancelled and rejected, under and subject to the rights hereinabove reserved in favor of said *administrator and of the firm of John Chaffe & Sons* touching their claims against the two heirs of age for moneys advanced and for expenses of cultivating the succession plantations and in favor of the administrator for moneys advanced for the maintenance of the minor heirs, Mary and Kate Decker. It is further ordered that Chris, Chaffe, Jr., administrator, be required to present forthwith a provisional account of administration and a tableau of debts which may be due by said succession, from which he shall exclude, as debts due by said succession, all expenses incurred in the cultivation of succession plantations, either by himself or by Edward Sparrow, former administrator of said succession, and all items of indebtedness due to John Chaffe & Sons, either by A. M. Ashbridge or by Edward Sparrow, personally.

It is further ordered that, in his account, the administrator shall enter the claim of J. M. Kennedy for the sum of forty-eight dollars, as a privileged debt; that he shall charge himself with rent for the three plantations and their appurtenances, belonging to said succession, during the whole time that he cultivated them, at the rate of four thousand dollars per annum for the whole, subject to deduction of taxes and administrator's commissions.

It is further ordered that the demand for the destitution of said Chris. Chaffe, Jr., as administrator aforesaid, the demand to compel him to furnish a new bond, and the demand of Mrs. Fanny Ashbridge for her withdrawal from his bond as administrator, be and the same are hereby rejected and dismissed, and that all costs in both courts be taxed against the succession.

No. 9838.

NEW ORLEANS AND GULF RAILROAD COMPANY VS. MICHAEL FRANK.

Where the charter of a railroad company requires that the stock shall be paid for in cash, and that no certificate shall issue until such payment is made, it is a sufficient compliance with the statute prescribing that the charter of such companies must set forth "the time when and the manner in which" the stock shall be paid for.

In an expropriation proceeding for a right of way the verdict of a jury of the vicinage, composed of land-owners, and presumed to be familiar with the value of the land sought to be expropriated, will not be disturbed by this Court, unless it is found to be inconsistent with the proof in the record, or entirely unsupported by evidence.

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 Railroad Company vs. Frank

A PPEAL from the Twenty-fourth District Court, Parish of Plaquemines. *Livaudais, J.*

E. Howard McCaleb and White & Saunders for Plaintiff and Appellee:

1. The existence of a corporation or its right to exercise corporate powers, can only be questioned by the State in a direct action. Rev. Stats., sec. 2393; 5 Ann. 179; 18 Ann. 677; 24 How. 278; Field on Corporations, sec. 493.
2. The general laws of the State enter into and form a part of the charter. Abbott's Dig. of Corporations, vol. 1, p. 445, No. 6.
3. When no term for the performance of an obligation is fixed it may be executed immediately. Rev. C. C. 2050.
4. The jury of freeholders in expropriation cases are regarded as experts. 12 Ann. 503. They may rely on their own opinions. Mill's Eminent Domain, sec. 248. 3 Yerg. 423.
5. In an appeal from a judgment founded on a verdict of a jury, failure to make application for a new trial is good reason for affirming the judgment. 15 L. 456; 10 Ann. 91; 17 Ann. 78.
6. Damages may be compensated by benefits and advantages to be derived from the construction of the railway. N. O. Pacific R. R. vs. Murrell, 34 Ann. 536; N. O. Pacific R. R. vs. Gay, 31 Ann. 430; V. S. & T. R. R. vs. Calderwood, 15 Ann. 481; Opelousas R. R. vs. Lagarde, 10 Ann. 150.

James Wilkinson and H. C. Cage for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. From a judgment granting the right of way to the plaintiff company through defendant's plantation, and awarding \$200 for the value of the same, the defendant has appealed.

There was an exception filed to the proceeding to the effect:

"That the charter of the company does not comply with the law, as it does not set forth 'the time when and the manner in which the stock shall be paid for.'"

The charter is before us, and it does require that the stock shall be paid for in cash, and that no certificate of stock shall issue until this payment is made.

In our view, this is strict compliance with the statutory requirements. B. and O. Telegraph Co. vs. Morgan's L. and T. R. R. Co., 37 Ann. 883.

The exception was properly overruled.

In expropriation proceedings we place great reliance upon the verdict of the jury. Being taken from the vicinage, and land-owners themselves, and presumed to be thoroughly acquainted with the character of the land and its value, a court should not disturb the

 Railroad Company vs. City et al.

estimate of value fixed by the verdict, unless it is found inconsistent with or entirely unsupported by the evidence.

We have examined the record carefully and find the usual conflict that characterizes cases of this kind, but this review satisfies us that the verdict was justified by the proof.

Judgment affirmed.

 No. 10006

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CANAL & CLAIBORNE STREET RAILROAD COMPANY vs. CITY OF NEW ORLEANS ET AL.

The original grantee from the city of New Orleans of a franchise or privilege of a right of way over certain streets for railroads, for a term of twenty years, cannot, after the expiration of said term, enjoin the city from advertising and selling the same franchise, on the ground that the city has failed to comply with its alleged contract obligation to take and pay for its "railroads, rolling-stock, equipments and fixtures."

Such failure, even if the obligation existed, could not operate to prolong the franchise, or to restrain the city in the exercise of its sovereign authority over its streets for the benefit of the people to whom they belong in common.

The specifications of the proposed sale cover only the franchise of the right of way, and do not propose to sell any property of plaintiff, all of whose legal rights are expressly reserved under a clause requiring the purchaser to respect and equitably settle for them; and under the same clause plaintiff may compete at the sale without waiving any rights

A PPEAL from the Civil District Court for the Parish of Orleans.
Eightor, J.

H. D. Ogden for Plaintiff and Appellant.

Walter H. Rogers, City Attorney, and *Wynne Rogers*, Assistant City Attorney, for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. In 1867 the City of New Orleans sold to C. A. Labuzan & Co. (who subsequently transferred to plaintiff) the "*right of way*," or the "*privilege of the right of way to establish railroads on Claiborne and other streets for passengers only*," which right and privilege was awarded and transferred for the term of *twenty years*.

The contract contains the usual specifications as to routes, method and material of construction and various other matters not necessary to detail, and also the following stipulation:

"The said railroads, rolling stock, equipments and fixtures to revert to the City of New Orleans at the expiration of said twenty years' privilege, on a valuation to be ascertained by two disinterested

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persons, one to be appointed by the purchaser and the other by the city ; and in the event of a disagreement as to said valuation between said persons thus appointed, a third person or umpire shall be appointed by one of the district courts of and in the city of New Orleans, the decision thereby had to be final and binding."

The twenty years, for which the privilege or right of way was sold, having expired, the city proposed to sell, and advertised for sale, the same privilege and right, with certain extensions and modifications, upon specifications adopted and published by the city.

Plaintiff brings the present suit to enjoin this sale, on various grounds, and brings up the present appeal from a judgment of the court *a qua* maintaining an exception of no cause of action interposed by the city, and dismissing the suit.

The grounds of plaintiff's claim are substantially :

1st. That, under the reversion clause of the original contract heretofore quoted, appraisers had been appointed to value "the railroads, rolling stock, equipments and fixtures "and that they had agreed upon a valuation of \$223,664 74, which, it alleges, was binding, and had the effect of *res adjudicata* ; that the city was bound, by its contract, to take the property at this valuation, and to pay for the same ; and that it has no right to sell the right of way heretofore enjoyed by plaintiff, without first paying for its property as aforesaid, or at least, that it can only sell it subject to a condition imposed on the purchaser to take and pay for said property.

The city responds that the reversion clause imposed no obligation whatever on the city to take or pay for plaintiff's property, but merely gave it the privilege of taking it at the appraised value, if it should desire to do so. Irrespective of this controversy, which we find it unnecessary to decide, we do not see how the failure of the city to comply with such obligation, even if it existed, could give to the plaintiff any other right than to claim its judicial enforcement by ordinary legal remedies. It is impossible that such failure should operate to prolong plaintiff's right to exercise the right of way by a railroad over the public streets, after the expiration of the term for which that privilege was granted ; or to prevent the sovereign power of the city, delegated by the State, over the public streets, from immediately attaching free from such privilege ; or to restrain the city, in the exercise of the same sovereign power, from again granting the right of way, on such terms and conditions as it may choose, consistent with the general rights of the public.

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We have heretofore held that, as stated in the Code itself, the "streets, public walks and quays, are things which belong in common to all the inhabitants of cities and other places, to the use of which all the inhabitants and even strangers are entitled in common;" that the rights of the city in regulating them and in granting proper rights of way over them for railroad purposes and the like, "emanate from the State, which, in the exercise of its sovereignty, has delegated them:" that "the power to dispose of a franchise (right of way), being an attribute of sovereignty, is one which no extrinsic power can set in motion, and which requires, as a *primum mobile*, the volition of the being in whom it was vested, which is, in the present instance, the city of New Orleans." Board of Liquidation vs. City, 32 Ann. 915.

In the exercise of her sovereign right and volition, the city sold to plaintiff the privilege of this right of way for twenty years and no longer. The term has expired. The plaintiff has no longer any such right or privilege. The sovereign rights of the city have re-attached, absolutely free from any privilege of plaintiff. Her sovereign power over her streets, delegated for the convenience and welfare of her people, cannot be restrained in its exercise to await the settlement of controversies touching rights and obligations, not concerning the franchise or privilege itself, but other private property.

2d. It is claimed that the specifications, under which the sale is proposed, violate plaintiff's rights of property, because they locate the routes precisely where plaintiff's tracks now are, and also because they contain the clause, "the existing tracks in the above enumerated routes may be used."

Under the views heretofore expressed, plaintiff's right to occupy the streets with railroads or to use the right of way over them, has absolutely expired, and the city has the power to sell and locate the right of way thereafter to be granted according to its will.

So far as the grant of the right to "use existing tracks," contemplates the use of plaintiff's cross-ties, iron and other severable property, it would be mere *brutum fulmen*, not binding on plaintiff and which it could resist, or exact compensation therefor. We find, however, another clause in the specifications which robs this grant of all significance, viz: "If anything in these specifications are in conflict with any rights or privileges granted to any person or company prior to this grant, the purchaser must equitably settle all such conflicts and hold the city harmless from all consequent damages."

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This evidently operates as a reserve of all plaintiff's existing rights, whatever they may be, and warns the purchaser that they must be respected or settled equitably.

3d. The same clause destroys the last contention of plaintiff, viz: that it has a right to be a bidder at any public sale of the franchise, but that it is excluded from bidding, under the proposed specifications, because it cannot do so without abandoning its rights of property, and of insisting on the payment by the city of its appraised value.

Whether or not this would be a ground for injunction it is obvious that, under the clause above quoted, no such obstacle exists to its becoming a bidder, and that it may purchase, if it should be the adjudicatee, without waiving any of its legal rights, and that any other purchaser, who should seek to use "existing tracks," could not use plaintiff's property situated on said tracks, without an equitable settlement therefor. Indeed, the city does not propose to sell or transfer any property of plaintiff, but only the privilege or franchise of the right of way, plaintiff's interest in which has absolutely terminated.

Judgment affirmed.

No. 9801.

J. C. MORRIS VS. EXECUTORS OF L. B. CAIN ET ALS.

P. S. WILTZ, JR., PUBLIC ADMINISTRATOR, VS. EXECUTORS OF L. B. CAIN ET ALS.

(Consolidated.)

A contract of mortgage, like that of sale, the object of which was to give preference to one creditor over another, in securing the payment of a just debt, cannot be set aside as fraudulent, unless suit be instituted within one year from the date it was entered into.

An executor is a judicial depositary of property of the estate he represents; and his possession is that of the creditors for whom he is a *quasi* mandatary. Hence, his custody of succession effects, continued by the assent and acquiescence of the heirs, suspends prescription in favor of the creditors whose claims have been acknowledged.

Their acknowledgment by placing them on account or *tableau* of debts, or appending them to a petition for an order of sale to pay debts, will suffice.

This Court is without jurisdiction to revise a judgment in favor of one who has not, himself, appealed, and who has not made an answer to the appeal of his adversary.

The law does not permit an attorney-at-law to give in evidence anything that has been confided to him by his client without his clients' consent. The privilege is not that of the attorney but of the client. Such testimony is incompetent. It does not matter that the relations of client and counsel have ceased, or that the client be dead.

A mortgage may be consented to secure an obligation which has not yet risen into existence; but in such case the mortgage can only be enforced, in so far as the future obligation shall have been created. It is not necessary that a mortgage should express upon its face that it was executed to secure a future debt.

39 712
44 945
39 712
49 1021

39 712
82 883

39 712
110 139

39 712
114 824

39 712
115 915

39 712
117 756

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A mortgage note may be reissued to a third and innocent holder, for value before maturity, without impairing the security of the mortgage, provided it is only a collateral security. The purport of a bill or note is to be collected from the eight corners of it: and a memorandum on the back, affecting its operation, must be regarded as if written on its face.

A memorandum made *after* the execution of the instrument, with the consent of all parties, will modify and control its future operation in market.

A purchaser of mortgaged property at judicial sale, under proceedings taken for the collection of *one* of a series of mortgage notes, is entitled to *retain* in his hands the surplus of the price beyond the amount taken under the writ of sale, until it is demanded by holders of the remainder of the series; but he owes interest at the rate of five per cent per annum until same is paid over, or deposited, according to law.

The decisions of this Court, which exonerate the purchaser from the payment of interest, were rendered under the Code of 1808, which did not contain the provisions of Art. 2553 of the present Code, and which establish a rule different from that contained in the Code of 1808.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Henry C. Miller, W. S. Finney and T. Gilmore & Sons for J. C. Morris and Canal Bank.

Gus. A. Breaux for the Public Administrator.

J. McConnell and H. E. Upton for Defendants.

T. J. Semmes & Legendre for Germania National Bank.

Braughn, Buck, Dinkelspiel & Hart for M. Frank.

E. E. Moïse for Moses Lobe & Co.

E. D. White, E. T. Florance, Percy Roberts for Sundry Appeltees.

The opinion of the Court was delivered by

WATKINS, J. On the 25th of February, 1878, L. B. Cain executed a conventional mortgage before Bendernagel, notary, in favor of Henry Roos, to whom he acknowledged himself indebted in the sum of \$140,000; and to represent which he executed one series of twenty-four, and another of four notes—twenty-eight in all—of \$5,000 each, payable to his own order, and by himself indorsed. The first series of notes are numbered from 1 to 24; those numbered from 1 to 12 became due at the expiration of twelve months, and those from 13 to 24 in two years after their date.

The second series are indicated by the letters A, B, C and D; A and B falling due in one year, and C and D in two years. The first series of twenty-four notes were secured by the mortgage on two improved city lots, situated in the first district; and the second series of four notes, upon the mortgagor's residence property in the fourth district.

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All of the notes bear interest at the rate of eight per cent, and the mortgage secures their payment, in the hands of the present or of any future holder.

On the 9th of March, 1878, Henry Roos, the mortgagee, at that time holding eight notes of the first series, viz: Numbers 1, 2, 3, 4, 5, 6, 7 and 10, executed, before Theodore Guyol, notary, an act of preference in favor of J. C. Morris, holder of eleven others of the same series, viz: Numbers 11, 12, 13, 15, 16, 17, 20, 21, 22, 23, 24—for his own account and that of the New Orleans Canal and Banking Company—in which it was stipulated and agreed that those held by Henry Roos should be postponed, in the payment thereof, to those held by Morris and the Canal Bank; and in case of sale being made of the mortgaged property, the proceeds of sale should be first applied to the discharge of the latter, whether same be in their hands or those of some future holder. All the notes, of both series, are paraphed by Bender-nagel to identify them with the act of mortgage; and those embraced in the act of preference were paraphed by Theodore Guyol to identify them therewith.

On the 23d of April, 1881, J. C. Morris obtained an order of seizure and sale on six of these *priority* notes, viz: 11, 12, 13, 15, 16, 17—representing \$30,000—and caused to be seized and advertised for sale the *two* improved city lots in the *first* district; and at the execution sale made on the 18th of June, 1881, *one* piece was adjudicated to Moses Lobe & Co. for the sum and price of \$67,000; and the other to M. Frank for \$27,550—the total price aggregating \$94,550.

Of this sum the former paid in cash \$10,000 and the latter \$5,000—and each retained in his hands the residue.

The fourth district property was not then sold, nor included in the executory proceedings.

On the 27th of February, 1878, L. B. Cain executed before Bender-nagel, notary, another act of mortgage upon property in the second district, in favor of H. Roos, or any future holder, to secure the payment of \$5,000, evidenced by two promissory notes of \$2,000 and \$3,000, due at one and two years, and payable to his own order and by himself indorsed.

The executors of Cain took a rule on the purchasers to show cause why they should not pay over to them the surplus of the price above the amount due the seizing creditor; and he took a like rule on the sheriff, for proceeds enough to satisfy his demands, attorneys' fees and cost.

The latter prevailed; but the former was denied, on the ground that the law entitled the purchasers to retain, in their own hands, the surplus, for the purpose of discharging the claims of other creditors holding mortgages on the property purchased, when duly presented for payment.

On the 9th of August, 1881, Moses Lobe & Co. filed an intervention or interpleader in the executory proceedings, in which all claimants to any share in the funds in their hands were cited to appear in court and contest their claims thereto contradictorily with each other, and that the same be decreed to such person or persons as shall effectually disburden the property of encumbrances and pass a clear title to them and enable them to procure the cancellation of all mortgages inscribed against it.

The parties who were cited and appeared are the following, viz :

1. J. C. Morris holding as collateral security the following notes, viz: 11, 12, 13, 15, 16 and 17, aggregating \$30,000.
2. Canal Bank, likewise holding five notes, viz: 20, 21, 22, 23 and 24, aggregating \$25,000.
3. Germania National Bank, likewise holding five notes, viz: 1, 2, 3, 4 and 19, aggregating \$25,000.
4. Henry Roos, likewise holding four notes, viz: 5, 6, 7 and 10, aggregating \$20,000.
5. Julius Meyer, likewise holding two of said notes, viz: 8 and 9, aggregating \$10,000.
6. David Roos, likewise holding two notes, viz: 14 and 18, aggregating \$10,000; also A, B, C and D (second series) \$20,000; also two notes, \$2000 and \$3000 = \$5000, making the total of \$35,000.
7. Widow Caroline Cain claims \$6000 dotal funds she received as an *ante* nuptial gift, evidenced by a marriage contract in 1856, and which were received and used by her husband, L. B. Cain. Said contract was duly recorded long anterior to the execution of the acts of mortgage in question, and she demands the right to be paid in preference to all others.

The *concurus* thus formed was recognized by this Court in *Morris vs. Cain*, 35 Ann. 759.

During the pendency of the sale under executory proceedings, on the 16th of May, 1881, P. S. Wiltz, public administrator, administering the succession of Benjamin Weil, brought suit against the executors of L. B. Cain upon a claim for \$171,000.

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On June 1, 1881, he filed a supplementary petition, in which the following substantial averments are made :

1st. That the act of mortgage of the 25th of February, 1878.

2d. That of February 27, 1878.

3d. The act of sale from L. B. Cain to Henry Roos, of the 26th of December, 1879, of property in the sixth district, _____ are, one and all, fraudulent simulations, and import no verity whatever.

That, prior to their confection, Cain had become financially embarrassed, in consequence of the failure of Alcus, Scherck & Auty, for whom he was indorser for a large amount; that said acts had no real existence, but were unreal, fictitious, fraudulent and simulated—a mere screen and device to secrete and fraudulently cover the property of Cain from the pursuit of creditors.

That Cain was not then, and has not since become, indebted to Henry Roos in any manner, and that the recitals of the acts on this subject are untrue.

That none of said notes were issued to Roos, or anyone else, except those now held by J. C. Morris and the Canal Bank.

He charges that the act of sale was also a fraudulent simulation, and that no cash was paid, and that it was a contrivance intended to defraud his creditors.

He prays judgment declaring all of said transactions to be fraudulent simulations, and null and void, "except in so far as the first (act) may have been legally vitalized *pro tanto* by the issue, as aforesaid, by L. B. Cain to J. C. Morris of eleven notes, before their respective maturities, viz: 1 to 24," and he prays, also, that the inscriptions of said mortgage be erased and cancelled.

By consent of parties, the two suits and proceedings were consolidated for trial and judgment.

The defendants, Henry Roos, David Roos and Julius Meyer, tender a plea of prescription of one year against the action of Wiltz, administrator, in so far as it may be considered and treated as a revocatory action, and in their answer aver the validity of all of said acts of sale and mortgage, and that said mortgage notes were delivered by Cain to Henry Roos as a security for his, then, large indebtedness to him, and such amounts as Cain should *thereafter become indebted to him*; and also to secure Cain's indebtedness to David Roos and Julius Meyer, for whom Henry Roos was agent, and the whole of which, on the 25th of February, 1878, aggregated about \$60,000, and was represented in part by due bills, notes and other paper.

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They affirm the validity of the act of preference, executed on the 9th of March, 1878, and the right of J. C. Morris and the Canal Bank to be paid from the proceeds of sale in the hands of the purchaser in preference to the *other eight therein named*.

They claim that Julius Meyer, as holder of notes 8 and 9, and David Roos, holding notes 14 and 18, and the Germania Bank, holder of note 19—all of the first series—are entitled to be paid concurrently with J. C. Morris and the Canal Bank, for the reason that none of those five notes were embraced in the act of preference.

They further aver that the other four notes held by the Germania National Bank—1, 2, 3 and 4—were formerly held by Henry Roos, as security, and that when he purchased of Cain the sixth district property, on the 26th day of December, 1879, the price of \$7500, mentioned as cash, was *credited on his account*, and that notes numbered 3 and 4 were surrendered to Cain; and that subsequently, on the 13th of September, 1880, Cain paid him \$11,000, and this sum was credited on his account, and he then surrendered notes numbered 1 and 2 to Cain.

That said five notes were at those dates overdue, and were, therefore, given in pledge to the Germania Bank as collateral security, but *without any mortgage securing them*, as same had been *extinguished* and had ceased to have existence.

On the other hand the Germania Bank contends that Cain pledged to it all five of said notes during the month of March, 1878; that two of them are evidenced by a written act of pledge of date March 20th, 1878; and that the other three were delivered by Henry Roos to the bank, as security for the account of Cain for a then existing overdraft of \$10,000—the first two having been pledged as part security for Cain's demand note of \$24,245.

The whole indebtedness of Cain to the Bank at the date of his death, on April 4th, 1881, was reduced to \$16,000. L. B. Cain was, on the 25th of February, 1878, president of the Germania Bank; and was previous to that date and subsequently.

The bank denies the validity and binding force of the act of preference and claims that it acquired the five notes before maturity, without any notice of said act; and that, although the paraph of Theodore Guyol, notary, was at the time endorsed upon them, it conveyed no notice, and that, as the act of preference had not been recorded, their acquisition of them was protected by the law merchant, and entitled them to participate in the fund ratably and concurrently with Morris and the Canal Bank.

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No one denies that Mrs. Cain's mortgage primes the Roos mortgages, but it is claimed that, as hers is a legal mortgage only and operates equally upon all the real estate of Cain, its payment should be postponed to those creditors claiming under the Roos special mortgage; or, at most, she should only be allowed a distributive share.

The record shows, and the fact is, that the sale under executory proceedings did not embrace Cain's residence property, and which is the property mortgaged for notes A, B, C and D. Nor did it embrace the Sixth District property, securing \$2000 and \$3000 notes.

The former was subsequently adjudicated to David Roos at \$16,000, and the latter at \$4500, at probate sale procured by Cain's executors, but it is claimed that he has not paid the price and the *proces verbal* has been withheld.

The executors of Cain resist the claims of Wiltz, administrator, on account and affirm the validity and reality of the mortgages and sales that are assailed as simulated, and allege the *insolvency* of his succession.

Various ordinary creditors of Cain intervene and unite with Wiltz, administrator, in seeking the annulment of those different acts.

Moses Lobe & Co. announce their willingness to pay over the balance of the purchase price in their hands to whomsoever the court may direct, but they aver that they have been diligently seeking to ascertain the proper parties to whom payment should be made, and have offered to make a deposit of the money, and that they should not be required to pay interest as demanded by Roos & Meyer.

J. C. Morris proceeded by rule on the sheriff and other interested parties to coerce the payment of the amount due him under the writ of seizure and sale, and on the 26th of January, 1883, there was paid to him the sum of \$37,815.32, the principal and interest due him; the sum of \$8,051.28 cost, besides attorneys' fees stipulated in the act.

The amount due the State and city for Cain's taxes was also paid out of the fund under orders of court.

The judge *a quo* pronounced judgment on these numerous and complicated issues substantially as follows, viz:

1. In favor of Weil's succession, as an ordinary creditor of Cain's succession, for the sum of \$39,039.63.

2. In favor of Henry Roos for \$4,965.98, with eight per cent interest from October 13, 1875; also for the sum of \$5,342.34, with like interest from November 23, 1876; also for the sum of \$10,420.02, with like interest from January 10, 1877. Less several credits, among which are

the following, viz: on December 19, 1879, \$7,500; on August 27, 1880, \$9,000; on August 2, 1880, \$1,000.

3. In favor of *Julius Meyer*, \$3,360, with eight per cent interest from March 27, 1876; also for \$3,000, with like interest from April 7, 1876; also for \$366, with like interest from July 10, 1876. Less amount paid August 22, 1876, \$366.

4. In favor of *David Roos* for \$700, with eight per cent interest from December 20, 1876; also for \$3,000, with like interest from January 7, 1876; also for \$3,735.18, with like interest from January 15, 1878; also for \$14,680.27, with like interest from January 1, 1876; also for \$4,000, with like interest from March 21, 1878.

The total amount allowed Roos and Meyer aggregate about \$70,000, without interest.

5. In favor of Mrs. Caroline Cain \$6000, with five per cent interest per annum, from the date of her husband's death, on the 4th of April, 1881, with recognition of legal mortgage on the properties in dispute, and as priming the special mortgages of the 25th and 27th of February, 1878. It also decreed her entitled to be paid from the proceeds, in the hands of the purchasers, the sum of about \$2100.

6. In favor of Henry Roos, recognizing the sale to him of the sixth district property as valid.

7. In favor of J. C. Morris, recognizing the payment made to him of his debt, interest, attorney's fees and cost, and the payment of taxes.

8. In favor of Canal Bank and Germania National Bank, entitling them to be paid out of the proceeds of sale.

9. In favor of Moses Lobe & Co, directing them to pay the balance of *capital* in their hands *without interest*, and decreeing the recorder of mortgages to cancel and erase all mortgages against the property purchased by them.

10. Against Henry Roos, David Roos and Julius Meyer, decreeing them *not* to be entitled to participate in the distribution of the proceeds of the sale of the mortgaged property; and directing and requiring them to surrender all the mortgage notes of the first series, held by them, to the executors of Cain, for cancellation, and declaring the mortgage extinguished by confession *pro tanto*.

The decree did not in terms pass upon the question of simulation. The purchaser, Mr. Frank, did not appear or take any part in the proceedings.

From this judgment, Henry Roos, David Roos and Julius Meyer *alone* appeal.

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I.

In this Court *none* of the appellees file answers or ask any amendment of the decree appealed from.

In this Court the Germania Bank and Wiltz, administrator, each file a plea of prescription of five years against all the mortgage notes of Cain that are held by the appellants; and the latter also pleads the prescription of five years against all due bills and obligations alleged by the appellants to have been executed by Cain, and by them introduced in evidence; and three years in bar of any account of theirs against Cain's succession.

We will dispose of the various pleas of prescription first.

II.

The plea of prescription of one year urged by the appellants is aimed at the action of the public administrator only. An examination of the averments of the petition and the prayer, discloses it to be essentially one in declaration of simulation only—as there is no alternative prayer for the revocation of the acts assailed as having been made in *fraud* of creditors, if not shown to have been simulated.

In *Johnson vs. Meyer*, 30 Ann. 1204, our immediate predecessors said: "When sales are attacked by a *direct* action, there is no reason why the party may not demand relief from them by alleging simulation or fraud, or both. We are not disposed to hamper the remedies of creditors, who resort to a direct action, by doubtful technicalities."

It may be that the administration of the proof of simulation, will discover the transaction to have been *only a fraudulent* one; and there might arise a state of facts that would entitle the plaintiff to judgment under his prayer for general relief.

Hence we may examine the plea.

A contract giving preference to one creditor over another, in securing the payment of a *just* debt, cannot be set aside under the revocatory action, unless suit be instituted within one year from the date it was entered into. R. C. C. 1987.

In such case it does not matter that the *debtor* was *insolvent* to the knowledge of the creditor with whom he contracted; nor that other creditors were injured thereby.

The two acts of mortgage charged to be simulated are within the provisions of that article.

In *Renshaw, Caumack & Co. vs. Herbert*, 29 Ann. 285, the Court said: "It appears that the notes secured by the mortgages, and which

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were the basis of the judgments attacked, were given in lieu of pre-existing notes held by the mortgagees which were offered in evidence, etc. * * * *

"If there was fraud, which rendered the contracts, mortgages and judgments attacked liable to be set aside at the suit of plaintiff, *it was to secure certain creditors in preference to others.*

"These mortgages had been given more than one year before the institution of this suit to avoid them. * * The plea of prescription must prevail as to the mortgage sought to be avoided." R. C. C. 1987.

"The prescription of one year was pleaded by defendants. The evidence does not sustain the charge of simulation." 24 Ann. 123, Lafitte vs. Daigré; 24 Ann. 246, Brown vs. Kelley; 33 Ann. 965, Conté vs. Cain.

In the event it be ascertained that the charge of simulation preferred against the two acts of mortgage, is not sustained by proof, as a revocatory action, it is prescribed, it having been filed in June, 1881.

In so far as the conveyance of the Sixth District property is concerned, the suit is governed by the provisions of R. C. C. 1994, which limits the right of action to one year from the time the creditor has obtained judgment against his debtor.

III.

Of the prescription urged against the demands of the appellants, against the succession of Cain.

They resist the plea on the ground that prescription has been both legally interrupted and suspended in different ways.

1. On the 4th of August, 1881, the executors of Cain presented to the Court a petition, accompanied by a statement of debts, praying for an order of sale of all property remaining in the succession unsold at the time. That property consisted in part of the residence property of the deceased, situated on St. Andrew street, and covered by the mortgage of date February, 1878, securing notes A, B, C and D, and the First street property covered by the mortgage of February 27, 1878, securing the two notes of \$2,000 and \$3,000, respectively, now claimed by David Roos. This sale was ordered to pay debts. It was sold, among other properties, and brought \$21,000; but the fund has not been distributed.

The statement of debts mentions the mortgage notes of Cain held by various parties, on property situated on Magazine and Gravier streets, for \$140,000. Also those secured by mortgages on St. Andrew street and sixth district property, for \$25,000, and the general mortgage of Mrs. Caroline Cain for \$6,000.

There are now, and have at all times been, since their qualification, large values in the hands of Cain's executors.

The properties described in the inventory were valued at \$236,-430.71.

Independent of the surplus of proceeds of the sale, under executory process, in the hands of the purchasers, there are evidently large values in the hands of the executors.

The acts of mortgage and other evidence in the record show that the appellants have in their possession, and *claim* to have had since the date of their execution, quite a number of Cain's notes, as securities for his indebtedness to them previously existing.

Those are the acts of mortgage and notes previously assailed as simulated by Wiltz, administrator; yet, for the purposes of the *plea* under consideration, we must *assume* their verity and genuineness. Otherwise the controversy would be ended.

In *Renshaw vs. Stafford*, 30 Ann. 855, our predecessors decided that an executor is a trustee for the creditors of the deceased, and is a judicial depositary of the property of his estate, and his possession is that of the creditors, for whom he is a *quasi* mandatary. And that it "results, further, that the creditors are in possession through this trustee of the property and effects of the estate, which are their common pledge."

"It is the well established jurisprudence of this State that possession, by the creditor himself or by his mandatary, of the pledge securing his debt, operates a suspension of prescription as long as that possession continues." 1 R. 556; 8 R. 145; 11 R. 183.

"As long, therefore, as the heirs of the deceased allow the property of his estate to remain in the custody of the administrator, the trustee of the creditors, the principle stated requires that *prescription at least*, and certainly so far as their debts bear upon the objects of the pledge, be suspended."

In *Maraist vs. Guilbeau*, 31 Ann. 713, the Court held that a judicial acknowledgment by an administrator, by the filing of an account, is far more solemn and authentic than any writing under private signature. 16 Ann. 260, Succession of Yarbrough.

In 32 Ann. 338, *Heirs of Porter vs. Hornsby*, the Court held that the filing of a statement of debts was a recognition of the claims of creditors which *suspended prescription during* the administration." 33 Ann. 308, *Cloutier vs. Lemee*.

In *Trouendel vs. De Bouchel*, 33 Ann. 753, the Court said: "When the administrator of a succession applies for an order of sale of prop-

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erty to pay debts, and annexes to his petition a list of debts to be paid, it is a sufficient acknowledgment to interrupt prescription."

If, therefore, the prescription of the mortgage notes held by Roos and Meyer was *only interrupted* by the mortuary proceedings in August, 1881, they would have taken a new period, which only elapsed in August, 1886, since the present appeal was obtained.

If the proof of judicial acknowledgment, or possession of collaterals by appellants for their demands against Cain, should be deemed insufficient—though it is, in our opinion, ample—the present litigation, with its multifarious issues and pleas, in which the sole object aimed at is a participation in the fund realized by the sale of property mortgaged, would interrupt and suspend prescription as between the litigants.

Cain's executors, as well as his creditors, are parties. They were cited into court by Moses Lobe & Co., in June, 1871, for the expressed purpose of coercing a full and final settlement of all their claims, contradictorily with each other.

The proceeds of sale are in the hands of the purchasers. Appellants appeared in court on the 7th of November, 1881, and contradictorily with the identical parties urging the pleas of prescription, and the executors of their common debtor, claimed that a share of the fund should be applied to the payment of their demands, for the security of which they held and presented some of the mortgage notes.

On the 12th of December, 1881, Cain's executors filed an answer in the suit of Wiltz, administrator, as executor of Cain, in which they aver that the acts of Cain assailed as simulated, are real, genuine and *bona fide* transactions.

That of itself was a judicial acknowledgement sufficient to prevent the notes going to prescription.

We are of the opinion that neither of the pleas can be sustained.

IV.

In order to bring the discussion of the remaining issues within proper limits, we must first ascertain what issues are presented by this appeal for decision.

In 26 Ann. 451, Succession of Ostrander, a former court said: "He has not appealed from the judgment, or any part thereof, nor has he asked, in answer to the administrator's appeal, that the judgment be amended. We can, therefore, pass upon the complaint of the appellant only." 25 Ann. 508, Gnett vs. Easton & Barrow.

In 15 Ann. 434, Converse vs. Robinson, it was said: "It is well settled that this cannot be done without an appeal on the part of the

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party complaining. This court is *only seized of jurisdiction to amend the judgment as between appellant and appellees*, and not as between appellees."

"A judgment cannot be disturbed, nor can its correctness be questioned, either in favor of, or against, one not a party to the appeal." Hen. Dig., p. 62, vol. 6, and authorities.

"A defendant who has not appealed cannot avail himself of the appeal of his co-defendant." 6 N. D. 598, *Plauché vs. Gravier*; 6 La. 228, *Millaudon vs. Cujas*.

"An appellee cannot have a judgment amended in his favor unless he has prayed for it in his answer to the appeal." C. P. 888, 592; Hen. Dig., p. 70; 6 Ann. 7, and authorities.

"When there are several opposing claimants to plaintiffs whose demands were severally passed upon by the judgment below, none of them can be heard on appeal but such as were actually appellants." 8 La. 192, *Abot vs. Nartigue*; 5 Ann. 140, *Succ. of Decoux*; 8 Ann. 73, *Hood vs. Knox*; 10 Ann. 197, *Wortham vs. Scheuck*; 19 Ann. 527, *Lynn vs. Lowenthal*; 38 Ann. 777, *Enders vs. Gingras & Mulhaupt*.

The appellees, in the instant case, have neither joined appellants nor answered their appeal. In so far as they are concerned the decree of the Court *a qua* must remain undisturbed.

The effect of this will be that the judgment rendered in the lower court cannot be changed in any of the following respects, viz:

First, as to amount of the debts allowed against the succession of Cain in favor of the succession of Well; in favor of Henry Roos, David Roos and Julius Meyer; in favor of Mrs. Caroline Cain, with interest and first mortgage; in favor of Henry Roos, recognizing his title to the sixth district property; in favor of J. C. Morris, recognizing the payment to him of the proceeds of the sale of the first district property, to a sufficient amount to discharge his claims against Cain, with interest, attorneys' fees and cost; and in favor of the State and city of New Orleans, recognizing payment of taxes.

V.

It is of first importance that the rights of the appellants should be ascertained before the rank of different creditors is established and their priority determined.

This leads us into the discussion of the charges of simulation of the two acts of mortgage executed by L. B. Cain on the 25th and 27th of February, 1878. But as a necessary preliminary to that discussion, the competency of L. L. Levy as a witness must be passed upon, as his evidence is chiefly relied upon to establish those charges.

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It will be borne in mind that L. B. Cain was at the date of these transactions—long before and after—president of the Germania National Bank, one of the litigants in this suit. He executed the mortgages to and in favor of Henry Roos, of this city, to whom he confessed himself a debtor for a large sum, and to secure which the mortgages were apparently executed. The notes were executed and made payable to Cain's own order and by himself endorsed. They fell due at one and two years after date.

Two or three days prior to their execution the firm of Alcus, Scherck & Auty failed in business. L. B. Cain was on their paper as indorser for the aggregate amount of \$120,000. Of this paper, about \$30,000 was in the hands of the Canal Bank. Cain was indebted to J. C. Morris about \$20,000, and to the Germania Bank about \$15,000. He also owed large amounts to other persons. On the 9th of March, 1878—only a few days after their execution—Henry Roos was in possession of nineteen of those notes, *i. e.*, of the first series. On that day he passed before Theodore Guyol, notary, the act of preference in favor of Morris and Canal Bank, as a *better security*—they being the holders of eleven and Henry Roos of eight. It is of these transactions that Levy testified *in extenso*.

The evidence discloses that he is a duly licensed and practicing attorney at law, and has been a member of the New Orleans bar since 1850; that L. B. Cain was one of his first clients; and that he continued to be his retained counsel generally, as well as his law firm, Cotton & Levy, until a short time before his death, on April 4, 1881. He states in his evidence that on the day of the failure of Alcus, Scherck & Auty, Cain went to his residence to consult him in regard to the calamity that had befallen him, and desired his advice as to how he could shelter himself from disaster. He and Cain consulted the following day at his office and the execution of this mortgage was determined upon. He was present at the office of Bendernagel, notary, when it was executed by Cain and accepted by Roos, acting as the counsel of Cain, if not of Roos. He saw the notes executed and knew all the circumstances under which they were issued. He was present at the office of Theodore Guyol on the 9th of March, 1878, when Roos executed the act of preference. He states that it was on his advice as a lawyer that it was consented and executed.

The proof further shows that for many years previous to all these transactions Major Levy and his firm were the retained counsel of Henry Roos, and different firms of which he had been a member;

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though he does not admit that, he acted as counsel for Roos in these particular transactions.

He was confessedly counsel for Cain, one party to them, and Roos was the other. His legal advice embraced them both and availed them both.

Under this state of facts objections were urged on the trial, and earnestly pressed here, to his testimony, on the ground that an attorney at law is *not permitted* to "give evidence of *anything that has been confided to him by his client without the consent of his client.*" R. C. C. 2283.

An agreement was made to the effect that the witness should make his statements subject to the objection, and that it should be passed upon when the merits were considered.

The objection was made by the executors of Cain and the appellants also.

The objections made are full, and particulars are given.

In *Bailly vs. Robles*, 4 N. S. 362, it was held that "facts communicated by a client to the attorney, in his *professional character*, cannot be given in evidence by the latter, although he does not receive a fee." 2 Ann. 923, Succession of Harkins.

In 11 Wheaton 280, *Chiroc vs. Reinicker*, the Supreme Court said: "The privilege, indeed, is *not that of the attorney, but of the client*, and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such persons are not at liberty, even if they wish, to disclose them, and the *law holds such testimony incompetent.*"

In 94 U. S. 457, *Continental Life Insurance Company vs. Schafer*, the Supreme Court say: "Within the scope of the professional employment of an attorney at law, the communications made to him are privileged (by his client), and without the consent of the latter, he should neither be permitted nor required by the Courts of the United States to testify concerning them."

In 15 La. 88, *Hart vs. Thompson*, our predecessors held: "We cannot admit the distinction pressed upon our attention, by appellant's counsel, between the case when a party *continues* to be the client of the attorney and that when he has *ceased* to be his client, at the time the attorney is called upon to testify. * * * Nor do we understand why the courts should feel themselves authorized to *supply the consent of a client who has died without giving it.*"

We are, therefore, of the opinion that his evidence was incompetent and should have been excluded.

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VI.

The evidence satisfactorily establishes the following facts, viz :

That long prior to 1878 Henry Ross and L. B. Cain had many and large financial transactions, and that the former occupied for many years a seat in the office of the latter.

That David Roos and Julius Meyer resided in the vicinity of Opelousas and dealt largely in this city, annually shipping to their factors large quantities of cotton for sale.

That they were men of reputed means, and had, during the years 1875 and 1876, loaned L. B. Cain large sums of money through Henry Roos, who acted as their agent, for which Cain had, from time to time, executed his due bills and promissory notes in their favor.

That at the date of the transaction complained of, Cain was indebted to these appellants near \$70,000.

That immediately after the execution of the two mortgages H. Roos had in his *possession* and under his control a number of the notes secured thereby.

That Mr. Leveque, who was bookkeeper of the commercial house of Marks Bros. & Co., of which Cain was a member, had frequently seen these notes in his possession.

That Mr. Kennedy, Cain's private secretary, was in possession of a number of facts, which he detailed, corroborative of Roos' possession of them as security for his claims.

That Roos was in possession, since the death of Cain, and produced on the trial and filed in evidence, all the notes he claimed to control for himself and his associates.

That the executors of Cain do not set up any claim to them ; but, on the contrary, affirm appellant's title to them.

That only a small part of their large demands were subsequently paid by Cain.

That the notes and obligations of Cain which appellants held were *not* cancelled and surrendered upon the execution of mortgages and the delivery of the notes to Henry Roos.

That J. C. Morris, Canal Bank and Germania Bank also retained all of Cain's obligations and treated and considered the mortgage notes as only collateral security therefor.

That, notwithstanding the total acceptances of Cain for Alcus, Scherck & Auty, was reckoned at \$120,000, only the \$20,000 presented by the Canal Bank, and represented by J. C. Morris, figures in this suit, and they are the only ones existing, so far as the record informs us.

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That, if Cain was in a state of insolvency when these mortgages were executed it was unknown to any other than himself, for he was reported to be worth \$250,000, and continued to be president of the Germania National Bank for two years thereafter.

His paper never went to protest during his lifetime, and the inventory of the property of his estate shows that he possessed *at his death* on April 4, 1881, values worth \$100,000 in *excess* of the value of the property mortgaged.

That there is no other claimant of the notes held by the appellants.

That two or three witnesses swear, of their *personal knowledge*, that Cain executed the two acts of mortgage to secure his indebtedness to appellants.

There are, in connection with these established facts, several circumstances that point directly to appellants' possession of these notes as surety. One of them is, that on January 16, 1880, Cain resigned the presidency of the Germania National Bank. In the early part of that year Cain was much troubled about a debt he owed Lehman, Abraham & Co., of this city. They threatened to *protest* his paper if the debt was not arranged. Both Kennedy and Leveque testify to his great anxiety about it. Now, if in point of fact appellants did not hold the mortgage notes as security for their claims against Cain, why did not Cain employ some of them as security with these pressing creditors? Because Roos held, amongst others, the notes 14 and 18 and C and D, having a face value of \$20,000, and they did not fall due until February 25th and 28th, 1880. The proof on this point is that "a year or so before his death, Cain had trouble with Lehman, Abraham & Co." He died on April 4, 1881.

Another circumstance is that some months after the execution of these mortgages Henry Roos loaned Cain \$4,000 in cash. Why would he have done that if he had not been amply secured?

There is still a more potent one, and that is that Cain was indebted to appellants, anterior to and at the date of these mortgages, near \$70,000, and the judgment appealed from affirms it, in addition to the large sums he owed to other persons to the knowledge of Roos; and the improbability there was of his accepting a mortgage of \$140,000, on his most valuable properties, in favor of the *creditors of Alcus, Scherck & Auty, to the prejudice and exclusion of his own* and those of his associates.

Conceding that it was the *avowed* purpose of Cain to protect his acceptances from protest—and we rather think it was—with what propriety, or even *show* of success could he have approached Roos on

the subject, *unless he had promised him a share of the benefits to be derived therefrom?*

The evidence satisfies us that the charge of simulation is not made out.

VII.

It appears, from the evidence, that all parties—Morris, Canal Bank, Germania Bank and appellants—*retain* all of Cain's notes, due bills and other obligations, and hold his mortgage notes as security therefor.

In some instances the indebtedness was *increased* after the execution and delivery of those notes. In one instance two of those notes were pledged by Cain for an *overdraft* of \$10,000 and for *any future overdraft* that might occur thereafter. In one case a portion of those notes were employed by one of Cain's creditors as a security, and upon his debt being partially paid, they were returned, and by Cain reissued before maturity.

These circumstances do not affect their validity and do not evidence simulation.

The Code authorizes a mortgage to be given for an obligation which has not yet risen into existence. R. C. C. 3292.

But in this case the mortgage can only be enforced in so far as the future obligation shall have been created. R. C. C. 3293. "The fulfillment of the promise, however, shall impart a retrospective effect to the time of the contract."

In *D'Meza vs. Generes*, 22 Ann. 285, the Court held that "a mortgage may be given to secure a debt that has no legal existence at its date, as well as to secure a *loan* that is to be obtained in the future, on the faith of its security, * * * and that the loan having been made on the faith of the security of the mortgage, it was binding on the property mortgaged to the *extent* of the amount loaned from the date of the loan."

In *Pickersgill vs. Brown*, 7 Ann. 297, the Court held: "It is *not* essential in such a mortgage, even in respect to third persons, that it should *express upon its face* that it was executed to secure *future* debts. It may be described as security for existing debts, and yet *used to protect those which*, in contemplation of the parties, *were to be created at a future time.*" 8 N. S. 529; 10 R. 383; 16 La. 371, *Brander vs. Bowman et al.*; 12 Ann. 432, *Wolf vs. Wolf*.

In *Matthews vs. Rutherford*, 7 Ann. 225, it was held that under the law-merchant, the only difference between an *absolute* holder for value

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and the party who takes the note as *collateral* security, is that the former may recover *in full*, while the latter can only recover to the *extent of his debt*. 21 Ann. 5, Succession of Dolhonde.

In 25 Ann. 363, Merchants' Mutual Ins. Co. vs. Jameson, it was held that when a mortgagor offers a series of mortgage notes as collateral security, and part are accepted and part declined, the latter may be placed *elsewhere* as security. 27 Ann. 561, Gardner vs. Maxwell.

In referring to those cases this Court said in Schepp vs. Smith, that "whatever perplexities once existed touching the power of the mortgagor to dispose, himself, of his notes, secured by mortgage in favor of a *nominal* mortgagee, have been effectually dispelled" by the rulings therein.

"These last two cases theoretically favor the recognition of the existence and validity of the mortgage, in favor of a third and innocent holder, *when the note is reissued by the maker before maturity*." 35 Ann. 5.

This doctrine meets our approval. There is nothing in such a transaction to impair the merchantable value of a security negotiable by delivery.

VIII.

We will next consider the act of preference executed by Henry Roos on the 9th of March, 1878. This act was executed at the instance and request of John C. Morris, and for his benefit and that of the Canal Bank. The act was passed before Theodore Guyol, notary, and same was identified with the notes by his official paraph indorsed on the face of the notes—not only the eleven held by Morris and the Canal Bank, but the eight then held by Henry Roos for *his own* account. Those, as we have heretofore ascertained, were numbered 1, 2, 3, 4, 5, 6, 7 and 10, and maturing in one year from date.

Of these the Germania Bank acquired, as collateral security for Cain's indebtedness, notes numbered 1, 2, 3 and 4. The bank claims that its acquisition was prior to their maturity, but Henry Roos contends that it was after they had become due, and had been paid. On this subject there is a serious conflict of testimony which we need not examine, as we are satisfied that the mortgage notes were only intended for use as *collateral* security, and did not evidence any *primary* obligation. But the Germania Bank contends that it had no notice or knowledge of the existence, or contents of the act of preference, when it acquired them, and that it is protected by the law-merchant, as a good faith holder before maturity, for value; and that the notary's paraph was insufficient to put it upon inquiry.

Counsel for the bank cite, in support of that theory, 11 Ann. 664; 8 Ann. 457, and 35 Ann. 3, Schepp vs. Smith.

The first two cases are only to the effect that the notary's paraph identifying the note with a mortgage securing its payment, does not impair its negotiability. But in *Schepp vs. Smith* it was held sufficient to put a purchaser on his guard.

The Court say: "Had the note been paraphed to identify it with the act (of pledge) the defendant might, perhaps, have charged that the pledgee was thereby put on his guard—notified of the declaration contained in the act of sale, and bound thereby, etc. * * * What he was bound to know was what he could have known, and, in point of fact, did know."

Treating of the effect of memoranda written on bills and notes, Mr. Daniels says: Questions have frequently arisen as to whether they were to be regarded as incorporated into the instrument or not.

Quoting: "It seems that the purport of the instrument is not only to be collected from 'the four corners,' but from 'the eight corners,' a memorandum on the back, affecting its operation, being regarded the same as if written on its face." Daniels' Nego. Ins., sec. 151.

Again: "It is competent for either party, by parol testimony, to show the time, the person by whom, and the circumstances under which a memorandum upon a bill or note was made.

"If made—and it will be presumed that it was so made—contemporaneously with the execution of the instrument, and is a component part thereof, it will be given full effect as above stated; if made after its execution, and with the consent of all parties, it will modify and control its operation; and if made by a stranger, without the consent of any party, it will be a spoliation, and disregarded; while, if made by the holder without the consent of the parties, it will vitiate and avoid it, being a material alteration." *Ibid*, secs. 154, 769.

The proof shows that Morris was the holder for himself and the Canal Bank of eleven of the first series of notes, and Henry Roos of eight. Morris demanded of Cain better security.

Cain obtained Roos' consent to yield the preference that was granted.

Subsequently, the Germania Bank acquired from Cain four of the subordinated notes—for the argument, it may be conceded before maturity—as collateral security. The vice president and cashier testify that the bank obtained them from Henry Roos, as agent of Cain, and for Cain's account.

The notes themselves are indorsed: "Pay to the Germania Bank," and signed, "L. B. Cain."

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All the other notes are indorsed in blank. This is proof undeniable that the Germania Bank was not a *purchaser* from a payee, or *other third person*, before maturity, for a valuable consideration. Those witnesses testify, and Cain's account shows, that the bank held this paper as collateral security only. When the paper was received by the bank, it was impressed with the paraph, identifying it with the act of preference by the maker, from whom it was received. Those notes, thus impressed, had only the value, in the hands of the Germania Bank; of second mortgage paper.

The paraph of the notary was neither an alteration nor spoliation.

The bank denies that these notes were ever reissued, as Roos contends. This only strengthens the conclusion that the notes were by the maker postponed, in their right to payment, to those held by Morris and Canal Bank. Cain, the maker, *before* the issuance of the notes, had the right to alter them if he chose. If they had once been issued to Roos, he and Cain, maker and payee, had that right. If the notes were subsequently returned by Roos to Cain, and by him reissued, before maturity, to the Germania Bank, the alteration made *by Roos and Cain* was still impressed upon them.

But, if the Germania Bank is to be viewed in the light of a *purchaser*, its position is not improved.

"It is quite clear and well settled that the *purchaser* need not have notice of the *particular* fraud, or equity, or illegality, in order to be effected by it. It is sufficient that there be notice, *actual* or *constructive*, that there is *some* fraud, equity, or illegality, affecting the *original parties*." *Ibid*, sec. 799.

The fact that the act of preference was not recorded until long after the bank's acquisition of the notes can make no difference. Had they dealt with the *property* mortgaged instead of the notes, quite a different rule would have obtained.

"Parties negotiating for negotiable instruments are not bound to take notice of *public records*, and litigation, *which would affect them with notice, were they dealing with the subject-matter*.

"And, therefore, when there is *nothing* on the face of the bill or note *giving notice of any defects*, the fact that a deed of trust securing its payment contains recitals which show that equities or offsets exist between the *original parties*, does *not* weaken the position of a *bona fide* holder without notice." *Ibid*, sec. 880.

The paraph on the note was quite sufficient to put a purchaser upon inquiry. It does not, of itself, impair its *negotiability*; but it does impair its *value as a security*. In the instant case all the notes

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were held as collateral security. It was the mortgage that gave them value. The act of preference was created in order to furnish Morris and the Canal Bank with "*better security*," to which Cain, the maker, consented.

We are of the opinion that the act of preference was a valid and binding agreement, and that the notes postponed thereby cannot be allowed to come in competition with others mentioned as entitled to priority, nor with those that are not mentioned therein. They must be paid, and in full.

IX.

The remaining question for determination is, whether Moses Lobe & Co. are liable for *interest* on the balance of the purchase price remaining in their hands.

The judgment of the lower court relieved them, as well as M. Frank, from paying interest. This was, doubtless, upon the theory that the appearance of Moses Lobe & Co. represented both.

In their intervention, all parties thought to have an interest in the distribution of this fund were cited into court to contest, contradictorily with each other, their respective rights, and they prayed the court to allow them to make a deposit of the purchase price in their hands, and that the fund be decreed to be paid to *such party or parties as shall effectually disburden the property purchased of its mortgages and free them from all liability*, so that the property should pass to them *unincumbered*, and they be relieved *from paying interest*.

Thereupon the court granted an *ex parte* order, directing all persons interested to be summoned by notice published in a newspaper, and that the funds be deposited in the State National Bank on or before the 1st of October, 1881, or that the parties notified show cause to the contrary.

The money was never deposited in court or in bank. Intervenor announced their readiness to make the deposit, and that it should be paid to whomsoever the court should decree entitled to it.

It was admitted on the trial that intervenors "tendered the court, for deposit, the total amount of the adjudication and asked the court to issue an order upon all parties to show cause why it should not be deposited in the State National Bank, or at any other place they should be willing it should be deposited."

The contention of the Germania Bank and appellants was that the fund should be deposited with the executors of Cain for distribution.

There was some evidence adduced by the intervenors to the effect that they had in bank cash deposits *sufficient* to have enabled them to

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have checked for an amount equal to the surplus of the proceeds in their hands. But the evidence also shows that they did not keep in bank a *special fund on deposit* for the purpose of paying the purchase price; and, notwithstanding they had a *surplus to their credit in bank*, they were checking on the bank, from time to time, for various sums. That this money has been kept in their own name to the credit of the *general account*, and a sufficient amount at all times retained there to pay the sum due to whomsoever the court should order it paid.

Was this such a deposit or offer to deposit the price of adjudication as contemplated by the code, whereby the purchasers might exonerate themselves from paying *interest*?

In this case we are dealing with a *concursus* created by intervenors for their own protection and benefit.

When this cause was under previous consideration their right to create it was determined. 34 Ann. 644; 35 Ann. 759.

Their manifest purpose, in its creation, was to compel the creditors of Cain to contradictorily establish their rights, and to receive *payment* accordingly, with a view of disencumbering *their property*. Their right to make a deposit was not then a controversy in the case, and was not decided.

The appellants rest their claim for interest on R. C. C. 2550, 2559.

Quoting the former: "The buyer owes *interest* on the *price* of the sale until the payment of the capital, in the three following cases:

* * * * *

"2. If the thing sold *produces fruits*, or any other income.

"3. From the date of the sale, when the price is then due."

Quoting the latter: "The *purchaser* may also require the deposit, to *relieve himself from the payment of interest*."

All debts bear interest at the rate of five per cent per annum from the date they become due, unless otherwise stipulated. R. S. sec. 1883; R. C. C. 1938; 33 Ann. 582; 7 N. S. 437; 4 Ann. 6; 12 Ann. 116.

Like rules obtain with regard to judicial public auction sales, and private sales. R. C. C. 2617, 2608.

These articles have been the subject of repeated adjudications. 19 La. 94, Ball vs. LeBreton; 7 R. 175, Erwin vs. Greene; 9 R. 424, Fer-
rand vs. Claiborne.

In 15 Ann. 256. Brothers, syndic. vs. Cronan, the Court said. "The vendee, in order to relieve himself from the payment of *interest*, is required to make a *deposit* of the price."

In that case suit was brought to have the adjudication declared null. The Court decided that he had the right to "suspend *payment* of the

price" until security was furnished, but that did not relieve him from paying interest. R. C. C. 2557, 2558.

The Court puts it thus pointedly: "The fact that the syndic in the suit against McDonogh sought to have the adjudication declared null, did not authorize the plaintiff to keep *both the price and the property*," etc.

Quite a parallel case is found in 5 Ann. 313, Scott vs. Featherstone, in which the Court said: "The sale under the concurrent mortgage did not extinguish the *other mortgages created in the same act and at the same time*. No proceedings had been taken on those other mortgages, and the sheriff had no right to receive the amount due on them, under the writ he held.

"The portion coming to the *other mortgage creditors* would, in that case, remain in the hands of the purchaser, *subject to their call*, and secured by their mortgage.

"Collier, in whose place they stand, was a stake-holder to the amount remaining in his hands, after satisfying the executions under which he purchased.

"For that *interest*, as well as the principal, a privilege existed on the property at the time of the judicial sale, and *it continued to run against Collier afterwards, upon that portion of the price which remained in his hands*.

"*To that interest the plaintiffs are entitled.*"

In 31 Ann. 87, Bacas vs. Hernandez, the Court said: "He is not only permitted to retain, but he is *required* to retain in his hands, the amount of the liens in advance of that of the seizing creditor, and the day to which the *interest* upon them is to be calculated for retention, has been fixed." 18 Ann. 65, Quertier vs. Succession of Hille; 25 Ann. 345, Henderson vs. Merchants' Mutual Insurance Co.; 7 R. 398, Fortier vs. Slidell.

In Yateman, Woods & Co. vs. Erwin, 14 Ann. 145, the Court said:

"But the property was of a kind which produced fruits, and it would be unjust that plaintiffs should retain the price in their hands, and *not pay the interest*, while his judgment, to pay which the property was sold, was bearing interest.

"It appears to us, that the article of the Code of Practice which authorizes the purchaser to retain in his hands the amount of the special mortgages and privileges, implies that the purchaser, himself, like the property he has bought, must become responsible, and bound for the *interest which may accumulate on such mortgages after the sale*.

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"Otherwise it would be to the advantage of the purchaser to delay the payment of the portion of the price left in his hands as long as possible, and the debtor would be deprived of his property *while interest would be constantly accumulating against him*," etc.

The purchasers have been in the possession and enjoyment of the valuable property they purchased on the 18th of June, 1881, and yet they have retained in their hands about \$90,000 of the price to the credit of their *general account in bank ever since*, less the amounts disbursed, upon orders of court, in the executory proceedings. To relieve them, under all the circumstances herein related, from the payment of *legal interest*, would be gross injustice to Cain's succession and his creditors.

X.

The appellants are the only parties entitled to the benefits of this decree against the purchasers for interest, and only the holders of notes of the *first* series of twenty-four are entitled to participate in the distribution of the proceeds of the sale of the property made June 18, 1881.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and is hereby amended in the following particulars, to-wit:

1. So as to recognize the right of David Roos, as the holder of notes numbered 14 and 18, to participate in the distribution of the proceeds of sale concurrently with the New Orleans Canal and Banking Company.

2. So as to allow Julius Meyer, as the holder of notes numbered 8 and 9, to participate therein concurrently with the New Orleans Canal and Banking Company.

3. So as to allow the Germania National Bank, holding note No. 19, to participate therein concurrently with the New Orleans Canal and Banking Company.

4. So as to allow Henry Roos, holding notes numbered 5, 6, 7 and 10, and the Germania National Bank, holding notes numbered 1, 2, 3 and 4, to participate ratably and equally in whatever surplus shall remain after preceding payments have been made.

5. So as to require of Moses Lobe & Co. to pay five per cent per annum interest on the sum of \$67,000, the amount of price of the property purchased by them, under executory proceedings, from the 18th of June, 1881, until paid, subject to proper credits for sums by them expended under orders of court.

6. So as to require of M. Frank to pay like interest on the sum of

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\$27,550, the amount of the piece of property purchased by him from same date, until paid, subject to proper credits for sums expended under orders of court.

By rejecting the demands of Wiltz, administrator, against the appellants for the annulment and revocation of the two acts of mortgage as simulated *pro tanto*, and by avoiding that part of the decree of the court *a qua* requiring the appellants to surrender their notes for cancellation.

By requiring the Recorder of Mortgages to cancel and erase the said conventional mortgage executed by L. B. Cain on the 25th of February, 1878, and the *legal* mortgage resulting from the registry of the marriage contract between L. B. and Caroline Cain, in so far as it affects their property, when Moses Lobe & Co. and M. Frank shall have complied with the terms of this decree.

It is further ordered, adjudged and decreed that, in all other respects, the judgment appealed from be affirmed, with all costs of both courts to be taxed against P. S. Wiltz, administrator, M. Frank, Moses Lobe & Co. and Germania Bank.

Judgment amended and affirmed.

ON APPLICATION FOR REHEARING.

POCHÉ, J. On consideration of the numerous applications for rehearing in this cause, we have discovered several errors which have crept in our review of the very complicated and almost innumerable issues presented in the multifarious pleadings contained in this record. Hence, we have concluded to reopen the case in order to make necessary corrections.

I.

The first complaint which attracts our attention emanates from Moses Lobe & Co., and is levelled at that part of our opinion which holds them liable for legal interest on the amount of their purchase from the date thereof.

In his brief, their counsel is clamorous in his description, and he grows literally censorious in his complaint of the manifest errors which, in his opinion, we have committed in that connection.

His great reliance to support his assertion that we have done injustice to his clients, is on our opinion in the case bearing the title of *Morris vs. Executors of Cain*, reported in the 34th of our *Annals*, p. 657.

He argues that, on the strength and under the guidance of our adju-

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dication and of our utterances in that case, he advised his clients of their right to suspend the payment of the price of their purchase, and assured them that they could not be held liable for interests on the amount of their debt. Hence, he concludes, with great assurance, that we must have erred in our present case, or in the previous opinion; that it is now too late for us to recede from our previous utterances, and that, therefore, we have no alternative but to recant our conclusions in the present case, or otherwise we might be charged with glaring judicial inconsistency.

A careful reading of the opinion in the 34th Annual will satisfy any impartial mind that the zeal of counsel has clouded his judgment.

A reference to that case shows that the two points discussed and disposed of therein were as stated in the opinion :

1. "Are the defendants (the executors) entitled to receive the proceeds of sale realized in this suit, to distribute them by an account in the succession of the deceased, which they represent ?"

2. "Has a purchaser of real estate at the judicial sale made in this case the right to proceed, as he has done, with a view to clear the property acquired by him from the encumbrances which burden it ?"

The issue was presented in a proceeding styled an intervention, instituted by Lobe & Co., in which it was proposed to bring all parties in interest into court by means of a notice published in a public journal, under an *ex parte* order of the district judge.

Now, while the Court recognized the right of a purchaser situated like Lobe & Co. to seek by some legal proceeding to clear the encumbrances which cloud his title, or in the mean time to deposit the amount of his purchase, it concluded that the mode adopted by them and sanctioned by the lower court was not warranted under our laws; it also held that the executors were not entitled to receive and administer the proceeds of the sale, and hence the following decree was entered :

"It is ordered and decreed that the judgment appealed from discharging the rule of the executors for the proceeds of sale be affirmed at the costs of appellants."

"It is further ordered and decreed that the *ex parte* order rendered on the 9th of August, 1881, on the petition of Lobe & Co. filed on that day be annulled and set aside, and that the prayer therein for such *ex parte* order be refused without prejudice to further proceedings on the petition itself, contradictorily with the parties therein asked to be cited, the costs of the appeal from the order, including the costs of the rendition of the order, to be paid by Lobe & Co."

Now, it appears, from the records of this Court, that in furtherance

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of that decree, Lobe & Co. then renewed their proceedings in the lower court, where they were met by an exception of no cause of action, and one of improper proceeding. On appeal by them from a judgment maintaining the exceptions, this Court recognized the proceeding as proper, as well as intervenor's cause of action, reversed the judgment appealed from, and remanded the case for further proceedings. 35 Ann. 759, *Morris vs. Cain's Executors*.

It is clear that the purport and legal effect of those two decisions were to judicially recognize the right of intervenors to seek to clear the encumbrances off their property, and to judicially determine the proper mode of proceeding to that end. No issue was presented involving their right to make a deposit of the purchase price in the instant case, and no decree or mandate affecting such right in the remotest degree was made in either case.

We were, therefore, fully sustained by the record when we made the following statement in our present opinion :

"Their right to make a deposit was not then a controversy in the case and was not decided." Hence, it follows that any argument or assertion to the contrary is unwarranted.

The last judgment above-referred to was rendered in May, 1883, and the record before us fails to disclose any effort on the part of Lobe & Co. to press their asserted right to make a deposit to a trial, and as an independent question, it has not to this day been judicially disposed of.

It is, therefore, perfectly safe to conclude that the argument which seeks to commit this Court to a decision or utterance under which counsel could claim the right to assure his clients that they could not be legally held liable for interests on the amount of their purchase, is absolutely unfounded.

It is thus made clear that intervenors can derive no strength from our own precious utterances in support of their present contention.

A second examination of the authorities on which they rested their claim to be exonerated from the payment of interest on their purchase, and of those on which we rested our conclusions has had the effect of solidly confirming our views on the subject.

The apparent conflict between the decisions which they quote and those which we have followed is easily explained by the consideration that Article 2553 of the present Civil Code, which is quoted in our opinion, was not contained in the Code of 1808, on the provisions of which the decisions of *Miles vs. Oden*, 8 N. S. 214; *Jovellina vs. Minor*, 1 La. 72; *D'Aquin vs. Coiron*, 3 La. 409, which they quote,

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were rendered. Hence it follows that the rule was changed, not as a result of a judicial departure from established principles, but as a consequence of a legislative mandate.

Dealing with the subject in the leading case on this question, this Court said: "All these decisions were made with reference to the Code of 1808; the case now before us arose under the existing Louisiana Code, which contains some express provisions on this subject, besides those in the former Code." And the article in question is then referred to as the provision introduced in the new Code by the juriconsults who prepared the amendments to the Code, and doubtless with the intention of establishing the rule that the purchaser must either deposit the amount of his purchase or pay interest thereon. In that case the opinion settled the rule as follows: "To withhold or suspend payment does not necessarily imply a forfeiture of any part of the debt or of its accessories. The creditor who is unable to give security may require the deposit. He may require it to be made in a bank which pays interest on deposits. If he do not and consents to leave it in the hands of the debtor, the latter becomes a quasi-pledgee, and being at the same time in the enjoyment of the property sold, it would seem should be bound in equity to pay the interest, which is a compensation for fruits, unless he in his turn chooses to relieve himself from the payment of interest by depositing the price." *Ball et al. vs. LeBreton et al.*, 19 La. 149.

This case has been affirmed in every subsequent opinion rendered in causes involving that question. In the instant case it is not contested that *Lobe & Co.* had the right to suspend payment. It is equally clear that the property bought by them bears fruits; hence, they must pay interests.

But, as contended for by intervenor's counsel, we should have framed our decree so as to conform with the following conclusion in our opinion: "The appellants are the only parties entitled to the benefit of this decree against the purchaser for interest." It follows, therefore, that the extent of the obligation to pay interest is to be measured by the aggregate amount accruing out of the purchase price to the notes held by *Julius Meyer* and *Henry and David Roos*.

The complaint of the same counsel of that part of our decree in distributing the costs incurred in the trial below is also well founded and in both these particulars we shall amend our original decree to the relief of *Moses Lobe & Co.*

II.

The next application to be considered is that made by counsel for

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the Germania Bank, who charge error in our conclusions in favor of Henry Roos. They contend that the record affords no proof of the legal rights of Roos to the ownership and possession of the notes Nos. 5, 6, 7 and 10 of the series of 24 mortgage notes. A second examination of the record on this point leads us to the conclusion that the contention is unfounded, and to adhere to the reasons of our original opinion.

But the bank is entitled to relief on the question of costs. There is error in holding her for a portion of the costs in the lower court, and to that end our amended decree will be particularly in her favor.

III.

We shall now note the complaint of the present counsel of M. Frank, who is held up as no party to the proceedings and as having been erroneously condemned to pay interest on the amount of his purchase, as well as to costs. His counsel are mistaken in their contention. Although Frank had made no appearance by pleadings or by counsel, he had been legally made a party to the *concursum*. A default had been taken against him in two of the numerous pleadings which were all joined in the consolidated proceedings, and the district judge rendered in his favor precisely the same judgment which was rendered in favor of M. Lobe & Co., and, like them, he is now an appellee before this Court, and equally within the scope of any judgment which may be rendered in favor of the appellants in the cause.

When the district court decreed that he was entitled on payment of the amount of his bid *without interest*, to a full cancellation of the mortgage and other encumbrances which affected the property which he purchased, no one was heard to complain in his behalf that he was not involved in the contest.

Our conclusions as to him are correct and they will remain undisturbed.

IV.

We are favorably impressed with the complaint of counsel for the Canal Bank from that part of our opinion which purports to give legal effect to the preference recognized as binding in our opinion, granted by Henry Roos as the holder of eight of the mortgage notes to the eleven notes of the same series held by J. C. Morris and by the Canal Bank.

Under a correct construction of that act it is clear that the *status* of the notes 8, 9, 14, 18 and 19, which were not then held by either of the contracting parties, remains as unaffected as if the act of preference

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had never been executed. It follows therefore that, with the act, as without it, the holder of each of those five notes is entitled to participate in one-twenty-fourth of the whole fund, for the reason that he is neither preferred nor postponed to the holders of any of the other notes of the series.

Now the practical result of our decree is to advance the holders of these five notes, *quoad* the eight postponed notes, to the same rank held by Morris and the Canal Bank, and thus to make them participate each for one-sixteenth instead of one-twenty-fourth of the proceeds of the sale, and therein consists the error which we shall correct in our new decree.

In order to facilitate a proper execution of the judgment, we recast the decree in its entirety; although the corrections are intended to affect certain portions only.

It is therefore ordered that our previous decree be annulled and set aside, and that the following decree be rendered in its stead:

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended in the following particulars:

1. That said judgment, in so far as it exonerates Moses Lobe & Co. and M. Frank from the payment of interest on their purchase, as it denies the ownership of appellants to the mortgage notes which they claim to hold, and in so far as it maintains the action of Wiltz, public administrator, for the simulation *pro tanto* of the act of mortgage under which appellants declare, be annulled and avoided. It is further decreed

2. That five-twenty-fourths of the principal of the fund realized be set apart for the benefit of the Germania Bank, as holder of note 19 for one-twenty-fourth; of David Roos, as holder of notes 14 and 18, for two-twenty-fourths; and Julius Meyer, as holder of notes 8 and 9, for two-twenty-fourths.

3. That out of the residue, nineteen-twenty-fourths, J. C. Morris and the Canal Bank, as holders of the notes 11, 12, 13, 15, 16, 17, 20, 21, 22, 23 and 24, be paid in full and by preference out of the amount accruing to and remaining over to the credit of Henry Roos, as holder of notes 5, 6, 7 and 10; and of the Germania Bank as holder of the notes 1, 2, 3 and 4.

4. That Moses Lobe & Co. and M. Frank be condemned to pay interest at the rate of five per cent per annum from June 18, 1881, on the balance remaining due by them respectively on the respective amounts of their purchases, to the extent of the aggregate amount of the notes held by appellants as follows: of notes 8 and 9 held by

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Julius Meyer, of notes 14 and 18 held by David Roos, and of notes 5, 6, 7 and 10 held by Henry Roos.

5. That the recorder of mortgages be ordered and required to cancel and erase the said conventional mortgage executed by L. B. Cain on February 25, 1878, and the legal mortgage resulting from the registry of the marriage contract between L. B. Cain and Caroline Cain, in so far as it affects their property, as soon as Moses Lobe & Co. and M. Frank shall have complied with the terms of this decree.

It is further ordered that in all other respects and particulars the judgment appealed from be affirmed and made the judgment of this Court.

It is further ordered that all costs below incurred in the action of Wiltz, administrator, as against the validity of the mortgage and the claims of appellants, be taxed against said public administrator, and all others costs below equally between Moses Lobe & Co. and M. Frank; and that the costs of appeal be taxed equally against P. S. Wiltz, Jr., public administrator, M. Lobe & Co., M. Frank, and the Germania Bank.

 No. 9825.

JOSEPH A. WALKER, SYNDIC, AND MRS. C. E. McVEAN, ADMINISTRATRIX, VS. MARY A. DOHAN.

The sale of the unexpired term of a lease involves the sale of the obligations as well as the rights. But nothing prevents the severance of the right of occupancy from the obligation to pay the rent and the sale of the former alone. The purchaser, in such case, would, of course, assume the risk of his right being defeated by failure of the principal lessee to pay his rent; but he would, by no means, become personally bound for the rent.

The sale in this case being of the right of occupancy alone, and not of the lease, the defendant cannot be held for the rent.

A PPEAL from the Civil District Court, for the Parish of Orleans.
Rightor, J.

Braughn, Buck, Dinkelspiel & Hart for Plaintiffs and Appellants.

W. S. Benedict for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The firm of C. E. McVean & Co. held a lease of a

39	743
46	522
39	743
48	949

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store-house in this city, which began on October 1, 1884, and ended on September 30, 1886. By the death of McVean and the insolvency of cession of the firm, the present plaintiffs, in the capacities stated, became their legal representatives.

A judicial order was obtained in those proceedings for the sale of the following described property, to-wit :

"The right of occupancy from day of sale to the 30th of September, 1886, of that certain store, situated at the southwest corner of Canal and St. Charles streets., said store having been lately occupied by C. E. McVean & Co., as a merchant tailor's and gentlemen's furnishing goods establishment."

The property thus described in the order, the advertisements, and the *proces verbal* of sale, was adjudicated to defendant on January 19, 1886, as the last and highest bidder, at the price of fifty dollars, which was paid.

A few days afterwards, viz: on February 1, in the consolidated proceedings of the succession and insolvency, plaintiffs jointly representing that the rent of the store due and to become due was secured by the lessor's privilege on the movables in the leased premises, which had been sold and the proceeds of which were then in their hands subject to said privilege, obtained an order of court authorizing them to pay in full the amount of said rent to the lessor, viz: \$3,750, which payment was made.

Immediately afterwards they brought the present suit, in which they claim from defendant, over and above the price of adjudication, the rent running under the original lease, from day of sale to end of lease, amounting to \$3,150.

Defendant filed an exception of no cause of action, which was sustained by the judge *a quo*.

A lease is defined by the Code as "a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing at a fixed price."

The contract embodies, in itself, reciprocal rights and obligations—the *right* of enjoyment and the *obligation* of paying the rent—which, so far as governed by the contract alone, coexist and adhere to each other. Hence, it has been repeatedly decided that the sale of the *unexpired term of a lease*, without qualification, is a sale of the lease for such term, as an entirety, including its obligations as well as its rights; or, in the language of the Court, that the "*bid for the lease* in such a case, is a premium which the bidder is willing to give for the transfer of the lease to himself, with all its obligations, as well as all

the rights thereto attached, from the moment of the adjudication." Bartels vs. Creditors, 11 Ann. 433; D'Aquin vs. D'Armant, 14 id. 217; Brinton vs. Datas, 17 id. 174; Lehman vs. Dreyfus, 37 id. 587.

A reference to every one of these cases will show that the thing sold was *the lease* for its unexpired term.

But in the instant case, as appears from the statement given, the thing sold is not the lease, but simply the right of occupancy for a given term. In other words, the *right* is severed from the *obligation*, and is sold separately and apart. In the earliest of the above-quoted cases, the learned dissenters, Lea and Spofford, JJ., said: "There are two ways of selling the unexpired term of a lease—one by selling it for a premium, subject to the payment of the rent to the landlord; the other by selling or assigning *the right of occupation* without the assumption of the rent. The latter is the more frequent way of selling or assigning it, since it rarely happens that the unexpired term of a lease is worth a premium. The case of a sub-lease is a familiar illustration of one form of this latter mode of assignment. The sub-tenant has nothing to do with the original contract of a lease. He is bound only for the payment of the rent which *he* stipulates to pay as sub-lessee; and whatever may be the rights of the *landlord* to cause the lease to be cancelled for non-payment of the rent by *his* tenant, he can in no case hold the sub-tenant liable for the payment of the rent under a contract to which he is not privy. Even the lessor's privilege would not extend to the effects of the under-lessee, except so far as the latter might be indebted to his principal tenant. C. C. 2676; 6 Rob. 294." Bartells vs. Crs., 14 Ann. 437.

Nothing in the majority opinion conflicted with these plain propositions of law. The only point of difference was whether the sale of the unexpired term of a lease, *es nomine*, without express limitation, involved the transfer of the obligations with the rights, or of the latter alone.

Mr. Hennen, the author of the Digest, and one of the most acute legal minds of his day, in his note on these decisions, anticipated the very question which is now presented, saying: "What forbids the severance of a right from its correlative obligation and the transfer of the one without the other? The lessee's right is to occupy the premises, his obligation to pay the rent. Can he not make a sale or donation of the right, retaining himself the obligation to pay the rent? It is true that the non-fulfilment might defeat the enjoyment by his vendee of the right transferred. But the transfer and sever-

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ance would be none the less possible and legal. * * * The lessor's rights are not thereby affected." 1 Hennen's Dig., p. 803.

These suggestions admit of no answer conformable to reason, and the right and power of the lessee to transfer his right of occupancy separately from his obligation to pay the rent, though dependent as regards the lessor upon *his* compliance with that obligation, must be conceded, unless restrained by special contractual stipulations.

Indeed, this very case affords a conspicuous illustration of the necessity for the existence of such right and power. Here was a case where the rent due by the insolvent lessees for the entire term was abundantly secured by privilege on movables which had been sold and the proceeds held by plaintiffs subject to the lessor's claim. By virtue of this obligatory payment of the rent, plaintiffs were left with the right of occupancy which was, naturally, useless to them and worthless, unless they could sell it.

What should hinder them from selling it and realizing, for the benefit of the estates which they represented, whatever it would bring?

They have exercised that right. They have severed the right of occupancy from the obligations of the lease, and have sold the former simply and alone. This is what the defendant purchased, according to the plain terms of the adjudication. She has not bought a lease or the unexpired term of a lease, and cannot be held for obligations which she never expressly or impliedly assumed.

Judgment affirmed.

DISSENTING OPINION.

BERMUDEZ, C. J. This controversy involves the question of the extent of the liability of the adjudicatee of the right of *occupancy* of premises, the lease of which had many months to run.

The suit is brought by the syndic of an insolvent firm and by the administratrix of the succession of a deceased partner for the recovery of rent paid the landlord, from the defendant, as the adjudicatee of the right of occupancy of the property for the unexpired term of the lease.

To the petition an exception of *no cause of action* was filed.

From a judgment sustaining this defense the plaintiffs have taken this appeal.

From the petition and documents annexed to it, the following appear to be the facts in the case :

On the 15th of August, 1884, the estate of S. B. Slocomb leased to Moriarty & McVean, for the term of *two* years, commencing on the 1st of October following, the southwest corner of Canal and St. Charles streets, for \$4,500 per annum, payable monthly; the defendant, Mary Dohan, serving a security for the payment of the rent and the fulfillment of all the obligations thereof.

The firm having gone into insolvency, and one of the partners, Chas. E. McVean, having died, the court ordered the sale of the right of occupancy of said premises.

On the 19th of January, 1886, the sheriff offered the right of occupancy for sale, which was adjudicated to the defendant for \$50, paid cash, who is now sued for \$3,150, for the rent from that date to the termination of the lease, 1st of October, 1886.

After the sale, the syndic paid, with the authority of the court, the landlord, with a view to a subrogation to the latter's rights under the lease.

The defense, practically, is that, as the *right of occupancy* and *not the lease*, was purchased, the defendant is not liable for the rent of the premises beyond the \$50 which were actually paid to the sheriff.

It has been held, in several cases, that when the lease is sold to liquidate a succession, or an insolvency, the amount of adjudication is to be considered as a *bonus or premium* for the lease, and that the adjudicatee is liable for the rent, under the conditions of the lease, for the unexpired term.

The last expression of the judicial mind on that question is to be found in the case of *Lehman vs. Dreyfus*, 37 Ann. 587, in which previous authorities were reviewed and expounded. 11 Ann. 433; 14 Ann. 213; 17 Ann. 174.

While counsel for the purchaser denies the applicability of the principle announced in the most recent case, he remained perfectly silent touching the anterior adjudications, and refers to no authority to sustain his position.

It is impossible to discern in this case any difference between the sale of a lease and the sale of the right of occupancy. Of what advantage would the right to the lease be without the right of occupancy, and what would be the benefit of the right of occupancy without the lease?

The lease confers the right of occupancy and the right of occupancy is the consideration of the lease. There was no severance.

Whoever, therefore, acquired the right of occupancy under the

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lease, acquired the lease, and whoever bought the lease, bought the right of occupancy under it.

If, by purchasing the lease, the adjudicatee incurs the obligations of a lessee, it is clear that acquiring the right of occupancy is acquiring the lease, and is an indisputable voluntary assumption of consequent obligations.

The jurisprudence which has established the liability of the purchaser of the lease for the payment of the rent, may be erroneous; but it has for thirty years become a rule of property which must be respected, and which cannot be destroyed by subtle questionable distinctions without a difference.

When the court ordered the sale, and when the sheriff offered the right of occupancy, bids, in the shape of *premiums*, were expected for the purchase of that right as a thing, as the object to be sold, which the insolvents surrendered to the possession and enjoyment of the premises, subject, of course, to all the rights and obligations, as lessees, during the eight months and ten days to run before the expiration of the lease.

In other words, what was offered and what was sold was the *privilege of occupying* the premises, as the insolvents would have done had they not surrendered to their creditors.

The adjudicatee, by purchasing the right of occupancy, jumped into their shoes, and has thereby acquired all their rights and incurred all their obligations under the lease.

In the case of *Brinton vs. Datas*, last cited, one of the grounds of resistance was, as appears by the transcript, that the lease (offered in evidence, but to which the defendant was *not* a party) was *res inter alios acta*. The objection did not hold.

The court then declared that the adjudicatee was liable for the rent, whether the lease or the terms and conditions thereof were announced in the advertisement or not. "It is the *legal effect of the adjudication*."

In the present case the adjudicatee cannot plead ignorance of the lease, for she, by a specially authorized agent, intervened in the act and served as surety.

She cannot be heard to say: that she is a "*stranger*," or "*third person*." She actually had knowledge that there was a lease, and that the lessees were to pay rent at the stated rate for the premises.

Purchasing the right of occupancy was purchasing the lease, for without the lease, the right of occupancy would not exist. The right

Scott & Co. vs. Seelye.

of occupancy, therefore, implies the lease. This must have been the general understanding at the sale.

To suppose that when the defendant offered \$50 for the right of occupancy, during *eight* months and more, of premises rented for \$4,500 *per annum*, she understood that she would, on payment of that paltry sum only, be entitled to the possession and enjoyment of the property during that time, free from the rent under the lease, would require a stretch of credulity which the most conciliating mind cannot stand.

WATKINS, J., concurs in this opinion.

No. 9694.

W. B. SCOTT & CO. VS. A. B. SEELYE.

The ten years within which a suit to revive a judgment must be brought, begin to run from the *rendition* of such judgment.

This means: Its *signature* by the lower judge, or its finality on appeal, whether when the last judicial day allowed for asking a rehearing expires, or when such rehearing is refused.

Particularly is such the initial point for prescription, when the judgment sought to be revived, is first rendered by the appellant's court, in place of that rendered by the lower court.

The finality of such judgment on appeal is not to be computed from the date of the *signature* of the reversed judgment in the lower court.

When ten calendar years appear to have run from the finality of the judgment, the burden is on the plaintiff to show that the suit to revive was instituted within the delay.

A mere omission to do so does not justify a judgment declaring the action prescribed.

Where it is clearly in the power of a plaintiff thus omitting or failing, to adduce proper proof, it would serve no useful purpose to dismiss his suit. The case ought to be remanded.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

W. S. Benedict and H. C. Cage, for Plaintiffs and Appellants.

J. McConnell and H. E. Upton, for Defendant and Appellee :

First. Neither a suspensive or devolutive appeal will prevent prescription from running against the judgment appealed from. *Marbury vs. Pace*, 30 Ann. 1330.

A judgment becomes final from the date of the signature of the judge *a quo*, and if ten years are allowed to elapse from the date of such signature, before citation of revival is served on the defendant, it is prescribed. The delay caused by a suspensive appeal will not be counted in favor of the judgment creditor to defeat the plea of prescription.

Walker vs. Succession Hays, Town Public Administrator, 23 Ann. 176.

A devolutive appeal from a final judgment does not suspend or interrupt prescription pend-

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ing the appeal. Acts of 1853, p. 250. Where a law is clear and free from all ambiguity, the letter of it must not be disregarded under the pretense of pursuing its spirit. C. C. 13. The citation required by the Act of 1853, page 250, in that the judgment may be revived before it is prescribed, refers to the judgment rendered by the district court, and not that of the Supreme Court. 21 Ann. 295; 23 Ann. 587.

Second. Any party interested in a judgment may have the same revived by causing the judgment debtor to be cited before the court which rendered the judgment, before prescription has accrued. The restraining of the execution of a judgment by a writ of injunction sued out by the judgment debtor, does not interrupt the current of prescription. If, therefore, more than ten years are allowed to elapse from the date of the rendition of the judgment, without causing the judgment debtor to be cited, the judgment is prescribed. Yale, Jr. & Co. vs. Randle & Co.. 23 Ann. 579.

The rendition of the judgment is the signing thereof by the judge; at least, that act fixes the date of the judgment and the period from which prescription begins to run. C. P. 545, 546, 547, 555.

Hereafter, all judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from their rendition, unless revived at any time before they are prescribed by having a citation issued according to law, to the defendant or his representative, from the court which rendered the judgment, unless the defendant or his representative show good cause why the judgment should not be revived. R. C. C. Art. 3547; 31 Ann. 342, 343; 21 Ann. 295; 29 Ann. 69; 30 Ann. 1331; Acts of 1853, p. 250; R. S. 2813.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit to revive a judgment. The plea of ten years' prescription in bar, having been sustained, the plaintiffs appeal.

The judgment rendered by the lower court was *in favor of the defendant*, and signed on the 3d of July, 1874.

On appeal, it was reversed on the 24th of December following, and judgment was rendered for \$5000, with interest, in favor of plaintiffs.

On the 14th of January, 1885, the present action was brought to revive, and on the next day citation was served.

The district judge sustained the plea of prescription, and rejected the demand.

Counsel for plaintiffs insist very properly that the ten years began to run only on the day when the judgment in favor of plaintiffs became final and executory.

It appears, from the minutes of this Court, that within the six judicial days allowed, an application for a rehearing was filed, which was refused on the 20th of February, 1875.

The transcript of appeal in the present suit, does not show that this material fact was proved in the lower court. The burden was upon the plaintiffs to show that they had brought their action to revive within the ten years, after the judgment had become executory.

The contention that the judgment of the Supreme Court must be

read behind the signature of the district judge, as though rendered by him, and that prescription must be computed from that signature, can hardly be considered serious—for, that would be to allow prescription to run against a judgment *before it existed*.

By "*rendition*" found in Article 3547 R. C. C. the Legislature meant the finality of the judgment, sought to be revived, whether by the signature of the district judge, or by the expiration of the last judicial day allowed to ask a rehearing, or the refusal of such rehearing.

Owing to plaintiffs failure to show that the suit was brought and citation served, within the delay, there was no initial point for the computation of the prescription and such omission could not justify a judgment sustaining the plea.

Dismissing the suit, would serve no useful purpose.

In furtherance of the ends of justice the case ought to be remanded.

It is, therefore, ordered and decreed that the judgment appealed from be reversed, and that this case be remanded to the lower court for further proceedings according to law, defendant to pay costs of appeal and those of the lower court, from the filing of the plea of prescription; costs to be subsequently incurred, to abide the result of the suit.

No. 9939.

THE STATE OF LOUISIANA VS. JAKE DURR.

The rule that the right of peremptory challenge is waived when the juror is passed over to the opposite party, cannot be maintained without qualification; but it must be exercised before the juror is accepted by the opposite party and commenced to be sworn.

Neither the prosecution nor the accused, though he be one of two, or more, jointly indicted and on trial, can be heard to complain of peremptory challenges tendered by the other. Evidence pertaining to collateral issues, disconnected with the charge against the accused, cannot be introduced. Same would be confusing and misleading to the jury.

It is improper that the trial judge should give to the jury a special charge which contains statements of fact, although hypothetically stated, if likely to influence the mind of the jury in reference to the facts proven in the case.

The judge is not forced to adopt the language in which defendant's counsel may couch a requested special charge; he may recast the propositions and submit them in his own terms. When special instructions asked for, are partly correct and partly erroneous, the judge is neither bound to affirm nor repudiate it as a whole, but he may restate it in his own terms.

The correctness of the refusal of the district judge to sign *one* bill of exceptions cannot be tested by the presentation and signing of *another*, with reasons assigned. It must be presented in a different form of proceeding.

A PPEAL from the Tenth District Court, Parish of DeSoto.
Hall, J.

M. J. Cunningham, Attorney General, and J. C. Pugh, District Attorney, for the State, Appellee:

39	751
44	384
39	751
50	1139
39	751
113	730
39	751
118	149

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1. A tender of the juror to the accused is no waiver of the right of peremptory challenge. Wharton, P. and P. § 675; Waterman, C. D. P. 602 (140); Wharton, C. P. and P. 672; Bishop on C. P., Vol. 1, § 945; Proffat Jur. Trials. §§ 105, 165; State vs. Roland, 34 Ann. 19.
2. The rejection of a juror by the trial judge, *even if erroneous*, affords of itself no legal ground of complaint to the accused. 1 Bishop C. P. § 926; State vs. Ostrander, "13 Iowa, 435;" Wharton, Cr. Pl. and Pr. § 620; State vs. Barnes, 34 Ann. 395; State vs. Eloi, ib. 1195; State vs. Farrar, 35 Ann. 315. This is no longer an open question in criminal jurisprudence. State vs. Creech, 38 Ann. 481; State vs. Shields, 33 Ann. 1410.
3. A witness cannot be interrogated, *even on cross-examination*, about immaterial and collateral matters.
4. General character for "badness" or "infamy" is inadmissible. Wharton Cr. Ev. §§ 472, 484 and 486.
5. The test of whether a fact inquired of, on cross-examination, is collateral, is: would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea. Ib. § 484, and authorities therein cited.
6. The court is not bound to give instructions in the words asked for, however material might be the instructions; but if given substantially, so as to meet the whole of the point, it is sufficient. State vs. Carr, 22 Ann. 407; State vs. Porter, 35 Ann. 1159.
7. The trial judge may withdraw an erroneous instruction, and correct his error. State vs. Jones, 36 Ann. 204. Can withdraw illegal and incomplete evidence of the jury. State vs. Davis, 34 Ann. 351; State vs. Parce, 37 Ann. 269.
8. The trial judge is limited to the law, and cannot trench on the facts. R. S.
9. The trial judge is not required to give a special charge when it is substantially covered by his general charge to the jury.
10. Proper way to secure the signature of the trial judge to a bill of exception is by mandamus. 17 Ann. 287; 26 Ann. 67. The judge properly refuses to sign a bill of exception which does not conform to the facts.

E. W. Sutherland and Scales & Lee for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The defendant was indicted for an assault upon Julia Hutchins, with an intent to commit a rape, and from a verdict of guilty and sentence by the court to imprisonment for one year at hard labor, he has appealed.

The alleged irregularities in the proceedings and errors of the trial judge are presented by sundry bills of exception reserved for the accused.

I.

The *first* one was taken to the judge's allowing the district attorney to *peremptorily* challenge a juror *after* he had been examined on the part of the State on his *voir dire* and surrendered to defendant's counsel for examination.

The argument is that the State had fully examined the person tendered as a juror, and had *accepted* him, and that the district attorney had no right to *reconsider* his acceptance and selection, and

thereafter peremptorily challenged and discharged the person from service as a juror.

The trial judge ruled that the right of either party to challenge a juror may be exercised at any time before the juror is sworn, and that defendant has no right to complain, because he may only exercise the right of *rejection*, and not the right of *selection*, by the State.

In this State the right is given to the prosecution to exercise peremptory challenges, as well as to the accused. R. S. 997, 998, Act 36 of 1880.

At common law the prosecution was not entitled to peremptory challenges.

Whar. Crim. Plead. and Practice, Sec. 612, that author says: "Under ordinary circumstances the *defendant's* right to a *peremptory* challenge is waived when the juror is *passed over* to the court or the prosecution, though this opinion cannot be maintained without qualification, as, on due cause shown to the court at any moment *before the case is opened and the juror in question is sworn*, it will permit the challenge.

"In any view, the right ceases when the panel is complete and accepted." *Ibid*, Sec. 617.

In another section the same author says, in discussing the same subject, "that the better opinion is that, on due cause shown, the right may be exercised at any period down to the completion of the panel." *Ibid*, Sec. 677.

We do not understand the phrase "on due cause shown," occurring in these two quoted sections, to relate to *challenges for cause*. Same must be understood in the sense of reason, or excuse—i. e., that the defendant may make a *peremptory* challenge, *after* he has passed the juror, if he can assign to the court a reasonable excuse for the delay in preferring it. *Peremptory* challenges alone are under discussion in those sections.

This being the rule at common law, where the prosecution has no right to exercise peremptory challenges, there is no good reason why it should not apply to this State, where the prosecution is so entitled.

In treating of its exercise in those States whose laws are similar to our own, Wharton says: "The challenge, *either by the prosecution or the defense*, must be before the oath is commenced, down to which time it exists. The moment the oath is begun it is too late." *Ibid*. Sec. 672; 1st Bishop Crim. Plea. and Prac. Sec. 945. But same author says: "It is no waiver of the right to challenge *for cause*, for the de-

fendant to pass the juror over to the court, or to the opposite side for examination." Ibid. Sec. 675.

The rule laid down by this Court's predecessors in *State vs. Cummings*, 5 Ann. 332, is that "the State should first exercise the right of challenge *for cause or peremptorily*, and present the juror to the accused as a good and lawful juryman; that the accused should then exercise his right; and that *the State should not be allowed to challenge after the juror has been accepted by the prisoner.*"

Wharton says "the right of *peremptory* challenge is a right *not to select, but to reject.*" Ibid. Sec. 620.

Hence, neither the State nor the defendant has any right to complain of peremptory challenges tendered by the other.

"Neither of two defendants, in one indictment, on a joint trial, has cause to complain of a challenge by the other." Ibid. Sec. 680.

In *United States vs. Marchant*, 12 Wheaton 482, the Supreme Court say: "The right, therefore, of (peremptory) challenge does not, necessarily, draw after it the right of *selection*, but merely of *exclusion*. It enables the prisoner to say who shall *not* try him; but not to say who *shall be* the particular jurors to try him." 4 Blackstone, p. 353.

It is clear that the district attorney had the legal right to *peremptorily* challenge the juror, E. V. Flores, at any time prior to his *acceptance* by the accused.

II.

A second bill was reserved by the defendant's counsel to the refusal of the court to allow him to ask Will Collins—a witness for the State under cross-examination—if he had "seduced his cousin, Julia Laurent, who lived in proximity to his mother's house." The ground on which counsel maintains the competency of the testimony is "that it will show that he is a seducer; and the true motive of the said Oscar Collins and Will Collins, brothers, in going, at that time, to the house of the prosecutrix, their cousin; that their true purpose and motive (in) going there was * * * for the purpose of entrapping and overtaking the defendant, at the house of the prosecutrix, by prior arrangement and agreement between them," etc.; * * * "and that their going to the house was not by accident, or for the purpose of protecting the prosecutrix against the defendant," etc.; * * * "and that the said Oscar and Will Collins and defendant were rivals and competitors for the *illicit* love of the prosecutrix," etc.

The trial judge assigns the following reason for disallowing an answer to the question propounded, viz: "The matter inquired

about, the seduction of Julia Laurent by Will Collins, occurred five or six years ago, and that unfortunate girl has been dead several years; and the court was unable to see how *that* circumstance could have any relation to this case, or any tendency to prove a conspiracy, etc., as claimed, especially as there was *no evidence whatever* of a conspiracy, or that the Collinsees went to the prosecutrix's house for any improper purpose," etc.

We agree with the district judge. If admitted, and the answer had been an affirmative one, it could not have effected in any way the issue joined on the charge of assault, with intent to commit a rape. The alleged seduction was a collateral issue not on trial, and totally disconnected from the alleged criminal assault by the accused upon an entirely different person.

The ruling is approved.

III.

A *third* bill was reserved by the defendant's counsel to the refusal of the trial judge to give the jury the following special charge, viz :

"In cases of this kind, the evidence of the prosecutrix is to be received with caution. In coming to your conclusion as to whether the defendant assaulted the prosecutrix with intent to rape her forcibly and against her will, if you should find that he assaulted her at all, you must take into consideration all the surrounding circumstances at the time. The question of intent is one of fact to be deduced from all the circumstances surrounding the case. If you should find that any assault was made by the defendant on the prosecutrix, then, in coming to your conclusion as to whether such assault was made with intent to rape her, notwithstanding such resistance as she might make, such facts, as that the assault was made in the day time; in a place near the public roads, or railroads, or depots, houses or places open to public view; occupied by, and frequented by people; within reach of assistance, and within sight and call of assistance, and that she made no outcry or call for assistance, and made no effort of escape when she had opportunity to do so; or that she remained alone in the house, so situated, with the defendant, for any considerable period of time, after she suspected the intent of defendant to rape her; or that she quietly remained alone in the house, so situated, with defendant, for a considerable period of time after such alleged assault, and that she only made outcry to a person who *unexpectedly approached* the house, and who was not discovered until immediately in the presence of defendant and prosecutrix, who were then, or had been for some considerable period of time, seated,

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in quiet conversation, after the alleged assault had been made, if any assault had been made; and, all such circumstances, justify strong inferences that the assault, if any assault was made, was not made with the intent, on defendant's part, to rape the prosecutrix, notwithstanding all resistance she might make."

The court refused this charge as a whole, but accepted part of it. The portion of the special charge adopted by the court and read to the jury was the second and third sentences thereof as follows:

"In coming to your conclusion as to whether the defendant assaulted the prosecutrix with intent to rape her forcibly, and against her will, if you should find that he assaulted her at all, you must take into consideration all the surrounding circumstances at the time. The question of intent is one of fact to be deduced from all the circumstances surrounding the case."

The bill further recites that defendant's counsel had requested previously, that a written charge be given, and that it was given; and it charges that, after having declined to make the special charge requested, the trial judge announced *orally*, "that in lieu of the remaining portions of said special charge," he would read certain sections of Wharton's Criminal Law, which are copied into the bill.

He insists that the action of the court in refusing said special charge, "*as presented in writing*, was illegal, and that it was the duty of the court to have read to the jury the special charge *in full, as presented, or to have rejected it in full.*"

He further excepts to the *oral* statement made by the judge to the jury, in declining to make the special charge requested; and to his *reading* law to them from books, as applicable to the case, on the ground that the accused was entitled to a charge *exclusively* in writing.

Further, that "*the attempted withdrawal* thereof from the jury, after objection was made by the defendant's counsel, and the attempted reduction of it to writing, was illegal. That the written charge had already, theretofore, been completed and read to the jury, and that *the additional* charge, reduced to writing and read to the jury, was not requested by the defendant or the State; and that the court, after having furnished the written charge to the jury, had no right to write and read other and additional charges or sections of the law; and the action of the court was calculated to confuse and mislead the jury."

The bill is *in extenso* and purports to recite much of the evidence that was adduced upon the trial, and which was reduced to writing, and appears in the record annexed to bill No. 2.

The judge, in the reasons that are annexed to this bill, makes the

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statement that the *special charge* asked for contains a *partial statement* of the evidence, with facts *proved* intermingled with what was *not proved*, and partial statements of the testimony of prosecutrix, omitting the reasons she gave for not making an outcry or escape, viz: that defendant threatened to kill her if she cried out or attempted to escape, which, if given by the court to the jury, would have been likely to have influenced their decision on the facts by reciting in their hearing and refreshing their memories upon a partial and incorrect statement of them, without giving them the law applicable to the whole and correct statement of facts. * * * That if the court had given this special charge, as asked for, it would have been charging the jury on the facts, in violation of R. S., Sec. 991," quoting it.

"It will be observed that the statement of facts in the special charge rejected, is not given hypothetically, but in the narrative form."

It is elementary that the trial judge is forbidden to charge the jury on the facts; and it is equally improper that he should give them in charge, partial statements of fact, although hypothetically stated, if likely to influence their minds upon the facts in the case.

Hence the rule announced by Wharton, that the judge is not "forced to adopt the language in which counsel may couch instructions prayed for; but may *recast* the propositions, and submit them in his *own* terms; nor is he, when an instruction asked for is *partly correct, and partly erroneous*, bound either to *affirm or repudiate it as a whole*; but as has been seen, he may *restate* * * the law in his own terms." Whar. Crim. Plea. and Prac., sec. 712,

This Court has followed that rule in *State vs. Porter*, 35 Ann. 1159.

In *State vs. Jackson*, 35 Ann. 769, this Court held that where the "charge requires qualification, limitation or explanation, the refusal of the judge to give it will not be disturbed." 35 Ann. 775, *State vs. Ricnlft*; 36 Ann. 84, *State vs. Chevallier*.

The reasons assigned by the judge for his ruling appear to be ample and strictly in accord with the authorities quoted.

In reply to the counsel's objections to the judge's *oral* statements, and explanation of his refusal to give the special charge requested, to the jury, he says: "The *oral* remarks withdrawn and given in writing, it is believed, could not have prejudiced the defendant."

The course pursued by the trial judge in this particular, finds sanction in decisions of this Court. 36 Ann. 204, *State vs. Jones*; *Waterman's Crim. Dig.* pp. 379, 624.

Whether the *oral* observations made by the judge were withdrawn,

or in substance reduced to writing and read to them, is of no practical importance. The defendant's counsel contends that there is a fatal variance between the judge's oral statements and his supplemental written charge; and prejudicial to the accused.

Neither the record nor the bill of exceptions discloses such variance and we cannot therefore consider that question.

IV.

The *fourth* bill presents an objection to the judge's declination to give another special charge and which he refused on the ground that the matter covered by it was substantially embraced in the written charge already given to the jury.

The charge given to the jury was not brought up with the transcript and is not included in it, and we cannot make the comparison, and must accept the judge's statement as correct.

It was quite unnecessary that any part of the charge should have been repeated. Such a course would have been confusing and misleading to the jury.

V.

The *fifth* bill was taken to the judge's refusal to grant the accused a new trial.

The affidavit appended to the motion is elaborate, and to the effect that, in the hurry of the preparation of the special charge discussed in Bill No. 3, defendant's counsel made an accidental mistake and omission therefrom, of the words "if you find such circumstances to have been proven," and which it was his intention to have incorporated therein, and that he was unaware of such a mistake having been made until some time afterward; and that he subsequently proposed to add same thereto, but was refused permission by the judge so to do; and that same exercised a prejudicial effect upon the special charge requested and refused.

On this ground only his application for a new trial rests, though the bill of exceptions to its refusal mentions the three first bills taken.

The judge assigns as the reason why he refused to grant a new trial that he did not believe that defendant was prejudiced by any ruling he had made, or by the failure of his counsel to present his special charge in hypothetical, rather than narrative form.

We do not regard the omission from the requested special charge of the qualifying words as having produced any material difference in the ruling of the court, or as having exercised any injurious effect upon the verdict of the jury. The judge gave them in charge the substance of the requested charge; and whether the statement of facts, or the ref-

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erence made to them in the charge had been stated hypothetically, or as proven facts, the same should not have been given to the jury, if the judge believed they might unduly impress the minds of the jury as to what were proven facts. The charge of the judge should in no wise *trench* on the facts. It must be strictly confined to an explanation of the law applicable to the case.

The application for a new trial was properly refused.

VI.

The *sixth* bill of exceptions was taken to the refusal of the judge to sign another bill of exceptions with the special charge, so altered as to conform to the theory of defendant's counsel in reference thereto, as set out in his affidavit for a new trial annexed. Among other reasons the judge assigns for refusing to sign the bill in this form, is that "it would be to sign what is not true, as the court never refused the charge as therein presented."

In this refusal the court was correct. But, if error there was, same could not be reversed in this form of proceeding.

Finally, our study of this case has convinced us that defendant has had a fair trial.

Judgment affirmed.

No. 9872.

THE STATE EX. REL. E. DABOVAL ET AL. VS. THE POLICE JURY,
PARISH OF ST. BERNARD.

When the appealability of the case does not clearly appear, from the face of the pleadings, to determine the question, affidavits relating to the amount or value in dispute filed in this Court will be considered.

In a suit attacking a franchise or privilege granted to a person or corporation, and it appears such franchise or privilege exceeds in value \$2,000, this Court has jurisdiction. A mandamus will lie to compel the performance of duties *purely ministerial* in their nature, and when they are so clear and specific that no element of discretion is left in their performance, but that as to acts or duties necessarily calling for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required, *mandamus* will not lie.

A PPEAL from the Twenty-fourth District Court, Parish of St. Bernard. *Livaudais, J.*

Hampden Story and Sambola & Ducros for the Relators and Appellees:

1. Courts of justice are bound to interfere with the discretionary power of a municipal corporation, when the exercise thereof is unreasonable, unjust, oppressive, in restraint of trade, or in contravention of common right, or tends to create a monopoly. Const.

39	759
47	806
39	759
48	139
39	759
105	733

39	759
119	257

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- 50,248; Act of 1884, No. 92; Cooley, 192, 200, 203; 33 Ann. 1182; 18 Ohio 300; 1 Duer, N. Y. 494; 1 Dillon 394; Act of 1886, No. 101, § 9; Boone, § 292, 296-7, 310; 45 Ill. 95; 78 Ill. 405; Dillon 256; 7 Paige 261; 24 Wis. 542; 46 Ill. 490; 40 N. Y. 273; 3 Pick 462; 40 Mo. 550; 68 Mo. 544; 29 Wis. 307; 30 Wis. 322; 43 Iowa 524.
2. A mandamus lies to enforce, not only the performance of a duty, but also any legal right when the slowness of ordinary legal forms is likely to produce great delay and defeat the ends of justice, as well as in cases where there is no other specific remedy. *C. P.* 829; *Moses on Mandamus*, 18; 103 Ill. 552; 7 Cal. 286; 1 R. 496; 13 Ann. 291; 38 N. J. 262.
 3. An affidavit, that the facts are true to the best of affiant's knowledge and belief are sufficient, is sufficient in law. 1 R. 316; 13 Ann. 89.
 4. Exceptions to forms are waived by going to trial without a previous decision thereof. 23 Ann. 255; 18 Ann. 207; 26 Ann. 312; Vol. 2 Dillon 825, 828, 906.
 5. An affidavit to an original petition dispenses with swearing again to a supplemental petition, asking for a subsidiary writ or remedy on the very same sworn allegations. *Neminem cogit ad vana*, 7 R. 444; 18 Ann. 243.

F. C. Zacharie on the same side.

E. Howard McCaleb and *James Wilkinson* for the Respondents and Appellants:

1. *Mandamus* will not lie to compel the members of a police jury to perform an act resting in their discretion. *High's Ex. Leg. Remedies*, §§ 24, 34, 42, 325; *Dillon's Municipal Corporations*, § 669; 2 La. 393; 21 Ann. 352; 20 Ann. 518; 22 Ann. 603; 23 Ann. 333; 29 Ann. 692.
2. The authority conferred upon police juries by Art. 248 of the Constitution is a delegation of the police power, with the exercise of which the Courts cannot interfere without usurping jurisdiction.
3. The police jury cannot be compelled to grant a special permit to carry on a slaughterhouse. The Constitution only requires them to pass general "ordinances designating the places for slaughtering," and expressly prohibits the restriction of the business "to the lands or houses of any individual or corporation."
4. In executing Art. 248 of the Constitution, the police juries act in the dual capacity of police juries and boards of health. Sec. 3. Act 92 of 1882.
5. The act creating the Crescent City Slaughterhouse (No. 118 of 1869), and designating the limits for the business, is not the ordinance authorized by the Constitution, but a State law which has been expressly repealed by the Constitution itself.
6. Motives and influences alleged to have actuated members of the police jury in their official conduct, cannot be inquired into collaterally. *Dillon on Municipal Corporations*, § 248. They may be removed from office (Const. Art. 201; Act 135 of 1882); or punished under the penal laws for bribery, corruption, oppression or misdemeanors. Const. Art. 173; Act No. 4 of 1873; Rev. Stats. 862 and 869.
7. *Villavaso vs. Barthet*, recently decided, settles this case.
8. "A mandamus cannot be joined to an injunction." *Manning's Unr. Cas.* 81.

E. T. Beauregard on the same side.

ON MOTION TO DISMISS

- The opinion of the Court was delivered by
 TODD, J. The relators, who had organized themselves into a cor-

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poration known as the "St. Bernard Slaughterhouse Company," applied to the police jury for the privilege of erecting, maintaining and carrying on a slaughterhouse at a place designated in said parish.

This application was refused, and the relators then resorted to a mandamus to compel them to grant the privilege asked, and from a judgment making the mandamus peremptory defendant appeals.

The motion to dismiss is on the grounds:

1. That the matter in controversy does not exceed \$2000 in value.
2. That if it does exceed that sum, that the appeal bond is insufficient in amount.

I.

The pecuniary interest involved in the controversy does not explicitly appear from the pleadings, and in the record we find several affidavits, among them that of the president of the police jury of the parish, that the pecuniary interest of each party to the suit exceeds two thousand dollars.

These affidavits, in connection with the averments of the petition in regard to the capital stock of the corporation (\$100,000), and the purposes and objects of the corporation leave no doubt on our minds that the value of the franchise sought by the relators far exceeds in value the judicial amount.

II.

The appeal bond was fixed in the order of the judge; and in a suit of this character it was sufficient for a suspensive appeal.

Motion refused.

ON THE MERITS.

WATKINS, J. The relators are the St. Bernard Slaughterhouse Company, a corporation organized under the laws of the State, for the purpose of conducting the business of slaughtering cattle; and the individual members thereof.

They announce the purpose of this corporation to be, to erect and maintain all the buildings and wharves that are necessary to promote their business, "on the property secured by them, and situated * * in the upper portion of the parish of St. Bernard, adjacent and contiguous on the *upper line* to the property and limits of the Crescent City Slaughterhouse and Live Stock Landing Company." They allege their right under the Constitution and laws of the State to prosecute said business "upon their property," and aver "that it is made the duty of the police jury to grant them a permit to locate a slaughterhouse

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on the property above mentioned;” and that said locality is the one that has been, by law, assigned as the proper one for such purposes.

They further aver that the citizens of that vicinity favor their enterprise, and united with them in their petition to the police jury, requesting “the right to exercise the business of slaughtering cattle and other live stock, in the parish of St. Bernard, *on the property of Mrs. E. Daboval*,” but that “notwithstanding the law and the facts, the said police jury arbitrarily, dictatorily, without a semblance or warrant of law, and without plausible reason or excuse, refused to sanction their plan, clear, indisputable constitutional right and privilege to pursue, prosecute and carry on the business of slaughtering cattle and other live stock; and to erect, maintain and operate a slaughterhouse or *abbatoir on the property secured by them.*”

They charge that two of the members of the defendant police jury who participated in the proceedings of that body and voted against their petition were directly interested in its defeat and in favor of the Crescent City Slaughterhouse Company.

They further charge that another member declined to vote because of his apprehension that he might forfeit some political preferment or station. And that the appointment of another member was secured for the express purpose of defeating their application. They aver that the two last indicated cast their votes against their petition at the dictation of the Crescent City Slaughterhouse Company.

Relators represent that the action of the police jury in arbitrarily refusing their application was in violation of their clear legal right, and was controlled by a monopoly abolished by the State Constitution, and same is, in effect, an attempt to preserve and perpetuate the exclusive privilege and monopolistic feature of said corporation in plain violation of law and the settled jurisprudence of *this court* and of the Supreme Court.

They represent that they have exhausted all ordinary means of securing their rights in the premises; that they are without remedy by means of an ordinary suit, and they pray for a writ of mandamus to compel the defendant police jury “to proceed to hold a meeting and grant the privilege prayed for in this petition, by extending the limits already assigned by law *to their property.*”

Defendant excepted that relator’s petition disclosed no cause of action:

1. Because the power delegated by Article 248 of the Constitution is legislative in its character, and its exercise is discretionary and beyond judicial control.

2. It being the parochial board of health, its sanitary measures are not judicially reviewable, unless in violation of the Constitution.

3. Its declination of relator's application for the establishment of a slaughterhouse in the first ward of the parish was the determination of a sanitary measure and the exercise of a discretion vested in it by law, and beyond the reach of *mandamus*.

4. That the action relators complain of was taken by the respondent in its collective and representative capacity, and not by the members individually and separately; hence, the personal *motives* of the individuals in casting their votes for or against their petition cannot be canvassed or inquired into, particularly in a *mandamus* proceeding.

A *mandamus* is a *summary* proceeding and triable out of term time and at chambers, therefore the strictness of ordinary rules of practice may be properly relaxed in such case, and exceptions and answers plead conjunctively, and disposed of in one judgment.

I.

The important question raised by the pleadings is whether relators have shown a cause of action to entitle them to judgment.

Are the alleged duties of the respondent discretionary or ministerial? Do the provisions of Art. 248 of the Constitution authorize relators' averments?

It provides that "the police juries of the several parishes * * * shall alone have the power of regulating the slaughtering of cattle and other live stock within their respective limits; *provided*, no monopoly or exclusive privilege shall exist in the State, nor such business be restricted to the land or houses of any individual or corporation; *provided*, the ordinances designating the places of slaughtering shall obtain the *concurrent* approval of the board of health or other sanitary organization."

From the foregoing provisions it is manifest

1. That the police jury of St. Bernard alone has the power of regulating the slaughtering of animals thereon.

2. That in so doing it is clearly contemplated that its members shall act collectively, and through ordinances adopted by them, in making selections of localities suited thereto.

3. That such ordinances shall receive the concurrent approval of the health authorities of the parish. Such approval is a *condition precedent* to any locality being selected. It is only with the concur-

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rence of the health authorities that any valid selection can be made. An ordinance purporting to regulate the slaughtering of animals without the concurrence of the health authorities would be void.

In order that, in any case, the police jury may obtain the concurrent approval of the health authorities, it must, of necessity, first consult the health of the inhabitants in the locality of the proposed establishment for slaughtering animals.

This necessarily involves the exercise of a *very delicate discretion* on their part.

But, while the organic law does require the "concurrent approval" of the health authorities, it does not subordinate the action of the police jury to their control. The law does not deprive the police jury of its power of regulating this business, or of selecting the place or places at which same may be established and carried on. It does not oblige that body to select any *particular* place or locality such sanitary authority may designate. It can exercise the right of approval or disapproval of the selection made by the police jury. It may *reject*, but *cannot select*.

Applying these principles to the case in hand, it is obvious that *mandamus* is not the proper remedy whereby the relators can obtain relief. The duties that are imposed by law on the respondent are not ministerial, but essentially and purely discretionary.

This, relators impliedly admit by charging that the motives which actuated certain of the members of the police jury were bad, and that their votes were improperly influenced against their petition. For, if the duties thereby imposed are *ministerial*, and in the exercise of which they had no discretion, the particular motives by which certain members were actuated, need not be taken into the account. But if they are discretionary, and involve the exercise of judgment and volition, same cannot be controlled by *mandamus* though the discretion has been abused.

Should the refusal of the *mandamus* result in the maintenance of a monopoly of the business of slaughtering animals by some other corporation, its duration will be temporary, and will depend upon the application of the proper remedy by interested individuals.

II.

High defines the writ of *mandamus* thus:

"The modern writ of *mandamus* may be defined as a command issuing from a common law court of competent jurisdiction, in the name of the State or sovereign, directed to some corporation, officer

or inferior court, requiring the performance of a *particular duty* therein specified, which duty results from the official station of the party to whom the writ is directed, or from the operation of law." High's Ex. Legal Rem., Sec. 1.

Our Code defines it to be "an order * * * addressed to an individual corporation or court of inferior jurisdiction, directing it to perform some *certain act* belonging to the place, duty or quality with which it is clothed." C. P. 829.

Relators demand the right to erect, maintain and operate a slaughterhouse for the purpose of slaughtering animals on the property of Mrs. E. Daproval, in the parish of St. Bernard, and in the vicinity of the Crescent City Slaughterhouse Company. Was that "*the particular duty*" of the respondent police jury specified in the organic law? Was that "*a certain act* belonging to the place, duty or quality with which" the respondent was clothed by law?

These questions must be answered in the negative.

High says that "*the most important principle to be observed in the exercise of the jurisdiction by mandamus, and one which lies at the very foundation of the entire system of rules and principles regulating the use of this extraordinary remedy, is that which fixes the distinction between duties of a peremptory or mandatory nature and those which are discretionary in their character, involving the exercise of some degree of judgment on the part of the officer or body against whom the mandamus is sought. * * * Stated in general terms, the principle is that mandamus will lie to compel the performance of duties purely ministerial in their nature and so clear and specific that no element of discretion is left in their performance; but that, as to all acts or duties necessarily calling for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required, mandamus will not lie.*" High's Ex. Legal Rem., Sec. 24.

This Court had occasion, recently, to quote the latter paragraph with approval. 38 Ann. 923, State ex rel. Gaynor vs. Judge. In so doing we followed the uniform current of our own jurisprudence. 29 Ann. 264, State ex rel. Bank vs. Bowd; 28 Ann. 932, State ex rel. Longstreet vs. Johnson; 29 Ann. 146, State ex rel. Martin vs. Police Jury; 28 Ann. 905, State ex rel. Beebe vs. Judge; 32 Ann. 549, State ex rel. New Orleans vs. Judge; 34 Ann. 1114, State ex rel. Luminais vs. Judges; 36 Ann. 200, State ex rel. Mentz vs. Judges.

III.

Without elaborating the argument, it is sufficient to say that

Railroad Company vs. Darms.

plaintiffs' injunction must fail for the same reason that the mandamus failed.

It is our conclusion that the judgment appealed from is erroneous, and should be reversed.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be avoided, annulled and revoked; that the preliminary order be set aside, and the peremptory mandamus be refused at relators' and appellees' cost in both courts.

No. 9862

NEW ORLEANS AND CARROLLTON RAILROAD COMPANY VS. DANIEL
DARMS.

When a lease is silent as to the use which is to be made of the leased premises, it does not follow that the lessee may make what use of them he pleases; but he is still bound to enjoy the thing "according to the use for which it was intended by the lease." C. C. 2710.

In ascertaining the use so intended, resort is to be had to surrounding circumstances, such as the nature and situation of the premises, the use to which they had been previously applied, the occupation and character of the person applying for the lease, etc.

In aid of such circumstances, parol evidence may also be received to show that during the negotiations the lessee had been expressly notified that a particular use, foreign to the destination of the premises, would not be permitted. Such evidence does not violate the general rule prohibiting parol to vary or contradict a written contract, but falls under the exception admitting parol in order to ascertain the nature and qualities of the subject matter of the contract. Under the facts of this case, an injunction to prohibit the establishment of a bar-room on the premises leased is perpetuated.

No injury having resulted to the lessor and his right to dissolution under C. C. 2711 being not absolute, but subject to judicial discretion, the dissolution of the lease is denied.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

John M. Bonner for Plaintiff and Appellant.

Leonard, Marks & Bruenn for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. This action invokes the remedy of injunction to prevent the improper use of property leased by plaintiff to defendant, and seeks to annul the lease on the ground of such improper use.

The use complained of is the establishment of a bar-room, or coffee-house, and of a gaming-house.

The evidence clearly establishes that, some months after taking possession of the leased premises, the defendant did fit up and open a

public bar-room for the sale of spirituous drinks, with a room attached provided with card-tables, where visitors played cards for drinks.

Art. 2710, Civil Code, provides: "The lessee is bound:

"1. To enjoy the thing leased as a good administrator, *according to the use for which it was intended by the lease.*

"2. To pay the rent at the terms agreed on."

It is not necessary that the use, according to which the thing is to be enjoyed, should be expressed in the lease; nor does it follow, if the lessee is silent as to the use, that the lessee may make of the thing leased any use which he pleases.

On the contrary, this Court used the following language in a case of this sort: "The lease is silent as to the destination or object to which the building was to be affected. The inference is that the parties intended that it should be used for one of the purposes to which it had previously been put, etc.; the question of destination is to be determined according to surrounding circumstances." *Murrell vs. Jackson*, 33 Ann. 1342.

In an earlier case, the Court said: "The evidence establishes that the plaintiff's right of action was well founded; that the store rented to defendant was never intended by plaintiff to be used as a kitchen; that no such use was in contemplation at the time the lease was contracted," etc. *Caffin vs. Scott*, 7 Rob. 205.

We quote these decisions to show that, notwithstanding some difference between the language of our article and that of the corresponding Article 1723 of the French Code, they have been construed as substantially identical in meaning, and hence that the French authorities are fully applicable.

Those authorities are quite unanimous in support of the doctrine announced by Marcadé, in the following language: "The destination of the thing will be sometimes fixed by the agreement; but often the contract will be silent in this respect, and it is then, by the situation of the place, by the use to which the thing had been previously put, and by the character under which the lessee presents himself, that the destination shall be gathered. That destination, in whatever manner it shall appear, the lessee is bound to respect. Thus, not only shall the lessee, in default of an express stipulation, not be permitted to establish, in a private dwelling, a house of prostitution, or a gambling house; but he cannot transform a private apartment into a restaurant, a coffee-house, a club, nor a private house into an inn or a hotel." 6 Marcadé, p. 459; 3 Delvincourt, p. 192; 17 Duranton, No. 98; Duvergier Louage, No. 396; Troplong Louage, No. 308; 25 Laurent, No. 257.

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It is held that the establishment of a house of prostitution, or of a gaming-house, would, in no case, be sustained, unless the lessor had positive knowledge that such was the use for which the lessee rented the premises. Duvergier, No. 402; Troplong, No. 302.

In a lease which authorized the lessee to sub-lease "*a qui bon lui semblera ou lui plaira*," it was still held that he could not sub-lease to one who would use the thing in a manner contrary to its destination. Pothier (Louage), No. 281; Troplong (Louage), No. 1276; Duvergier (Louage), No. 391.

Now, in the instant case, the evidence shows that the building leased was contiguous to the depot and stables of plaintiff at the corner of Napoleon and St. Charles avenues, and was built to serve as a boarding-house and lodging-house for drivers and other employees; that it had been used to some extent for that purpose, and had never been otherwise used except, partially, as business offices; that plaintiff had received numerous offers to rent it as a bar-room or coffee-house at much higher rent than was paid by defendant, but had always refused; that no bar-room or other place for sale of spirituous liquors had ever been permitted; that defendant, prior to the lease, had kept a private market not far from this place, in which business he had been engaged for many years, and that he had never kept a bar-room or coffee-house; that, when he applied to rent the place, he asked permission to open a private market there, which was at first refused and only granted after discussion and intervention of friends; that for the first three months of the lease he used the house simply for the purposes of a private market and for offices and lodgings, and that it was only after that time that he indicated his purpose of opening the bar-room; and finally, that as soon as plaintiff heard of such purpose, it promptly protested against and prohibited it.

The foregoing surrounding circumstances would be amply sufficient to establish that the opening of a bar-room in the house was contrary to "the use for which it was intended by the lease."

But in addition thereto, the plaintiff offered evidence to prove that during the negotiations for the lease, defendant was expressly notified that, under no circumstances, would the selling of spirituous liquors be permitted on the premises.

This evidence was rejected on the ground that parol evidence was inadmissible to contradict or vary a written contract.

We think the ruling was error, and that the evidence fell within the familiar exception to the general rule which admits parol in order to ascertain the nature and qualities of the subject-matter of the contract,

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e. g., to identify, or define the extent of, the premises leased or sold, when not sufficiently described in the written contract and the like. 1 Greenleaf on Ev., §§ 286, 298a; Sergeant vs. Adams, 3 Gray, 72; Falcon vs. Boucherville, 1 Rob. 337; Moore vs. Hampton, 3 Ann. 193; D'Aquin vs. Barbour, 4 Ann. 441; Corbett vs. Costello, 8 Ann. 427; McLeroy vs. Duckworth, 13 Ann. 410.

In this case, the use of the premises is the cause or consideration of the contract; and we have shown that, in the silence of the contract as to the nature and kind of use contemplated between the parties, resort must be had to parol evidence of the surrounding circumstances to ascertain the intentions and define the rights of the parties. No circumstance could be of so much significance as the express notice given to the lessee that a certain use, foreign to the destination of the premises, would not be allowed.

The evidence is found in the record, and, although perhaps unnecessary to our decision, we may give it effect and it confirms the conclusion arrived at.

I.

Plaintiff claims a dissolution of the lease under Art. 2711 of the Code, which provides: "If the lessee makes another use of the thing than that for which it was intended, and if any loss is thereby sustained by the lessor, the latter may obtain the dissolution of the lease."

In this case, the improper use was stopped by the injunction almost as soon as it had begun, and the lessor has suffered no loss.

Under the similar Art. 1729 of the French Code, it is held that the right to dissolution for this cause is not absolute, but is left to the discretion of the courts, according to the circumstances. Troplong (Louage), No. 316; Duvergier (Louage), No. 107.

We think, in this case, the right of plaintiff will be sufficiently vindicated by perpetuating the injunction, without dissolving the lease, which runs for five years.

It is, therefore, ordered, adjudged and decreed that the verdict and judgment appealed from be annulled and set aside; and that there be judgment in favor of plaintiff and against defendant perpetuating the injunction granted herein, and rejecting the reconventional demand of defendant—defendant to pay all costs in the lower court and of this appeal.

Conery et al. vs. Waterworks Company et als.

No. 9693.

EDWARD CONERY, JR., ET AL., VS. THE NEW ORLEANS WATERWORKS COMPANY ET ALS.

Taxpayers have a standing in court to contest, upon proper charges, the validity of a municipal ordinance and contract executed under it, whenever its enforcement may increase the burden of taxation. A district court, the lower limit of whose jurisdiction is fixed, has jurisdiction to pass on a controversy when the matter in dispute, which is the value of the contract assailed, exceeds that limit; and the Supreme Court has jurisdiction when that value exceeds \$2,000. *Handy et al. vs. City of New Orleans* re-affirmed. Where an exception is filed denying the capacity or right of the plaintiff to sue or stand in judgment, and together with this exception an answer to the merits or a peremptory exception determinative of the case, and the lower court sustained the first exception and dismisses the suit, this Court, on reversing that judgment, will remand the cause to be tried on the other issues raised by the pleadings.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

E. H. Farrar, R. H. Browne, E. D. White and C. E. Schmidt for
 Plaintiffs and Appellants :

1. The district courts of this State are courts of superior and general jurisdiction, with as full power to issue the writ of injunction in all proper cases as any Lord High Chancellor.
2. One or more resident taxpayers has the right to invoke that jurisdiction, without any allegation or proof of special injury or damage, to restrain municipal corporations and municipal officers from making unlawful disposition of corporate funds or corporate property, the creation of illegal debts and the making of void contracts increasing the burden of taxation.
3. In such cases the thing sought to be enjoined is the subject matter of the controversy, and the measure of the jurisdiction of the court.
4. In such cases, it is the settled doctrine of all the courts of this country. State and Federal (except New York, where it has been settled by statute), that the taxpayer stands in judgment for the whole community, irrespective of the distributive interest he may have in the matter at issue. *Pro hac vice*, he is considered as the payer of all the taxes. *Crumpton vs. Zabriskie*, 101 U. S. 601; *Gifford vs. R. R. Co.*, 10 N. J. Eq. 171; *Baltimore vs. Gill*, 31 Md. 375; *Wade vs. Richmond*, 18 Gratt (Va.) 583; *Page vs. Allen*, 58 Pa. St. 338; *New London vs. Brainard*, 22 Conn. 552; *Harvey vs. Indianapolis*, 32 Ind. 244; *Barr vs. Deniston*, 19 N. H., 170; *Stevens vs. R. R. Co.*, 29 Vt. 546; *Webster vs. Harrington*, 32 Conn. 131; *Terrell vs. Sharon*, 34 Conn. 105; *Merrill vs. Plainfield*, 45 N. H. 126; *Normand vs. Coc*, 8 Neb. 18; *Oliver vs. Koightley*, 24 Ind. 514; *Drake vs. Phillips*, 40 Ill. 388; *Grant vs. Davenport*, 36 Iowa 396; *Douglas vs. Placerville*, 18 Cal. 643; *Smith vs. Majalvick*, 44 Ga. 163; *Newmeyer vs. M. & M. R. R. Co.*, 52 Mo. 81; *Wright vs. Bishop*, 38 Ill. 302; *Rice vs. Smith*, 9 Iowa, 570; *Place vs. Providence*, 12 R. I. 1; *Allison vs. Ry. Co.* 9 Bush (Ky.) 247; *Bound vs. R. R. Co.*, 45 Wis. 543; *Elyton Land Co. vs. Ayres*, 62 Ala. 413; *Bayle vs. City of New Orleans*, 8 Am. and Eng. Corp. cases 329; *White vs. Co. Com.* 12 Id. 485; *Whelen's case*, 11 Id. 174; *City of Delphi vs. Sturzman et al.*, 11 Id. 37; *City of Valparaiso et al. vs. Gardner*, 7 Id. 626; *Roper vs. McWhorter et al.*, 4 Id. 360; *Sacket vs. New Albany*, 3 Id. 85; *Ayer vs. Lawrence*, 59 N. Y. 192; *Dillon Mun. Corp.*, § 731 to § 737.
5. This doctrine has been repeatedly recognized in Louisiana. *Flagg vs. St. Charles*, 27 Ann. 319; *Babington vs. same*, 1b. 321; *Stevenson vs. Weber*, 29 Ann. 105; *Taxpayers'*

Conery et al. vs. Waterworks Company et als.

Association vs. City of N. O. et als., 33 Ann. 567; *Saloy et al. vs. City of New Orleans*, Ib. 79; *Rivet et al. vs. City*, 35 Ann. 134.

J. R. Beckwith for Defendants and Appellees:

To authorize a taxpayer to stand as plaintiff in a suit having for its object the rescission of a contract made by a municipal corporation, the plaintiff must not only show that he is a taxpayer, but set forth and disclose in his petition a state of facts which, if true, render the contract assailed absolutely void, not simply voidable. *People vs. Mayor, etc.*, of Brooklyn, 4 Comst. 419; *Dillon on M. C.*, § 55; *Spaulding vs. Lowell*, 23 Pick. 71; *Hodge vs. Buffalo*, 2 Denio 110; *Smith vs. Madison*, 7 Ind. 86; *Kyle vs. Malin*, 7 Ind. 34-37; *Livingston vs. Peppin*, 31 Ala. 515; *Mayor vs. Cabot*, 28 Ga. Rep. 50; *Wells vs. Atlanta*, 43 Ga. Rep. 76; *City of Vincennes vs. Callender*, 86 Ind. 484; *Valparaiso vs. Gardner*, 97 Ind. 2; *Jones vs. Richmond*, 18 Grattan. Va. 517; *Smith vs. Richmond*, 15 Wall 429; *Willard vs. Newburyport*, 12 Pick. 229.

Every municipal corporation has all of the power of administration of local municipal affairs expressly granted in its charter, and all incidental powers necessary to carry such powers into execution and effect and operation. Cases above cited and *Dillon on Mun. Corp.* 55, and cases there cited in note.

A municipal corporation with power to sue and be sued has authority to settle its contentions by compromise. This right also grows out of its authority to create debts and incur liabilities. *Dillon on Mun. Corp.*, § 398; *Bean vs. Jay*, 23 Maine 117, 121; *Meech vs. Buffalo*, 29 N. Y. 198; *Baileyville vs. Lowell*, 20 Maine 178; *Nelson vs. Milford*, 7 Pick. 18; *Augusta vs. Ledbeater*, 16 Maine 45; *People vs. Supervisors*, 27 Cal. 655; *People vs. Coon*, 25 Cal. 648; *Melville vs. Dixfield*, 30 Maine 157; *Petersburg vs. Maffin*, 14 Ill. 193; *Dillon on Mun. Corp.*, § 398.

Any consideration which will make a valuable consideration for a contract between individuals will constitute a valid consideration in a contract by or with a municipal corporation, a moral obligation alone is sufficient to support a promise of a municipal corporation, if sufficient to support a promise if the same state of things existed between individuals. *Gilford vs. Supervisors*, 13 N. Y. (3 Kern) 149; Same case, 24 Wend. and 18 Barb. 615; *Dillon on Mun. Corp.*, § 44; *Brewster vs. Syracuse*, 19 N. Y. 116; *People vs. Mayor, etc.*, of Brooklyn, 4 Comst. 419; *Thomas vs. Leland*, 24 Wend. 65; *Shelby County vs. Railroad Company*, 5 Bush (Ky.) 225; *Philadelphia vs. Field*, 58 Pa. St. 320; *Cooley on Constitutional Limitations*, 390, 491; *Blanding vs. Burr*, 13 Cal. 343; *People vs. Onandaga*, 16 Mich. 254; *Lycoming vs. Union*, 15 Pa. St. 166; *Nelson vs. Milford*, 7 Pick. 18; *Pike vs. Middleton*, 12 N. H. 281; *Briggs vs. Whipple*, 6 Vt. 95.

Under the general power and duty vested in municipal corporations to provide for the protection of public health and the extinguishment of fires, the corporate authorities have power to contract for a public water supply, and are the sole judges of the best means of obtaining the same, and their discretion in this respect is not subject to review by the courts, unless the means adopted are expressly prohibited by law. *Town of Livingston vs. Peppin*, 31 Ala. Rep. 545; *Mayor et al. vs. Cabot*, 28 Ga. Rep. 50; *Wells vs. Atlanta*, 73 Ga. Rep. 76; *Vincennes vs. Callender*, 86 Ind. 484; *Valparaiso vs. Gardner*, 97 Ind. 2; *Dillon on Mun. Corp.*, §§ 58, 59; *Railroad vs. Evansville*, 15 Ind. 395; *Page vs. St. Louis*, 20 Mo. 136; *Railroad Company vs. New York*, 1 Hilton (N. Y.) 562; *Hale vs. Houghton*, 8 Mich. 458.

Blanc & Butler and *G. A. Breaux* on the same side.

The opinion of the Court was delivered by

TODD, J. This is an action on the part of the plaintiffs, residents of the city of New Orleans, alleging themselves to be taxpayers to the

Conery et al. vs. Waterworks Company et als.

city in a sum exceeding \$10,000, against the city of New Orleans and the New Orleans Waterworks Company and others, seeking to restrain the execution of a contract entered into between the city and the said Waterworks Company on the 3d of October, 1884, and to prevent the council of the city from making any appropriations out of the public treasury in furtherance of the contract and the ordinance authorizing it; and further asking that said "contract and ordinance be declared null and void."

The petition charges as the ground of nullity that said contract and ordinance violate expressly the terms of the charter of the company, and are *ultra vires*, unconstitutional, null and void; and sets forth at great length the causes or reasons of the illegality and nullity propounded.

To this petition the city of New Orleans filed the following exceptions:

1. That plaintiffs have no capacity to stand in judgment.
2. That the petition disclosed no cause of action.

The Waterworks Company presented exceptions, which though differently formulated were in substance the same as the above.

The judge *a quo*, for reasons assigned in a lengthy and elaborate opinion, sustained the exception as to the right or capacity of the plaintiffs to maintain the action or stand in judgment, and dismissed the suit.

From this judgment the plaintiffs appealed.

This precise question was invoked in the case of Haudy et al. vs. City of New Orleans, recently decided and not yet reported.

Like the instant one, that was a case where a number of taxpayers and residents of the city joined in a suit for the annulment of a contract and ordinance of the city touching the wharf lease, on grounds very similar in every respect to those urged in the case before us.

We quote from the syllabus of that case to show the identity of the questions involved in the two cases, and how they were decided:

"Taxpayers have a standing in court to contest upon proper charges the validity of a municipal ordinance and contract executed under it, whenever its enforcement may increase the burden of taxation.

"A district court, the lower limit of whose jurisdiction is fixed, has jurisdiction to pass on such controversy when the matter in dispute,

which is the value of the contract, exceeds that limit; and the Supreme Court has jurisdiction on appeal when the value exceeds \$2000."

It plainly appears, therefore, from this recent ruling of this Court, amply supported by the authorities cited in the opinion, that in the instant case the decision of the lower court upon the exception in question was erroneous.

Notwithstanding that this question of the rights or capacity of the parties to stand in judgment was the sole question decided by the court *a qua*, as abundantly shown by the reasons therein assigned for the judgment rendered; yet the counsel on both sides have indulged in a lengthy and very able discussion of the exception as to "no cause of action" filed, but not determined in the court below.

We have examined thoroughly the record of the case, and are satisfied that there exists little or no dispute as to the facts out of which this controversy has grown; and that therefore the determination of the exception of "no cause of action" will determine fully the merits of the cause. This vital issue has not been passed upon or even considered by the judge *a quo*, as we learn from his written opinion in the record.

It is the province of the appellate court to review the proceedings of the inferior court, and to determine whether its rulings and decrees therein embraced are right or wrong, and not to deal with matters and issues distinctly presented by the pleadings but not considered or decided by that court. 19 L. 207; 9 R. 256; 7 Ann. 622; 10 Ann. 552; 11 Ann. 746; 15 Ann. 159.

We conclude, therefore, that it is proper to remand the cause, that the all-important issue raised by the exception referred to, not passed on by the court of the first instance, may be there tried and determined.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court sustaining the exception touching the right or capacity of the plaintiffs to maintain the suit and stand in judgment and questioning the jurisdiction of the court, be and the same is hereby reversed and the cause remanded to be proceeded with according to law; the costs of the lower court thus far incurred in the exception overruled and of this appeal to be paid by appellees, and the further costs to abide the final issue of the case.

No. 10,002.

THE STATE EX REL. CANAL AND CLAIBORNE STREETS RAILROAD
COMPANY VS. JUDGE OF CIVIL DISTRICT COURT, DIVISION D.

When a suspensive appeal has been granted from an order dissolving an injunction on bond and has been perfected by filing of proper bond, the judge cannot afterwards rescind the order of appeal, on the ground that order appealed from inflicted no irreparable injury, and was, therefore, unappealable. Affirming 36 Ann. 192.

The terms of the order of appeal granted, when unambiguous, must speak for themselves, and cannot be controlled by the statement of the judge that he did not intend to do what he has actually done.

APPPLICATION for prohibition and mandamus.

H. D. Ogden and Braughn, Buck, Dinkelspiel & Hart for the Relators.

The opinion of the Court was delivered by

FENNER, J. The facts, stated in briefest form, are as follows: Relator brought an injunction suit against the city of New Orleans *et al.*, and obtained issuance of the preliminary writ of injunction. Defendants filed an exception of no cause of action, and also a rule to dissolve the injunction on bond. The exception and the rule were tried on the same day, and the minutes of the court exhibit a judgment rendered on April 25, 1887, maintaining the exception and making absolute the rule to bond in a sum fixed therein. This judgment was duly signed by the judge on April 29th. On the same day relator applied for a suspensive appeal from said judgment, the motion therefor expressly describing the judgment appealed from as "rendered April 25 and signed April 29, 1887, dismissing its suit and making absolute the rule to bond filed by defendant," and, on said motion, the judge granted the order, and fixed the amount of the suspensive appeal bond, which was duly executed and filed on the same day.

Subsequently, on the suggestion of counsel for defendant and on his inquiry whether the suspensive appeal granted interfered with the city's right to bond the injunction, the judge entered on the minutes his order declaring "that the order for a suspensive appeal could not be held to apply to the ruling of the court on the motion to bond, which could not be appealed from suspensively, but went into effect at once."

Relator applied for a suspensive appeal from this order, which was refused.

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He now appeals to this Court for relief by prohibition and mandamus.

The case is on all fours with Irwin's case, heretofore decided by us, where we held that, after granting an order for a suspensive appeal from a judgment dissolving an injunction on bond, and after such appeal has been perfected, the judge's jurisdiction over the question was terminated, and he was powerless afterwards to set aside the appeal on the ground that the judgment was not appealable. *State ex rel. Irwin vs. Judge*, 36 Ann. 192.

In his return, however, the respondent judge sets up that he had rendered separate judgments on the exception and on the rule to bond, and that his minute clerk had committed error in embodying the two in one judgment; that he signed the judgment in that form through error; that when the motion for suspensive appeal was presented, he supposed that it applied only to the judgment on the exception, and only discovered these errors when his attention was called to them by defendant's counsel.

No one knows better than the esteemed respondent what implicit confidence we repose in any statement made by him; but such errors, when opposed by the express terms of a judgment entered on the minutes of his own court and subsequently signed by himself, and also by his order of appeal, in which he expressly embraced the judgment "on the motion to bond," have passed beyond his power of correction, however much he may regret them.

The question is, not what the judge intended to do, but what he has done, and it must be determined according to the record of his court. *Bourg vs. Gerding*, 33 Ann. 1369; *State ex rel. R. R. vs. Judge*, 34 Ann. 1118; *State vs. Lazarus*, 39 Ann.

The minutes show that he did grant a suspensive appeal, in terms, from the judgment authorizing the defendant to bond, which appeal was perfected by the appellant. This brings it distinctly within the authority of Irwin's case, heretofore quoted.

Of course the effect of the suspensive appeal from the judgment authorizing the bonding of the injunction, left the injunction in force and suspended the right to bond during the pendency of the appeal, and the relator is, therefore, entitled to the relief prayed for.

It is, therefore, ordered that the mandamus herein be made peremptory.

State ex rel. Broussard vs. Justice of the Peace.

No. 9983.

THE STATE EX REL. T. BROUSSARD VS. A. KOENIG, JUSTICE OF THE
PEACE, FOURTH WARD OF LAFAYETTE PARISH.*Certiorari* can only be resorted to when proceedings are absolutely null.

It is only when, upon examination of the record, the proceedings appear to be null and void, that they should be avoided and the respondent directed to try them anew, in conformity with the provisions of the law.

APPLICATION for certiorari.

C. Girard for the Relator.

The opinion of the Court was delivered by

WATKINS, J. Relator claims a *certiorari* upon the following grounds, viz:

1. That in the suit of T. Broussard vs. Gastine Herpin, in the respondent's court, he obtained judgment against the defendant for \$2 50, and against his (relator's) protest, and, ostensibly, upon defendant's affidavit, the respondent granted a new trial, when, in point of fact, no such affidavit had been made, and respondent's act was arbitrary and in gross violation of his (relator's) rights.

2. That, on the second trial, respondent associated with him Sidney Greig, a justice of the peace of an adjoining ward, and that the two jointly heard and determined said cause and rendered judgment therein, and that, as thus constituted, it was a court unknown to the laws of Louisiana.

3. That he presented and filed a suit in respondent's court to annul said judgment, and he declined and persistently refused to issue citation to defendant, or to permit any further steps being taken therein.

4. That the respondent and the constable of his court are demanding of him the payment of \$225, as *one-half* of the amount of cost due under said judgment, notwithstanding they have never exhibited any detailed bill of their costs, but, on the contrary, have refused so to do; and without the request of any party in interest, have issued execution and seized thereunder relator's property and offered it for sale.

5. Respondent, knowing that there was no appeal from the judgment rendered, acted in the premises wilfully, arbitrarily and for the purpose of oppression, extortion and of enriching himself at his (relator's) expense; and unless these proceedings are arrested, he will perpetrate upon him a gross and irreparable injury.

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State ex rel. Broussard vs. Justice of the Peace.

He specifically denies that he ever asked or prayed for an injunction against said judgment, and avers that he never, knowingly, signed either an injunction, appearance or forthcoming bond for the surrender of the property seized on the day of sale.

He prays that a certified copy of all proceedings in that suit be brought up, examined and declared null, and the respondent be enjoined to proceed no further until this is done.

From the respondent's return and the record annexed, we gather the following facts, viz :

1. That relator instituted suit and recovered judgment as stated, and upon the written affidavit of the defendant, a new trial was granted, and the plaintiff therein (relator here) was duly notified of the time and place the second trial would occur, and that both parties were present thereat with their witnesses.

2. That on the second trial respondent requested S. Greig, a justice of the peace of the adjoining ward of the same parish, to sit with him during his deliberations in that case, "because he knew that bitter differences existed between the two neighbors who were litigating in that case," and because he desired "to do exact justice in the case," etc.

On the trial, judgment was rendered dismissing plaintiff's (relator's) suit, and against each one-half of the cost was taxed. The reasons assigned was that both parties had been found "guilty of malice and negligence."

This judgment appears to have been signed by each of the justices ; but the respondent returns that the latter took *no part in the decision* of the case, and that he alone heard and determined it and rendered judgment therein, and that Justice of the Peace Greig only *advised* with him in the premises, and signed the decree as evidencing his approval of it only.

In this respect we fail to discover any badge of nullity.

Conceding there is no express law sanctioning such a proceeding, yet it is not an unfrequent occurrence that a judge of the vicinage, exercising like jurisdiction, sits *en banc* with the judge who is engaged in the trial of the case in hand.

Though it is not usual, in such cases, that another than the trial judge should sign the decree, yet that fact, in our opinion, would not vitiate it. It might well be treated as surplusage.

3. On execution under the judgment for cost, property of relator was seized and advertised for sale, and notice of seizure was served,

State ex rel. Broussard vs. Justice of the Peace.

but the relator demanded the right to give a forthcoming bond and retain possession until the day of sale.

The respondent returns that he executed bond and therefore failed to surrender the property, and his bond was duly forfeited. There is, in the record annexed to his return, a judgment to that effect.

He further returns that the relator, in person, prayed for an injunction against this writ and furnished the necessary bond and security. This case was fixed for trial by consent of parties, but upon their failing to put in appearance, on the day fixed for trial, same was dissolved.

Subsequently the relator sued out an injunction in the district court against the respondent and the constable of his court holding the *fi. fa.*, seeking to restrain further proceedings thereunder, and that same was dissolved at the March term of that court in 1887.

Respondent returns that during the pendency of that injunction a document was handed to him for filing, seeking to annul said judgment, but that he was advised and believed it to be the same in effect and purport of said pending injunction which had then only recently been served on him, and he was advised and believed that he could not do anything while same was pending.

He further returns that he was advised and believed that said action in nullity should not be placed on file in his court, because "said petition was couched in impertinent and disrespectful language," etc.

For all of said reasons he deemed it his duty to take no further action in the premises until said suit was decided.

He further represents that since that date (April, 1886), no other application has been made; and he avers his entire willingness to receive any petition from the relator, if couched in proper and decorous language, and to act thereupon officially and to the best of his knowledge and ability.

4. The respondent avers that the *fi. fa.* only issued against the relator for the sum of \$26 45, and the writ discloses that to be a fact, same being the cost incurred by him in said suit; "and that it is absolutely untrue that he demanded any cost whatever other than such as contemplated by that suit; and he denies that any demand for detailed bill of costs has ever been made by relator" and by him refused. On the other hand, he affirms that he has promptly furnished him with itemized bills of cost, and that he believes he has them in his possession at this time.

The record annexed does not, in any degree, support the relators averment that the respondent and the constable of his court were demanding a large and *extortionate* sum as costs, without authority of, though under the color of law.

5. There is no support for the assertion that respondent have acted wilfully, arbitrarily, or with the purpose of extortion, and oppression, as alleged in relator's petition. It may be that the judgment rendered operates a great hardship on the relator; that he was entitled to judgment against the defendant, Gastine Herpin, for the amount claimed and cost; and that even the amount of costs claimed are excessive.

All of those matters are placed within the *exclusive* jurisdiction of the respondent in such a case as the instant one, and his decree is not revocable on appeal, and it can be examined by this court only in the exercise of its supervisory power. Const. art. 90.

The *certiorari* can be resorted to only when proceedings are absolutely void, and should be set aside. C. P. 857, 864, 866.

It is only when, upon examination of the record, the proceedings appear to be null and void that they should be avoided and set aside, and the respondent directed to try the case anew in conformity with the provisions of the law. C. P. 864.

The record furnishes no warrant for our interference, in this case, with the proceedings in the respondent's court. 38 Ann. 968, State ex rel. Gorch vs. Robinson, Justice of the Peace.

It is therefore ordered, adjudged and decreed that the restraining order granted be set aside, and the relator's demand be rejected at his cost.

CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT OF LOUISIANA,
AT MONROE,

IN

JUNE. 1887.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ,* *Chief Justice.*

HON. FÉLIX P. POCHÉ,

HON. ROBERT B. TODD,

HON. CHARLES E. FENNER,

HON. LYNN B. WATKINS,

} *Associate Justices.*

*Absent during this term.

No. 1169.

R. N. LEWIS VS. G. A. PETERKIN ET AL.

The appellant who suggests a diminution of the record before the expiration of the three judicial days within which he may file the transcript of appeal, is entitled to a *certiorari* for the correction and completing of the transcript, even after the cause has been argued and submitted for judgment, in case his application be made before the expiration of the three days aforesaid.

A judgment of separation of property duly rendered in favor of the wife against her husband, cannot be inquired into or attacked collaterally by a creditor of the husband, whose claim had not yet arisen when the judgment was rendered.

A married woman separated in property from her husband has the legal right to purchase property in her own name and for her separate account, and the burden of proof is on the party assailing the validity of such sales.

Lewis vs. Peterkin et al.

A PPEAL from the Sixth District Court, Parish of Morehouse.
Levy, Judge ad hoc.

R. B. Todd, Jr., for Plaintiff and Appellant.

A judgment of separation of property, in order to be valid, must be executed; *dation en paiement* one year after its rendition, does not revive or give it effect. 28 Ann. 345; 34 Ann. 690.

A judgment of separation to effect third persons must be advertised or recorded.

Parol evidence is inadmissible to show authority to purchase real estate. C. C. 2997, 2440; 23 Ann. 196; 28 Ann. 678.

A simulated sale conveys no rights to the pretended vendee. 15 Ann. 177; 23 Ann. 46.

Where a sale is attacked on account of simulation the widest latitude is allowed. 30 Ann. 1203; 36 Ann. 681.

When the wife, who is separate in property, has left the enjoyment of her property to her husband without any procuration he is not answerable for the fruits until a demand be made by his wife, or if it is not made, until the dissolution of the marriage. He is not accountable for the fruits that have been previously consumed. C. C. 2396.

If after a separation of property and a dissolution of the community the husband operates with the wife's funds, this should be clearly made to appear. 15 Ann. 33; 16 Ann. 314; 18 Ann. 196; 29 Ann. 532.

If the husband buys and pays for property the purchase will be presumed to be his; if he uses his wife's funds this must be shown by her. 10 Ann. 784; 15 Ann. 33, 119; 21 Ann. 343; 22 Ann. 148.

Newton & Cason, for Defendant and Appellee:

ON MOTION TO DISMISS AND ON APPLICATION FOR CERTIORARI.

The opinion of the Court was delivered by

POCHÉ, J. On the first day of the present term appellees moved for the dismissal of this appeal on the ground that the clerk, in his certificate, did not state that the transcript contained all the evidence adduced on the trial below.

Two days later, appellant filed his application for an order to direct the clerk of the district court to correct his certificate, and the application is resisted by appellees on the ground that it was not made before, or at the time of the argument as required by art. 898 of the Code of Practice.

It is true that the motion for a *certiorari* was made after the case had been submitted, and not, as erroneously contended for by appellant's counsel, after it had been partially submitted. But it is clearly apparent that the fault is not imputable to appellant, if the clerk omitted to state the whole truth in his certificate. The transcript is voluminous, and it contains a mass of documentary evidence and of parol testimony taken down in writing.

Hence, it is more than probable that the error is in the certificate; and for that reason the appeal cannot be dismissed. Revised Statutes,

Lewis vs. Peterkin et al.

section 36, Flint vs. Peck, 22 Ann. 246 ; Baltimore vs. Parlange, 25 Ann. 335 ; Burton vs. Hicks, 27 Ann. 507 ; Stafford vs. Harper, 32 Ann. 1076.

Now, as the appeal cannot be dismissed at the present stage, because the apparent deficiency of the transcript is not imputable to appellant, and as the case cannot be tried because it is not shown that the transcript does contain all the evidence offered, admitted and considered below, what will become of the case ? Reason and law alike point out the course to be pursued, and require that appellant be allowed an opportunity to complete his transcript ; as the three judicial days within which he could file his transcript had not yet expired when the case was argued and submitted, his right, under the law, to have his transcript corrected and completed is not affected by the provisions of article 898 of the Code of Practice. Such a course was pursued in the case of Trudeau vs. Railroad, 15 Ann. 717, in which the following rule was formulated. " When a diminution of the record is suggested, the Supreme Court will order a *certiorari* to perfect it, although the case has been submitted for judgment."

But as it may happen that the silence of the clerk in his certificate is proof of a negative fact, and that the transcript does not contain all the evidence adduced at the trial, we shall not now dispose of appellee's motion to dismiss the appeal, and shall postpone consideration thereof until the clerk makes his return on the *certiorari*.

It is therefore ordered that a writ of *certiorari* issue to the clerk of the district court of the parish of Morehouse ordering him to complete his certificate to the transcript of appeal in this case, by stating positively whether said transcript does or not contain all the evidence adduced on the trial of said cause, and that said writ be made returnable on the 18th day of June, 1887.

ON THE MERITS.

This is an action in declaration of simulation, in which plaintiff, a judgment creditor of the defendant husband, seeks to subject to the execution of his judgment two pieces of immovable property purchased in the name of the wife, but alleged to be the property of the judgment debtor.

The wife resists the demand, and urges that at the time that she purchased the property she was duly separated in property from her husband by judgment, and that the purchases were made with her separate funds, of which she had the administration.:

Plaintiff appeals from a judgment which rejected his demand.

It appears from an admission of the parties in the record that in the year 1870 the court-house of the parish of Morehouse was entirely destroyed by fire, together with all the records and papers therein contained and belonging to the district court of that parish. Hence, secondary evidence, consisting of parol testimony, was properly admitted to show the alleged judgment of separation of property between Peterkin and his wife, rendered by that court in the year 1869. That testimony is corroborated by an authentic act executed by Peterkin and his wife on June 25, 1870, by which he transferred to her some movable property in part payment of the moneyed judgment which she had obtained against him.

Having proven that much, touching her condition as separate in property from her husband, the defendant wife is entitled to protection under her judgment against any collateral attack on the validity of the same on the part of plaintiff, whose claim against Peterkin did not originate before the year 1876, and whose judgment which he is now seeking to enforce against the property in dispute, was rendered only on the 25th of April, 1880.

As he was not a creditor of the husband at the date of the judgment of separation of property, he had no legal concern with its existence or validity, as he had no rights which could be jeopardized or affected thereby in the least.

This ruling finds ample support in reason and as well as in authority; and we find that in our jurisprudence it has been formulated thus:

"A judgment that has been regularly obtained by the wife against her husband cannot be contested or inquired into collaterally by a creditor of the husband whose claim only arose after it was rendered." *Farwell vs. O'Neil*, 22 Ann. 619; *Dinkgrave vs. Norwood*, 10 Ann. 564.

The judgment having been regularly rendered, and having been partly satisfied through a giving in payment executed in an authentic act within a reasonable time (C. C. 2428), it follows that the wife was thus fully able and authorized to purchase property in her own name, and the burden of proving the invalidity of such purchases is on the party attacking the same. *Chaffe & Sons vs. De Moss*, 37 Ann. 186; *Farrell vs. O'Neil*, 22 Ann. 619; *Todd, curator, vs. Larkin*, 38 Ann. 672.

Plaintiff has undertaken the task, and he has introduced evidence in support of his contention that both purchases, though made in the name of the wife, were in truth and in fact made for the husband. His evidence amounts at most to negative conjectures, showing some suspicious circumstances. But its weight is entirely destroyed by the

Lewis vs. Peterkin et al.

positive testimony of the defendant wife, who swears that both purchases were made for her own account; and it appears that both pieces of property have been since and continuously enjoyed by her, and treated and considered by the whole community as her separate estate.

The record shows that she received a considerable inheritance from her father and mother, and that for many years she has owned a large and valuable plantation which she at times leased, and at other times cultivated, and from which she could derive revenue sufficient to make subsequent and additional purchases. But being separate in property, she had the right in law to purchase property on terms of credit at her discretion, and the creditors of her husband have no authority to inquire into the source of the means or funds which she used in making payments thereon. It is sufficient for her to show that her true and real intention was to purchase for her own account, and it is incumbent on complaining creditors to make proof of the alleged simulation of the purchases made.

It may be conceded, as plaintiff contends, that the credit instalments on the purchase price of the town lot and residence in Bastrop were paid with parish warrants held by her husband for debts due him by the parish. She testifies that she acquired that paper from her husband in satisfaction of a debt which he owed her, and the record contains no evidence to the contrary. At the date of that purchase in 1877, plaintiff was not yet a judgment creditor of the husband. Hence, his rights or those of other creditors could not be affected, and they could not resist the legal effect of the purchase even if it were proved that Peterkin had made a donation to his wife of the parish paper without consideration.

Dealing with a similar attack, this Court has recently said: "What motive, then, for disguise or simulation? How natural, then, that all parties should have intended that the title should pass to the wife as a real title and as the true owner! If such was the intention, and we are convinced that it was, the wife's title could not be attacked as a simulation even if the husband had given the notes (with which the price was paid) to her without consideration." *Todd vs. Larkin*, 38 Ann. 672.

The true intention of the parties in the case at bar is made still more manifest by the fact that from 1877 to 1882 the husband was engaged in a mercantile business of considerable magnitude, and that he thus owned in his own name some immovable property in that parish, which he continued to own as late as the year 1885.

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It also appears from the record that the validity of Mrs. Peterkin's purchases of the property now under discussion has already been subjected to judicial test at the instance of her husband's creditors, whose attack was defeated.

Our conclusion is that her titles have successfully withstood the assault made by the plaintiff in this case, and that she is entitled to enjoy the benefits of the investment of her separate funds.

Judgment affirmed.

Mr. Justice Todd takes no part in this case.

No. 1157.

HEIRS OF ORY MURPHY VS. JUREY & GILLIS—J. P. MURPHY,
WARRANTOR.

80	785
46	1494
39	785
49	195
80	785
104	159
80	785
111	706
39	785
112	399
112	549

Property acquired during a marriage in the name of the husband is presumed to belong to the community. Nor will such presumption be rebutted by proof that he acquired the property with the money of his children by a former marriage: nor will such fact affect the title of the community to the property, though it may create a debt against it.

The heirs of the wife become vested with a title to her share of the community property at the moment of her death: and though they receive it subject to the payment of the community debts, they are not bound to await a liquidation of the community before resorting to an action to recover it. *Tugwell vs. Tugwell*, 32 Ann. 848, and *Glasscock vs. Clark*, 33 Ann. 584, reaffirmed. Nor in such action, petitory in its character, is the indebtedness of the community or its financial condition dissolved, when a legitimate subject of enquiry.

A PPEAL from the Third District Court, Parish of Lincoln.
Feazel, Special J.

Barksdale & VanHook for Plaintiffs and Appellees.

G. L. Gaskins for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. The plaintiffs, as the collateral heirs of Ory Murphy, deceased, sue to recover nine-tenths of the undivided half of the lands described in the petition, the said undivided half being the community interest of the deceased therein and inherited at her death by petitioners.

The defendants answered by a general denial and a call in warranty on their vendor, J. P. Murphy. Murphy, besides the general issue in his answer, denied that Ory Murphy, from whom the plaintiffs claim, had at her death, a community interest in said lands, and averred that though the lands were acquired during the marriage of the deceased

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with J. J. Murphy, they were acquired by the husband with his separate money, and money belonging to the children of his first wife, and never fell into the community existing between him and Ory Murphy, and further that the estate of J. J. Murphy was, at his death, insufficient to repay the children of his first marriage the funds of theirs used by him in the acquisition of these lands.

The prescription of ten and thirty years is also pleaded by the warrantor and a demand in case of recovery by the plaintiffs for reimbursement for taxes paid and improvements made on the lands.

There was judgment in favor of the plaintiffs decreeing them the owners of the interest in the lands claimed by them, save as to certain designated portions thereof, with a reservation to the parties of the right to adjust their claims for taxes, improvements, etc., in the partition of the lands.

There was judgment also in favor of the defendants and against the warrantor. From this judgment the present appeal was taken by the defendants and warrantor.

The facts of the case established are briefly these :

John J. Murphy was twice married in the State of Georgia. First, to Elizabeth Havell, who died in 1843, leaving several children, of whom the warrantor is one. Second, to Ory Glaze in 1844, and who died in 1860 without issue.

In 1848 Murphy and his wife moved to this State, accompanied by the children of his first marriage, and after his arrival in this State, he acquired by purchase the lands in controversy.

After the death of his wife, Ory Glaze or Murphy, J. J. Murphy, the surviving husband, remained in possession of the lands until his death in 1866. There was no administration on the succession of the wife, and no settlement of the community.

After the death of Murphy there was a partition of his estate, in which partition J. P. Murphy, the warrantor in this case, received the lands in controversy.

It is shown that these lands were all acquired during the existence of the community between J. J. Murphy and his wife, Ory Murphy, and are therefore presumed to be community property. C. C. 2405.

Upon the dissolution of the community by the death of the wife, the title to her share of the community property, the one undivided half of the same rested in her heirs. C. C. 2406; Tugwell vs. Tugwell, 32 Ann. 848.

And though the heirs of the wife received the property subject to the community debts, it is now settled that their action for it may be

maintained without allegation or proof of the liquidation or solvency of the community. *Ib.* and *Glasscock vs. Clark*, 33 Ann. 584. And it is enough to say in this case, as in the cases above cited, that the creditors of the community, if there are any, are not before us seeking to enforce their claims against the community. Nor would any such inquiry be permissible in an action of this kind, which is petitory in its character, and the right of the plaintiffs acquired at the instant of the death of the person from whom they inherited. The community creditors, if there were any, might have subjected this property by proper proceedings to the payment of their debts and thus divested the plaintiffs of their title to the property, but it has not been done and cannot be done in this form of action, nor by the parties to the present controversy. All evidence respecting claims against the community and its condition at the moment of its dissolution should therefore have been rejected.

There is a plea of prescription of ten and thirty years urged against the plaintiffs' right of action, which was overruled by the lower court and properly so.

Ten years had not expired between the date of the conveyance of the property from J. P. Murphy to the defendants. J. P. Murphy claimed the property by inheritance from his father, J. J. Murphy, and as the father had not a vestige of title to the property, he transmitted none to his heirs. They took it *cum vitiis*. There was no basis for the prescription urged in favor of J. P. Murphy.

There is an amendment of the judgment of the lower court prayed for as to that part of it which rejects plaintiffs' claims to certain designated portions of the land.

The amendment must be allowed.

The defendants in their answer admit the possession of all the land claimed and described in the petition.

J. J. Murphy was in possession of it at the dissolution of the community. It was a matter of no moment whether a part of this land was acquired by a military warrant or by money, so that it was acquired during the marriage. This and other portions excepted or declared free from plaintiffs' claims, purports to have been acquired by J. P. Murphy by inheritance from J. J. Murphy and partition. They, defendants, claim solely through their purchase from J. P. Murphy. J. J. Murphy was the author of both warrantors and defendants' title, and nothing is better settled than that parties cannot dispute their author's title.

It is therefore ordered, adjudged and decreed that the judgment of

Allen, West & Bush vs. Nettles.

the lower court be amended by decreeing the plaintiffs owners of the nine-tenths of the undivided half of the east half of the northeast quarter, section 34, and the east half of the northwest quarter of section 25, T. 18, N. R. 4 west; and by declaring open to adjustment in the partition of the lands all claims between the parties mentioned and referred to in the pleadings, subject to all defenses of the respective parties, and as thus amended the judgment is affirmed. Defendants to pay costs of both courts.

Mr. Justice Fenner dissents.

No. 1172.

ALLEN, WEST & BUSH VS. J. E. NETTLES, ADMINISTRATOR.

In a suit against an administrator for a balance of account, unappealable in amount, the defendant reconvenes, claiming payment to succession of \$7000, proceeds of cotton sold and credited in plaintiff's account. Held: that as any allowance made on defendant's demand necessarily increased the ordinary balance due plaintiff, this involves adjustment of entire account and the whole case is appealable.

Where mercantile accounts have been closed by rendition and acceptance without objection, the debtor cannot thereafter object to charges of 8 per cent interest and to compounding interest by capitalization of succession balances.

Such settlement of accounts being equivalent to payment, the debtor can only recover usurious charges less than one year old.

Under the 3d section of Act 44 of 1882, the consignee, from the date of consignment under bill of lading, acquires a perfect pledge with right to sell and pay his debt with the proceeds. The death of the consignor, after the consignment, could not affect such rights. But no consignment made after the death of the owner by an unauthorized person could operate to create a pledge in favor of the consignee. The death fixed the rights of all creditors as to the succession property and no one could acquire any new privilege thereon.

A PPEAL from the Sixth District Court, Parish of Morehouse.
Ellis, J.

Todd & Todd and S. T. Baird, for Plaintiffs and Appellants.

Newton & Cason and Boatner & Boatner, for Defendant and Appellee.

Bussey & Naff, for Interveners and Appellees:

The opinion of the Court was delivered by

FENNER, J. Plaintiffs sued defendant as administrator of Elbert Nettles for a balance of account of \$749.51. The accounts from which this balance results include sales of a large amount of cotton which was received and sold by plaintiffs and credited to defendant in ac-

39	788
48	684
49	506
39	788
113	290

count. The defendant denies that the balance claimed is due, and files a demand in reconvention, in which he claims a judgment against plaintiffs for the proceeds of said cotton, amounting, as alleged, to more than \$7000, on the ground that said proceeds are property of the succession, and, as such, must be paid over to the administrator to be administered and distributed according to law.

Plaintiffs are appellants from a judgment condemning them to pay to the administrator the sum of \$992.09, the value of twenty-nine bales of cotton, adjudged to have been received by plaintiffs after the death of Nettles, and giving a judgment in favor of plaintiffs to be paid in course of administration for \$1062.42.

Thus, it will be seen, that plaintiffs recover judgment for several hundred dollars more than they claimed in their petition. This results from the fact that in condemning plaintiffs to pay over to the succession the proceeds of cotton which had been credited on the account, this necessarily increased *pro tanto* the balance due on said account, and if the value of all the cotton claimed by defendant, say \$7000, had been allowed, it would, in the same measure, have increased the amount due to the plaintiffs as ordinary creditors.

We mention these matters at the threshold of the case in order to dispose of the motion made by defendant to dismiss the appeal as to the principal demand because that is not within our jurisdiction.

Ordinarily the motion would be well taken, because it is well settled that an appealable demand in reconvention does not give us jurisdiction of an unappealable principal demand, and *vice versa*.

But we regard this as an exceptional case, in which the principal and reconventional demand are so interlaced that one cannot be considered without the other. The issue, as framed by the pleadings, involves the adjustment of the entire account between the parties, in which the claims on both sides must be considered, and this adjustment includes an amount in dispute exceeding two thousand dollars.

The motion to dismiss is therefore denied.

ON THE MERITS.

We will first dispose of defendant's objections to the account on the ground of excessive charges of interest, commissions, etc.

Plaintiffs had conducted a large business with Elbert Nettles for a number of years prior to his death.

In the course thereof accounts and statements had been frequently rendered to him, informing him fully of the nature of the charges made against him, and balances had been frequently struck and car-

Allen, West & Bush vs. Nettles.

ried forward into new accounts. He received these accounts, and never made any objections to them. The last one before his death was rendered on August 26, 1885, and the account on which the present suit is based begins with the entry: "1885, August 26. To balance account rendered, \$2574.43."

Defendant now seeks to overhaul these accounts from 1881, and claims, and was allowed a deduction of \$407.01 for overcharges of interest resulting from the charge of 8 per cent interest, and from the compounding thereof by capitalizing, in the succeeding accounts, the balances from those preceding. We think this was error.

So far as these matters are concerned, the defendant cannot go beyond the accounts which have been rendered to and accepted by him without objection. Parol evidence cannot be received to prove a convention to pay 8 per cent interest, but when such charges have been made, and an account containing them has been rendered and accepted, the account becomes an account stated; the balance represents a settlement between the parties to pay which a promise is implied, and such settlement can no more be impeached on the ground that such charges are included therein, than if the account had been paid and the action were to recover them.

See on this general subject: *Lallande vs. Breaux*, 5 Ann. 505; *Milaudon vs. Sylvestre*, 8 La. 267; *White vs. Henderson*, 2 Ann. 241; *Compton vs. Compton*, 5 Ann. 618; *Thompson vs. Mylne*, 4 Ann. 206; *Pickersgill vs. Brown*, 7 Ann. 298; *Sentell vs. Kennedy*, 29 Ann. 679.

Defendant can only claim the reduction to 5 per cent of the interest charged in the last accounts of February 11 and August 29, 1886. This, according to our calculation, reduces the balance of the last-mentioned account by \$100.

Another deduction was claimed of two usurious charges of 2½ per cent for advances in addition to 8 per cent interest. Both these charges, amounting to \$87.17, were contained in accounts which had been rendered to deceased, and being more than a year old, they cannot be recovered. C. C. 2924. The allowance of these by the judge was error.

The deduction allowed to defendant of \$95, charged under the contract, for commissions on cotton not shipped, was correct. Nettles was to ship a bale of cotton for every ten dollars advanced, and was to pay a commission of \$1.25 for each bale deficient. We can discover no deficiency. The contract was made for the Girard account, and it appears that defendant shipped 24 bales on that account, and did not receive advances exceeding \$240.

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Another deduction of \$100 was allowed in correction of a supposed error in extending on the account, as the proceeds of three bales of cotton, \$14.14, instead of \$114.14. An examination will show, that although the extension of only \$14.14 does appear in the copy of the account, yet this is a mere mistake in copying, and that in the addition of credits the correct amount of \$114.14 is included.

Thus, it appears that the deductions of \$689.18, allowed by the judge in favor of defendants on the foregoing matters, should be reduced to \$195.

At the death of Nettles plaintiffs had on hand, unsold, a number of bales of cotton shipped for his account, and more were received shortly after his death.

The defendant administrator contends that plaintiffs are bound to pay over to the administrator the whole proceeds of all the cotton sold after the death of Nettles, and to assert their privilege (if any they have), on those proceeds contradictorily with other creditors.

So far as any cotton is concerned which had been consigned prior to the death of Nettles, although not sold and not even received till after his death, this contention is absolutely without force.

The third section of act No. 44 of 1882 provides: "That all merchants, factors and others who may have a general balance of accounts or any sum of money due them by any consignor or other person sending them cotton, sugar, etc., for sale, for the purpose of paying such balance of account or sum of money due, shall have a pledge upon all such property consigned or sent to them * * from the time the bill of lading or receipt thereof by the carrier is deposited in the mail or given to the carrier for transmission, which pledge shall be perfect, with the right of sale of said property, which shall be fully vested in said consignee, with the right to appropriate the proceeds of sale to the payment of the amount due such consignee; provided, that nothing herein shall be so construed as to defeat or lessen the privilege of the laborers and landlords in this State for wages and rents as now existing by law, nor as defeating or lessening any other valid *existing* privileges or liens."

Here we have an explicit provision that the mere fact of consignment evidenced by bill of lading, shall operate a perfect and instantaneous pledge, with the absolute right in the consignee to sell and pay his debt with the proceeds, subject to no limitation except in favor of *existing* privileges, which means privileges existing prior to the consignment. It is impossible to conceive how the death of the consignor after the consignment could defeat such clear and perfect vested rights

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conferred by the law itself. The proposition is really not worthy of further consideration. See *Jacquet vs. His Creditors*, 38 Ann. 863; *Rasch vs. Creditors*, 1 Ann. 31; *Jerome vs. McCarter*, 94 U. S. 73.

A different question, however, is presented with reference to the cotton consigned after Nettles' death. At the moment of death plaintiffs had no kind of privilege or pledge on this cotton, which passed immediately into the succession of Nettles, and became subject, *instantly*, to all the rights and privileges of creditors, which were absolutely fixed by the death, and could not be thereafter changed or affected by any act of the administrator or any other person.

This court has said: "Privileges and mortgages rightfully acquired before the death are respected; but with that exception the property of a succession is a common fund, the equal pledge of all the creditors; and one is not permitted, by superior diligence, or by dealing with the executor, to get an advantage over others." *Boyce vs. Escoffie*, 2 Ann. 872.

So we have held that "a privilege recorded after the death of the debtor cannot affect creditors, whose rights become fixed at the date of the death." *Suc. Rhoton* (syllabus), 34 Ann. 893.

Neither the administrator nor any unauthorized person could do any act after the death of Nettles the effect of which would be to confer upon plaintiffs a privilege or right of pledge on the property of his succession which did not exist at the moment of his death.

In this case, the cotton consigned after his death seems to have been consigned before the administrator was appointed, by some one who had no authority whatever.

It follows that plaintiffs must account to the succession for the proceeds of cotton consigned after the death.

It does not, however, follow that cotton received shortly after his death may not have been consigned before; and we agree with the judge *a quo* that defendant has supported his reconventional demand by no evidence establishing that more than 29 bales were consigned after the death; but as to that amount of cotton the proof is certain by production of the bills of lading which are dated after the death.

We shall adopt the judgment rendered below with an amendment, correcting his excessive allowance of deductions claimed by defendant.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by increasing the principal of the judgment against defendant from "\$1,062.42" to \$1,556.60, and that, as thus amended, the same be now affirmed, defendant and appellee to pay costs of this appeal.

Mr. Justice Todd takes no part.

 State ex rel. Ludeling vs. Judge.

No. 1168.

 THE STATE EX REL. JOHN T. LUDKLING VS. WILLIAM T. MILLSOPS,
 JUDGE AD HOC.

39	793
50	808
39	793
112	637

A district judge who has recused himself and appointed a lawyer or judge *ad hoc* to try the recused case, is the only one who has the jurisdiction or authority to appoint some one to fill a vacancy caused by the removal, death, or resignation of the latter.

APPLICATION for Prohibition.

The relator *in pro per*.

Stubbs & Russell, for the Respondent.

The opinion of the Court was delivered by

WATKINS, J. The relator, alleging himself to be the plaintiff in the suit entitled John T. Ludeling vs. J. C. Chaffe et al., now pending for trial in the parish of Ouachita, Fifth Judicial District, of which Hon. R. W. Richardson is the presiding judge, represents that said presiding judge recused himself therein, and caused the order of recusation to be entered on the minutes of his court. He further represents that the judge, after thus recusing himself, first appointed Thomas A. Garrett, a lawyer having the necessary qualifications, and he qualified as such, but resigned. Judge Richardson then appointed John Boatner as judge *ad hoc*, and he qualified and subsequently resigned. The same judge then appointed T. A. Garrett the second time, and he again qualified and resigned subsequently. Thereupon the said Judge R. W. Richardson selected and appointed the respondent as judge *ad hoc*, and he has qualified and assumed the exercise of the duties imposed upon him by law in that case.

Relator's contention is that Judge Richardson was without capacity to appoint the respondent, and that he is without jurisdiction or lawful authority to exercise the duties appertaining to the appointment; and that upon the resignation of the judge, or judges *ad hoc*, he, or some one of them, should have made the appointment of a judge *ad hoc*, to act in his place and stead.

This proposition is denied by the respondent, who asserts the legality of his appointment, and his jurisdiction over and lawful authority to try the recused case.

Relator cites in support of his claim, our recent opinions in State ex rel. Fontelieu vs. Judge, 37 Ann. 394, and State ex rel. Fontelieu vs. DeBaillon, 38 Ann. 727.

In the former case we said, in keeping with prior authority therein cited, that the judge appointed to try that case "became vested with

State ex rel. Ludeling vs. Judge.

jurisdiction over the case absolutely and as exclusively as would have been the case with a suit originating in his own court."

Sec. 6 of act 210 of 1880 declares that "the *lawyer* or judge appointed under sections 2 and 3 of this act, shall have and exercise the same powers as the judge (recused) may exercise in cases before his court, in which no causes of recusation exist, etc." The case above referred to not having been tried by the judge appointed to try it within nine months, an application was made to have the cause transferred to some parish in an adjoining district, and we held that the judge *ad hoc* at the time presiding, was the proper officer to make the transfer of said cause.

In *Halphin vs. Guilbeau & Broussard*, 38 Ann. 727, we held that "in case of the *transfer of a suit*, the *judge* of the court to which the transfer is made has as full and complete authority and jurisdiction over the same as if it had originated in that jurisdiction." State ex rel. *Gates vs. Judge*, 38 Ann. 452.

While it is perfectly true that the judge or lawyer appointed to try a recused case has exclusive jurisdiction over it, and can exercise as perfect control over it as the judge who has recused himself, can exercise over other causes in which he is not recused; and such judge *ad hoc* is the only competent and proper authority to *transfer the suit* to another jurisdiction, under the law, it does not follow that he has the power, or can exercise the authority of appointing another judge or lawyer to fill the vacancy to be produced by his contemplated resignation.

That power must of necessity reside in the judge who is recused, as is fitly illustrated by this case. The several lawyers selected and appointed by Judge Richardson, have already resigned, and the respondent was thereafter appointed and qualified, and entered upon the discharge of the duties of that office. It is perfectly clear that a judge *ad hoc*, who has *actually resigned*, could make no appointment thereafter. Such being the case, there could be no other judge *ad hoc* appointed, if none could be appointed by the judge recused.

Take the case of a judge *ad hoc* who should die, or remove from the State, at a time when there was a vacation of the court. If thereafter the judge recused *could not* appoint a judge *ad hoc* to fill his place, the trial of the case would remain at a standstill until the said judge should cease to be the judge of the court in which the recused case might be pending. We are unwilling to place such a construction upon the plain and unambiguous words of the statute as would pro-

State vs. Paul.

duce such a state of things. There is no such a *casus omissus* in the law under consideration.

So long as the judge *ad hoc* is acting he has exclusive control of the case, but he cannot select and appoint his successor.

The relator has not presented a case entitling him to relief.

It is therefore ordered, adjudged and decreed that his demands be rejected, and the alternative writ of prohibition be set aside, at his cost.

No. 1167.

THE STATE OF LOUISIANA VS. SAMPSON PAUL.

In criminal cases the Supreme Court cannot consider an appeal the record of which contains no plea or matter presenting an issue of law involved in the trial.

The course of attorneys who take appeals in criminal cases to which they pay no further attention is deserving of judicial censure.

A PPEAL from the Twelfth District Court, Parish of Grant.
Blackman, J.

John C. Wickliffe, District Attorney, for the State, Appellee.

M. T. Machin, for Defendant and Appellant.

The opinion of the Court was delivered by

POCHE, J. The defendant appeals from a conviction of larceny and a sentence to hard labor for one year, but the record which his counsel has brought up contains no bill of exceptions, no motion or plea or complaint on which this court can exercise its limited jurisdiction in criminal cases.

In the name of the State and in furtherance of a proper administration of justice, as well as in the interest of the parishes on which the burden of unnecessary costs is thus imposed, we take another occasion to discountenance the habit of some attorneys who take appeals in criminal cases, to which they pay no further attention. Such a course can hardly be in the interest of the accused, is unjust to the parish, and hardly respectful to this Court. *State vs. Williams*, 37 Ann. 311.

Judgment affirmed.

Houston vs. Railroad Company.

No. 1164.

JOHN R. HOUSTON VS. VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY.

Suits against railroad companies for damages may be brought in the parish where the damage was done or the injury received.

Where the speed of railway trains is not regulated by statute, unless in exceptional cases, the existence of a high rate of speed does not argue a fault on the part of the company. The reasonable rule is that the highest rate of speed is proper and legitimate consistent with the safety of the passengers.

A person cannot recover for an injury to which he has contributed by his own want of ordinary care.

A PPEAL from the Third District Court for the Parish of Lincoln.
Young, J.

Barksdale & Van Hook and *Graham & Gaskins* for Plaintiff and Appellee.

Stubbs & Russell for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. This is a suit of the plaintiff in his own right and as tutor of his minor children for \$22,500 damages, resulting from the death of his wife, Mrs. Georgia Houston, and infant child, run over and killed by the train of the defendant company on the 13th of January, 1885.

It is charged in the petition that "the killing was wantonly and recklessly done, and might have been avoided by ordinary care and prudence on the part of the employees of the railway company."

The answer is a general denial and an averment that the death was caused by contributory negligence on the part of the decased.

The case was tried by a jury, who, by a majority, returned a verdict in favor of the plaintiff for \$13,970 individually and as tutor, one-half in each capacity, and from the judgment on this verdict the defendant company has appealed.

There was a plea to the jurisdiction *ratione personæ* filed, which was overruled. This ruling was proper under the provisions of paragraph 9, C. P. 168, authorizing an action of this kind to be brought in the parish where the damage was done. This article was not repealed by the charter of the company. 30 Ann. 607. Besides, from the silence of the defendant's counsel, we infer that the correctness of the ruling on this point is not questioned.

The facts of the case are substantially and briefly these:

The deceased, carrying her infant child and accompanied by her sister, was walking on the railroad track, returning from a visit to a

39 796
45 1203
39 796
48 325
48 330
39 796
106 113

39 796
115 600
39 796
116 129
117 562

Houston vs. Railroad Company.

neighbor and going eastward to their home, which was on a public road running parallel with the track of the railroad, and about 150 yards distant therefrom. The train, bound in the same direction that the deceased and her sister were going, approached them. The latter stepped from the track and the train passed by her; the former was, however, overtaken at or near a crossing of the road to which she was hurrying; was run over and killed, together with her infant child.

The fault charged against the company, from which this deplorable calamity is alleged to have resulted, was the unusual and extraordinary speed at which the train was then and there being propelled, and the failure to give a timely warning, by the required signals, of the rapid approach of the train, and the failure to stop the train in time to avoid the casualty.

The contributory negligence charged was alleged to be that, notwithstanding the train was seen and heard by the deceased at a sufficient distance and in sufficient time to have afforded her ample opportunity to get off the track and thus avoid all danger, she persisted in remaining on the track after the train had been heard and seen, and after the signals had been timely given by the ringing of the bell and the blowing of the whistle, and when there existed no impediment to her getting off the track in a moment. And it was charged that her death was caused, not by the fault of the company, but by her own negligence in failing to take ordinary care to avoid the threatened danger.

There is a conflict in the testimony respecting the rate of speed at which the cars were running at the time of the disaster. The plaintiff contends that the train was moving at a speed of nearly sixty miles per hour, and the defendant that it was a speed of twenty-five to thirty miles only. We cannot see that this is a material inquiry.

There is in this State no statutory regulation of the speed on railways. Of course, it would evince criminal negligence to move a train at a high rate of speed through cities, towns or villages, or other places where people are accustomed to throng; but, considering that railroad companies are entitled to the exclusive use of their track or road-bed, there is no reason why, in an open country not thickly populated, the mere probability that a person or persons might occasionally walk on the railroad track should be made a factor in this question of speed on railroads. A high rate of speed has always been a great desideratum, and engineering skill has been taxed to the utmost to attain it; and we conceive the reasonable and established rule on this subject to be that no conceivable rate of speed consistent with the safety of passengers is *per se* negligence. Pierce, 354; Rorer, 1066.

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In the case before us, for instance, what mattered it at what rate of speed the train was moving, if the deceased could, if she chose, have stepped off the track, and was not prevented from doing so by the speed at which the train was running?

Under this view of the subject we cannot discover any fault of the company in connection with this question of the rate of speed at which the train was then moving.

Was the company in fault in failing to give a timely warning or in stopping or attempting to stop the train in time?

This is what the engineer says on this point:

"I was between three hundred and four hundred yards from them when I first discovered them. I rang the bell and blew the whistle to call their attention to the coming train. Both looked back, saw the train, and they turned around and both walked on a few steps, when one of them stepped off on the north side of the track. I expected the other one to get off any moment, as one does that is walking on the track that way. She never showed by her actions that she was frightened, was out of her mind or deaf. She commenced running down the track ahead of the engine. In the meantime I was getting very close to her. I thought she would not have time to make the crossing before I got to her, so I reversed my engine. (Then he describes the effect of reversing an engine.) The reason I reversed the engine on this occasion was to try to save the woman. There was no other means that I could have used to avert the accident; I used all the means I had. It is no unusual thing to see persons on the track ahead of an engine; I never before saw an occasion in which they did not step off to the side of the track. I don't think I can recall a trip that I ever made over the road in the day time where I did not see persons ahead of the engine on the track. I was engineer in charge of the locomotive; there was nothing undone by me that could have been done to avoid the accident."

There is some conflict between this statement and that of other witnesses, especially as to the distance between the train and the deceased when the warning signals were given, it being stated by one or more witnesses that the space between them was not more than fifty yards when the whistle sounded. Be that as it may, however, considering that the deceased was in hearing of the cars and in view of them from four to six hundred yards, that she was in the full possession of her faculties, mental and physical, and the engineer had the legal right so to presume, and that ordinary care for her own safety and the instinct of self-preservation even would warn her to step off the

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track, which her sister had already done, the engineer was not in fault in not sooner realizing and appreciating the imminence of the peril, and in not sooner taking steps to avoid it.

It is equally clear from the facts stated that the death of the deceased was really caused by the want of ordinary care on her part. It was entirely in her power to save herself by the exercise of such care. There was not the slightest difficulty in the way, as was apparent from the easy escape made by the sister of the deceased, who was shown to be of defective eye-sight, and therefore not as capable of taking in the situation or discovering its peril as the deceased.

The doctrine of contributory negligence, in brief, is that a person cannot recover for an injury to which he has contributed by his own want of ordinary care. Thompson, Neg., 1148 et seq.

In the case of Railroad Company vs. Jones, 95 U. S. 442, Mr. Justice Swayne, as the organ of the court, states the following legal propositions, which we quote here as peculiarly applicable: "One who, by his negligence, has brought an injury upon himself, cannot recover damages for it. Such is the rule of the civil and of the common law; a plaintiff in such cases is entitled to no relief. But when the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: 1. Whether the damages were occasioned entirely by the negligence or improper conduct of the defendant; or, 2, whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case plaintiff is entitled to recover; in the latter he is not." See also 95 U. S. 697.

It is suggested by the plaintiff's counsel that the deceased was evidently confused and bewildered by the appalling situation in which she found herself, and that therefore the principle of contributory negligence could not be imputed or applied to her acts and conduct.

We think it highly probable that her mental condition was such at the time as stated, so extraordinary was her conduct, but unless that condition was brought about by some fault of the defendant company, the deceased cannot be relieved from the imputation or effect of contributory negligence, and such fault we have failed to find, as already stated.

With respect to the death of the infant child, and the effect of the neglect of the mother as bearing thereon, the doctrine is correctly stated thus:

Sullivan vs. Railroad Company.

"If the parent is personally present controlling the movements of the child, the parent's negligence will defeat an action for an injury to the child in like manner as if he suffered the injury himself." *Pierce* 338; *Rorer* 1031-7 and 1070-1.

Reaching these conclusions, we are compelled to reverse the judgment appealed from.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed, and that the demand of plaintiff be rejected at his cost in both courts.

No. 1165.

E. A. SULLIVAN VS. VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY.

Plaintiff, walking on an elevated plank-walk, constructed alongside of its track at a station by defendant for the use of passengers and the public, heard a train approaching behind him, and moved to the middle of the walk, where he would have been safe from being struck by any passing car of the ordinary width. The approaching train, however, was a construction train of peculiar build, having its brakes attached to the side of the cars instead of at the ends, and thus causing the brake-wheels to project some fourteen inches beyond the edge of the car. This wheel being of the height of plaintiff's head, struck him as the train passed and knocked him senseless, inflicting severe injuries.

Held, that plaintiff had the right to be on the walk, and to suppose himself in safety while occupying it at a point beyond the projection of all ordinary trains, and that he was guilty of no negligence.

Held, that defendant's employee seeing him there, and knowing the extraordinary projection of his brakes, was bound to recognize his danger, and guard against it; and hence, was guilty of negligence.

The court is averse to increasing the verdicts of juries, who rarely underestimate damages; but when the jury has failed to do justice, the court, in the exercise of its jurisdiction, must do it.

The verdict in this case is manifestly insufficient, and is increased from \$100 to \$600.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

C. J. & J. S. Boatner, for Plaintiff and Appellant.

"A railroad company which grants the use of its road to another company, is responsible for accidents caused to passengers which itself carries, by the negligence of the other company thus running by its permission." *Railroad Co. vs. Barrow*, 5 Wall. p. 80; *A* and *E* railroad cases, vol. 17, p. 649; 36 Ind. 511.

It is the duty of companies to keep in a safe and secure condition their premises, depots and approaches from thence to their passenger cars. *Pierce on Railroads*, pp. 275-6.

It is the duty of a railroad company to construct safe platforms for its passengers. *Reynold vs. R. R. Co.* 37 Ann. 698; *Townes vs. R. R. Co.*, 37 Ann. 632; *Penington vs. R. R. Co.*, 34 Ann. 777; *Lehman vs. R. R. Co.*, 37 Ann. —; *Wharton on Negligence*, p. 654.

Sullivan vs. Railroad Company.

Where injury is partly due to negligence of the injured and partly by failure of the company to provide proper and suitable apparatus, the negligence of the injured will not exonerate the company from the consequences of its own default. *Townes vs. R. R. Co.*, 37 Ann. 632; *Grand Trunk R. R. Co. vs. Cummings*, 106 N. S. 700; *Ellis vs. R. R. Co.*, 95 N. Y. 546.

Malice will be presumed in all cases where there is a want of probable cause, and a wanton disregard of probable consequences that will follow the act of negligence or carelessness. 4 Ann. 377; 12 Ann. 53; 9 Ann. 219; 6 Ann. 577; 15 Ann. 491; 29 Ann. 494; 33 Ann. 397; 9 R. 418, 387; 4 Cush. 217, 238; 5 Bing. N. C. 722.

The law blends together the interest of society and of the aggrieved individual and gives damages not only to compensate the sufferer but to punish the offender. *Sedgwick on Measure of Damages*, p. 38; 13 L. 110; 26 Ann. 313; 33 Ann. 393; 34 Ann. 1108.

The Supreme Court has the power, and it is its duty to disregard the verdict of a jury where it is palpably erroneous in allowing only nominal damages, and to give judgment for the amount it may think meets the ends of justice. *Sedgwick on Damages*, 2 vol., p. 661; 5 Bing. N. C. 494; 22 Conn. 74; 19 Boob. N. Y. 461; 13 L. 110 and cases there cited; 26 Ann. 313; 33 Ann. 397; 29 Ann. 223; 34 Ann. 1107.

Stubbs & Russell, for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. At Waverly station the defendant company's main track is situated at some distance from its depot building, and between the two runs a side-track. Between the two tracks defendant had constructed a plank-walk for platform slightly elevated above the tracks, and running for some distance beyond the depot front. Its object was to furnish a convenient landing-place for passengers getting on or off its cars.

It consisted of three parallel planks, and was from three to four feet wide. Between the edge of the walks and the main track there was a space of between 12 and 18 inches, and, inasmuch as an ordinary box or passenger car projects over the track about 22 to 24 inches, it follows that it would, in passing, project about 6 to 8 inches over the walk. Like conditions existed with reference to the side-track.

On December 31 plaintiff had gone to the station to meet some families of laborers who arrived on the passenger train.

Shortly afterward he observed that some children of the party were on the main track, and noticing that another train was approaching, he walked up this plank-walk to make them get off the track.

After doing so he proceeded on the same walk towards the wagons which were to receive the laborers, going in the same direction in which the approaching train was coming, and with his back toward it. As it neared him he moved from the edge to the middle of the walk, and then, considering himself in safety, paid no more attention to it. Any ordinary car would have passed without touching him; but it

Sullivan vs. Railroad Company.

chanced that this was a construction train running with its engine in the rear, and composed of flat cars for loading and unloading dirt, with a centre-piece down their middle as a guide for an unloading plow which passed along the whole train propelled by a wire-rope attached to the locomotive. This arrangement necessitated the placing of the brakes on the side, instead of at the ends of the several cars, as is usual. Hence, the wheels of the brakes projected some fourteen inches beyond the edge of the car, and being about the height of plaintiff's car, the wheel struck him as the cars passed, inflicting the injuries for which the present suit in damages is brought.

We think the defendant is clearly liable. The plank-walk was built for the accommodation of passengers and the public, and the latter were invited to use it. Plaintiff was properly on the walk, and had the right to suppose that he was in safety there. Conceding that his eye might have informed him that the edge of the walk was too near the track to permit the passage of cars of ordinary width without projecting over it, yet he availed himself of this information, and occupied the middle plank, where he would have been safe from any ordinary train. It happened that there were some stationary box-cars on the side-track which projected over the opposite edge of the walk, and, if he had tried, he could not have moved much further away, though if he had moved a little farther, he would have escaped, as his companion did. Still, in occupying the middle plank, he passed beyond the reach of any ordinary car, and certainly had the right to suppose himself in absolute safety, as he would have been but for this unusual system of brakes. There is some evidence to show that the brake which struck him was bent outward, though this is not contradicted.

The engineer saw him, and knowing the projection of the brakes, and the situation of the platform, should have recognized and guarded against the danger.

Plaintiff was guilty of no negligence. He did not know, and was not bound to know, the existence of these unusually projecting brakes. He had a right to suppose he was safe, at least in the middle of that walk, and in taking that position, common experience and reasonable foresight assured him that, under all ordinary conditions, he ran no risk. The injury, therefore, was not an ordinary and natural sequence of his act, but was the result of extraordinary conditions brought about by the acts of defendant, and which plaintiff could not have foreseen, and had no right to anticipate. *Summers vs. R. R.*, 34 Ann. 144.

In the case just quoted, the nature and characteristics of juridical negligence are fully discussed. The conduct of defendant falls precisely under the principle there approved as laid down by the Supreme Court of Pennsylvania: "When we are engaged in an act which the surrounding circumstances indicate may be dangerous to others, and when the event whose occurrence is necessary to make our act injurious is one which we can readily see may occur under the circumstances and unite with the act to commit the injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury." *Fairbanks vs. Kerr*, 70 Penn. St. 86.

The jury, which tried the case below, appreciated the facts as we have done, so far as defendant's liability is concerned, and gave a verdict for plaintiff for one hundred dollars.

Plaintiff is the appellant, and demands an increase of the allowance. He is clearly entitled to it.

With all our indisposition to increase verdicts for damages rendered by juries, who rarely under-estimate them, yet it is a matter within our jurisdiction, upon which we are in duty bound to pass, and we must do justice when clearly satisfied that the jury has failed to do it. Hence, in proper cases we have extended such relief. *Scheen vs. Poland*, 34 Ann. 1107; *Deconux vs. Lieux*, 33 Ann. 397; *Richardson vs. Zuntz*, 26 Ann. 313; 2 *Sedgwick on Damages* 661, and cases there cited.

In this case plaintiff was knocked senseless, his ear was cut in two, he received a severe gash on head, his face was mashed and bruised, and his leg severely sprained. After recovering consciousness, he was seized with vomiting, which continued for several hours. He was laid up for several days, suffering great pain and incurring expenses for board and medical treatment, and did not fully recover for some weeks.

It is absurd to consider this verdict of one hundred dollars as affording reparation for such injuries. Indeed, it would scantily compensate the trouble and expense of the law-suit which he was compelled to bring in order to vindicate his rights.

We think an addition of \$500 to the verdict will mete out only moderate justice.

It is, therefore, ordered, adjudged and decreed, that the verdict and judgment appealed from be amended by increasing the principal sum from one hundred to six hundred dollars, and that, as thus amended, the same be now affirmed, defendant to pay costs of appeal.

Blakemore vs. Blakemore.

No. 1171.

R. M. BLAKEMORE VS. J. C. BLAKEMORE.

In case a partition cannot be effected in kind without serious inconvenience to one of the co-proprietors of the property held in indivision, it must be sold at public auction in order that the partition be effected by licitation.

A PPEAL from the Sixth District Court, Parish of Morehouse.
Ellis, J.

Newton & Cason and J. P. Madison, for Plaintiff and Appellee :

R. B. Todd, Jr., and D. Todd and Bussey & Naff for Defendant and Appellant

The opinion of the Court was delivered by

WATKINS, J. This is a suit for the partition between two joint owners of two tracts of improved real estate, known as the Barton and Buatt plantations.

The plaintiff demands that the partition be made in kind ; but the defendant denies the practicability of a partition in kind, and insists that same cannot be so made without great inconvenience to the proprietors, a depreciation in the value of the properties, and a cantling of tenements—and he demands that a partition be made by licitation.

The only question to be determined is whether the partition shall be effected by a division in kind, or by licitation.

I.

The defendant's counsel make complaint of certain alleged irregularities in the proceedings that occurred in the lower court, and of the celerity with which they were conducted ; and, among other things, our attention has been attracted to the fact that the experts appointed by the court at the suggestion of the parties, for the purpose of making an examination of the properties, and determining whether a division could be made in kind, did not make such an examination and report, but proceeded to make a division thereof instead.

When one of those gentlemen was interrogated as a witness he stated that he did not understand the purpose for which he was appointed, and was of the opinion that a partition could not be made in kind without causing great inconvenience and injury to the proprietors.

The gentleman appointed for the purpose of acting as umpire made a similar statement. Hence, the defendant's counsel contend that if a correct examination and report had been made, in pursuance of the order of the court, it would have been adverse to the pretensions of

Blakemore vs. Blakemore.

the plaintiff. The one filed was opposed by the defendant, and the case was fixed for trial. Both parties appeared with their witnesses, and during the progress of the trial each was allowed the fullest opportunity of being heard on the *vital* question in the case.

While it is true that the proceedings antecedent to trial and judgment were irregular, and might have vitiated the decree, yet, inasmuch as the defendant has condoned the fault, if fault there was, and has participated in the trial on the merits, we are of the opinion that no injustice will be done him by examining and deciding the cause on its merits.

II.

The record shows that the Barton place is situated in Morehouse parish, on the road leading from Oak Ridge to Eason's ferry, on Bayou Bartholomew, and contains about seven hundred acres, of which about three hundred are in a fair state of cultivation.

On this place there are a good dwelling-house, corn-crib, steam-gin and mill, and about fifteen cabins for the use of laborers.

The above-mentioned road runs through the cultivable portion of the land centrally, or very nearly so, dividing some into two fields of nearly equal size and proportion. The dwelling, steam-gin, corn-crib and nine laborers' cabins are situated upon a small area of about five acres, and same are in a good state of repair. The other six are situated upon a different portion of the plantation, and same are not in good condition. All of these improvements except six cabins are on the northern portion.

This plantation and improvements are estimated to be worth \$8000 or \$10,000. The plaintiff insists—and the proof shows—that all of the improvements are worth about \$750 only. The open land on this plantation is in shape a parallelogram, the length of which is double that of its breadth, and extends north and south.

The Buatt place is situated six miles distant from the Barton plantation, and only contains one hundred and sixty acres, of which one hundred and twenty are in cultivation.

This place has a horse-power gin and six laborers' cabins; and the gin and three cabins are on one part of the land, and three cabins are on the other part of the land.

It is estimated to be worth about \$2500.

Several witnesses were introduced on either side, but a fair preponderance of the evidence establishes that a partition in kind cannot be effected of the properties in controversy, without loss or inconvenience resulting to one of the co-proprietors. The Code declares that a par-

State National Bank vs. Allen.

tion in kind cannot be made where a diminution in value, or loss or inconvenience would result to one of the owners. R. C. C. 1340.

This question was well considered and decided by this court in *Meyers vs. Pargoud*, 34 Ann. 969, in which the court says:

"A division in kind should give to each proprietor a smaller plantation, if not complete, with at least a share of the open land, woodland, buildings, etc., if not equal, approximating equality."

In that case the court held that a partition in kind was impracticable, and could not be made in conformity with the views expressed.

If in that case a partition in kind would have been inconvenient and injurious, situated as the Pargoud place was, we feel the better assured that the two plantations in controversy could not be divided in kind without one of the co-proprietors sustaining loss or inconvenience.

The fact that the plantation improvements on the properties in dispute, are of small value, and some of them are not in good repair, cannot exercise any control over its division. They seemed to have been satisfactory to the co-proprietors, and must be viewed as we find them.

We are of the opinion that the judgment of the lower court is erroneous.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be avoided, annulled and reversed, and proceeding to render such decree as should have been rendered.

It is ordered, adjudged and decreed, that plaintiffs and appellee's demand for a partition in kind be rejected, and that defendant's demand for a partition by licitation be sustained.

It is further ordered, adjudged and decreed, that the two plantations and all their appurtenances and improvements, held in indivision by the plaintiff and the defendant as co-proprietors, "be sold at public auction, after the time of notice and advertisement prescribed by law," and in the manner prescribed by law for sheriffs' sales under execution; and it is further ordered, adjudged and decreed, that the cost of appeal be taxed against the plaintiff and appellee, and that all other costs be prorated between the parties equally.

No. 1176.**STATE NATIONAL BANK VS. L. D. ALLEN, JR., AND GARNISHEES.**

In a garnishment proceeding involving an appeal, an issue restricted between plaintiff and several garnishees, against each of whom plaintiff had prayed for judgment in separate and distinct amounts, the test of jurisdiction is in the respective amounts prayed for against each of the garnishees, and not by the original demand against the defendant, or in the cumulated amount of all the claims against garnishees respectively and separately.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Ludeling & Stillman, for Plaintiff and Appellant.

C. J. & J. S. Boatner, for Defendant and Appellee.

Stubbs & Russell, Potts & Hudson and M. T. Liddell, for Garnishees.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs brought suit to recover eight thousand dollars of the defendant, against whom they sued out a writ of attachment, accompanied by garnishment process, upon a large number of persons alleged to be his debtors.

Judgment was rendered against the defendant in the full amount claimed from him, and as that judgment has not been appealed from, it is now final, and is no factor in the present appeal.

The only issue submitted to our view under the pleadings is the right of plaintiffs to hold a large number of the garnishees for the respective sums claimed of them in plaintiff's traverse of the answers, which they made respectively to the questions propounded to them touching their respective indebtedness to the defendant Allen.

Judgment was rendered in favor of plaintiffs against two of the garnishees, for small amounts respectively acknowledged to be due by each to the defendant, but for reasons unnecessary to detail here, all the other garnishees were discharged.

Plaintiffs have appealed from that part of the judgment.

Appellees make the point that we have no jurisdiction *ratione materiae* on the ground that, under the pleadings, no judgment can be rendered against any one of the garnishees in a sum not exceeding \$2000; and that there is no community of interests or privity between the garnishees, so as to justify the addition together of all the separate claims urged against each of them respectively as a test of our appellate jurisdiction.

The point is well taken, and the appeal cannot be sustained.

The fact that all these various garnishees may be debtors of the defendant does not contribute to make them joint debtors of the latter more than the fact of their being residents of the same parish could produce the same result.

The status of the several garnishees, even if they should all be debtors of the defendant, cannot be traced to the same or common source, and the result may be that some of them are debtors, and that others are not indebted to the defendant.

State National Bank vs. Allen.

That feature is illustrated by the very terms of the judgment rendered below, in which two of the garnishees are held and the others discharged.

It is clear that, if the judgment had been rendered against all the garnishees except one, the parties cast could not have brought their appeal before this court, where they could not have shown an appealable interest without adding together all the amounts claimed of them respectively ; and it is just as plain that the two garnishees who were held below could not sustain an appeal before this court. It is also undeniable that plaintiffs can exercise no right of appeal which their opponents, and each of them, could not exercise, if the position was reversed.

In a suit in which several defendants could be sued in one action by virtue of a special legislation, this court has held that the separate interests of the defendants could not be cumulated so as to create an appealable amount, when the record showed that the separate interest of each was less in amount than the lower limit of our jurisdiction.

In that case, which was an expropriation proceeding by a railroad company, the court said : " There is no community of interest between the various defendants ; the evaluation of the lands and damages of each must be made separately, and the adjudication affects each separately and distinctly, as though they had been made defendants in so many different suits." " If the company had been satisfied with the award and judgment, and appeal had been taken by one of the defendants, he certainly could not have invoked the entire value of the lands expropriated as the test of our jurisdiction."

" He would have been limited and confined to the vindication of his own separate and distinct interest, and the amount allowed him by the award would have been held to constitute the matter in dispute." *La. Western R. R. Co. vs. Hopkins*, 33 Ann. 806.

And so with each of the garnishees in this suit, who, in case of appeal, would have been confined, under a question of jurisdiction, to the particular amount claimed of him in plaintiffs' motion for judgment in their traverse of his answers. See also *Marshall vs. Hormes*, 39 Ann. —.

Plaintiffs' counsel does not deny the proposition that no judgment could, under the pleadings, be rendered against any one of the garnishees for a sum exceeding \$2000, but his contention is that the amount of plaintiffs' claim against the defendant is the test of jurisdiction, and that his prayer was for judgment in that sum against each of the garnishees who would fail to answer.

Culverhouse vs. Marx.

In making that point counsel loses sight of the present status of his claim against the defendant, which has been merged into a final judgment, from which no appeal has been taken, and rendered several months before the trial of the issue between plaintiffs and the garnishees, and of the present status of his clients' claims against the latter, as characterized by his pleadings in his traverse, in which he prays for judgment against each garnishee in a separate amount against them all separately, in sums ranging from forty-one to fifteen hundred dollars.

Under his amended pleadings counsel has abandoned his original prayer, and he must now be held to the demands contained in his last pleadings.

On that point the question under discussion is entirely covered by the decision of this court in the case of Wood, Slayback & Co. vs. Rocci, New Orleans Insurance Association Garnishee, 32 Ann. 1120 in which similar pleadings had been made.

In that case plaintiffs had originally claimed from the garnishee the full amount of their demand against their debtor, but in their traverse they had prayed for judgment against the garnishee for the value of the property which the company had acknowledged to hold for the defendant. The court said: "By resorting to this rule plaintiffs unequivocally shifted their position, and clearly abandoned their previous prayer, as set forth in their supplemental petition. The character and amount of their demand are therefore to be tested under the relief prayed for in their rule to traverse garnishee's answer." * *

This is precisely the condition of the case in hand—and hence we must decline jurisdiction.

It is therefore ordered that the present appeal be dismissed at appellants' costs.

No. 1184.

WILLIAM C. CULVERHOUSE ET AL. VS. JACOB MARX—JAMES PEARSON,
WARRANTOR.

Though plaintiffs in a suit may have given no express authority to their attorneys to compromise the same, yet where the attorneys have compromised it, and given proper information to their clients of the terms of the compromise, and remitted to them the money paid under it, which is received, the latter will be held to have ratified it, and will be bound by it. A judgment rendered on the compromise can be pleaded as *res adjudicata* to another suit between the same parties, and embracing the same subject-matter.

A PPEAL from the Third District Court, Parish of Union.
Holstead, Special Judge.

Thos. O. Benton for Plaintiffs and Appellants.

Jas. A. Ramsey and *J. W. Holbert* on the same side.

E. M. Graham and *J. E. Trimble* for Defendants and Appellees.

The opinion of the Court was delivered by

TODD, J. The plaintiffs, as heirs of their mother, Mary Culverhouse, sue to recover one undivided half of the property described in the petition, which was once the property of the community that existed between the said Mary Culverhouse and her husband Wm. Culverhouse, both deceased.

The defendant called in warranty his vendor, James Pearson. They both answered, and from a judgment in their favor the plaintiffs have appealed.

In their answers among other defenses set up, were those of estoppel and *res adjudicata*.

These pleas are founded on the following facts and proceedings :

In the year 1882, these plaintiffs instituted an action in the district court of Union parish against the same defendant and for the same property now sued for.

There was a compromise entered into between the attorney representing the plaintiffs in said suit and the defendant and warrantor therein, and judgment rendered on said compromise on the 22d of October, 1882, declaring the settlement of the controversy by compromise and dismissing the suit.

In the petition in the instant case that compromise is referred to, and the same is alleged to be null and void on account of the want of authority in the attorney affecting it, and error on part of the plaintiffs.

By the terms of the said alleged compromise, the plaintiffs, through their said attorneys, agreed to receive \$567, and did so receive it, in full settlement of their claim to the property.

In the written agreement, evidencing the alleged compromise, we find this language, quoting :

“And the attorneys representing plaintiffs herein agree for them that this shall be in full settlement for all of the property situated in the town of Farmerville that was placed on the inventory of the succession of Mrs. Culverhouse, taken by W. C. Smith, recorder of Union parish on March 1st, 1859, bought by James Pearson, and it being the understanding that this settlement is to include all the property that ever belonged to the father of these plaintiffs, and which subsequently came into the possession of Jacob Marx by purchase from James Pearson, and of James Pearson himself and none other.”

State vs. Faulkner.

Soon after this agreement was entered into, Wm. R. Rutland wrote to one of the plaintiffs, Thomas Culverhouse, in which he thus referred in his letter to this compromise, quoting: "We have received a compromise of the first suit in your favor of \$500 and something over, which pays all costs. * * *

"Amount to distribute.....	\$500
One quarter amount of our fee as per contract.....	125
Amount to divide less fee.....	375
One-eighth interest to each heir.....	46

for which amount please find my sight draft, etc."

And in another letter to W. C. Culverhouse, also one of the plaintiffs, he wrote:

"The compromise only embraces the town property, and does not effect other lands near town."

Drafts representing the several interests of the heirs in the fund were sent and received. At least this is not disputed.

It seems to us that from this agreement, and the information given to the parties by those letters referred to of the counsel, there could be no mistake about the property, the subject of the compromise, or the terms thereof.

Now, although the plaintiffs may never have authorized the making of the compromise, yet it is certain that after receiving the money after being thus informed of the fact and the terms of the settlement and making no objection, they fully ratified it.

It was nearly three years before the parties were again heard from, and then through the present action.

We conclude that the pleas of estoppel and *res adjudicata* are fully sustained, and so concluding, we cannot disturb the judgment of the lower court.

Judgment affirmed with costs.

No. 1181.

THE STATE OF LOUISIANA VS. JAMES FAULKNER.

Where in a single transaction a party commits two distinct crimes, so related to each other that proof to sustain one need not involve the proof necessary to sustain the other, indictments will lie for both and conviction of one will not bar the other.

Thus when one, entrusted by A with cotton for a particular purpose, obtains money thereon from B, by falsely representing himself as owner and selling to him, he may be indicted as well for embezzling A's cotton, as for obtaining B's money under false pretenses; and conviction of latter offense will not sustain *autrefois convict* to the other.

39	811
45	937

State vs. Faulkner.

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

M. S. Crain, District Attorney, for the State, Appellee.

George E. Head and *E. H. Randolph* for Defendant and Appellant.

The opinion of the Court was delivered by

FAULKNER, J. Two indictments were filed against defendant: one for embezzlement of eight bales of cotton entrusted to him by George; the other for obtaining money from Martin by the false pretense that he was the owner of said eight bales of cotton.

To the last mentioned indictment he pleaded guilty and was sentenced. He then entered, in the embezzlement case, his plea of *autrefois convict*, based on the sentence just stated.

The State demurred to the plea and the lower judge sustained the demurrer. A bill of exceptions was reserved and this ruling is the sole error assigned on the appeal.

The ruling was correct. In the language of Mr. Bishop, "each indictment sets out an offense differing in all its elements from that in the other, though both relate to the same transaction." Bishop Cr. L. § 1057.

The general principle is, that a former trial is not a bar, unless the first indictment was such that the prisoner might have been convicted upon proof of the facts set forth in the second indictment. *Burns vs. People*, 1 Parker, 182; *Price vs. State*, 19 Ohio, 423; *Durham vs. People*, 4 Scam. 172; *Com. vs. Wade*, 17 Pick, 395; *Com. vs. Roby*, 12 Pick. 496; *Roberts vs. State*, 14 Geo. 8.

The indictment in the instant case makes no allusion to the dealing with Martin, or to the false pretenses on which money was obtained from him; nor, to maintain it, would it have been necessary, even in establishing the particular transaction, to prove any false representations. Proof of the mere sale to Martin would have sufficed to sustain the embezzlement, even though Martin had been informed that defendant was not the owner.

It has been held, in numerous cases, that where a particular act is of such a character as to constitute two distinct crimes, conviction for one will not bar prosecution for the other. Thus a person may be legally convicted of "retailing without a license" and of "trading with a slave," though both offenses arise out of the same act; and for "keeping a drinking-house," and also for "being a common seller of intoxicating liquors," though the same illegal acts are offered in sup-

 State National Bank vs. Singer.

port of each offense; and there are other like cases. *State vs. Glar-gon*, Dudley, S. C., 50; *State vs. Inness*, 53 Maine, 536; *State vs. Maher*, 35 Id., 225; *State vs. Coombs*, 32 Id., 529; *Com. vs. McShane*, 110 Mass. 502.

These cases are much stronger than the one before us, because, here the identity of the transaction constituting the two offenses is only partial.

Indeed, common sense suggests no plausible reason why defendant should not be punished for embezzling cotton entrusted to him by George, because he has been punished for obtaining Martin's money on false pretenses.

Judgment affirmed.

No. 1175.

THE STATE NATIONAL BANK VS. G. A. SINGER.

One signing his name on the back of a piece of commercial paper as the cashier of a bank cannot be held as surety thereon in case of its non-payment, if he was at the time of signing duly authorized to sign as such.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

John T. Ludeling for Plaintiff and Appellant.

C. J. & J. S. Boatner for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. The plaintiff sues the defendant as surety for and bound in *solido* with L. D. Allen, Jr., as the maker of three promissory notes, aggregating \$8,000, which had been discounted by the plaintiff for the account of the Bank of Monroe before maturity.

These notes were made payable to the maker's own order and by him endorsed in blank. Below the indorsement of the maker, L. D. Allen, Jr., on the back or reverse of the notes, is written the signature of "G. A. Singer, Cashier." If bound at all, Singer is bound as a surety, because, not being a party to the notes originally, his contract was not that of an endorser.

Defendant's contention is that he is not bound at all, and that he only indorsed his name on the paper "as a memorandum * * for

State National Bank vs. Singer.

the purpose of identifying the same with the account of the bank ;" while on the other hand, plaintiff's theory is that, inasmuch as it *dealt with the Bank of Monroe*, and discounted the paper of L. D. Allen, Jr., who was at the time its reputed and ostensible president, and of which G. A. Singer was the acting cashier, and the proceeds thereof were placed to the credit of the latter bank on open account, and in the usual course of their dealings, it (the plaintiff) believed, and had a right to believe, that the *Bank of Monroe* was bound to them for the amount of the notes as *security* for the maker. But that it subsequently transpired that L. D. Allen, Jr., was *one and the same person as the Bank of Monroe* ; and as, in this state of affairs G. A. Singer, cashier, did not, and could not, bind the Bank of Monroe, as it was already bound by the signature of L. D. Allen, Jr., who was the Bank of Monroe, he (Singer) bound himself personally as surety in its place and stead.

The proof shows that L. D. Allen, Jr., had, since 1880, conducted a banking business in the city of Monroe under the name and style of the Bank of Monroe, of which Allen was the ostensible president, and defendant the cashier. For several years the plaintiff had been the correspondent of the bank.

In May, 1886, the Bank of Monroe desired to negotiate a loan from the plaintiff on the faith of the notes in suit, and they discounted those notes and placed the proceeds thereof to the credit of the Bank of Monroe, and accepted and held the notes of Allen as collateral security therefor. At their maturity, Allen made default in their payment and they were sent to protest, and Singer was sued as surety.

Conceding all that plaintiff's claim concerning the Bank of Monroe and Allen having been one and the same juridical person, and it cannot change the *status* or increase the liability of Singer. He was cashier of the Bank of Monroe, and had authority to represent it in placing his name, in his capacity as cashier on the notes as he did, and he did not and could not incur any personal liability thereof to the plaintiffs. He, in no way deceived them, and they did not discount Allen's notes at his request or on his account, or that of his signature.

Plaintiffs counsel complain of the rejection by the court below of certain evidence he offered to connect Singer with the discount of the notes and the use of the proceeds. Such evidence was not competent under the pleadings.

We think the judgment appealed from is correct, and it is therefore affirmed.

Folger & Co. vs. Peterkin.

No. 1170.

FOLGER & CO. VS. MRS. ALICE J. PETERKIN AND HUSBAND.

38 815
f 52 1521
52 1524

A general mandate to the husband by a wife separate in property to manage her plantation and administer her property, does not authorize him to bind her by the drawing of bills of exchange, the power to draw which must be express and special.

When bills are so drawn by such an agent in the name of his principal, payable in the future, and are accepted by the drawees and by them passed off to third persons, the latter cannot recover on them against the principal without proof of express and special authority in the agent to draw them.

A PPEAL from the Sixth District Court, Parish of Morehouse.
Judge, *ad hoc*.

C. T. Dunn for Plaintiffs and Appellants.

Newton & Cason for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. Mrs. Peterkin, a wife separated in property from her husband, is sued upon two bills of exchange drawn by "Geo. A. Peterkin, agent for Mrs. A. J. Peterkin," to his own order and endorsed "G. A. Peterkin, agent," addressed to and accepted by the firm of Wyche & Morgan, of New Orleans.

The defense is a general denial and a special denial that her husband, Geo. A. Peterkin, had any authority to draw the bills as her agent.

The defendant wife testifies positively that she had never given any such authority to her husband, and that she never knew of the existence of such drafts until long after their maturity, when she immediately repudiated them.

There is no countervailing proof except that evidence that her husband acted as her general agent in the administration of a plantation owned by her and of her other property.

Nothing is better settled than that such general mandate does not confer power to bind the principal by drawing bills or notes. The Code itself declares that "A mandate, conceived in general terms, confers only a power of administration. If it be necessary to alienate or give a mortgage or do any other act of ownership, the power must be express." Article 2996.

The next article declares a number of acts which are not within the powers of administration conferred by a mere general mandate, saying: "Thus the power must be express and special for the following purposes," enumerating, amongst others, "to draw or endorse bills of exchange or promissory notes." Art. 2997.

Plaintiff contends that the general mandate to manage a plantation

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includes the power to draw bills and notes, under the following Article 3000, which declares: "Powers granted to persons, who exercise a profession, or fulfil certain functions, of doing any business in the ordinary course of affairs to which they are devoted, need not be specified but are inferred from the functions which these mandataries exercise."

Whether there exist professions or functionaries, the nature of whose functions would include the right to bind their employers by notes or bills without express authority, might be questioned; but it is well settled that persons employed to manage plantations or administer other property for their principals, have no such right. *Laplante vs. Briant*, 13 Ann. 566; *Avery vs. Lawes*, 1 Ann. 457; *Nugent vs. Hickey*, 2 Ann. 358; *Robertson vs. Levy*, 19 Ann. 327; *Nall vs. Higginbotham*, 21 Ann. 477.

This proposition does not conflict with that announced in *Reynolds vs. Rowley*, 3 Rob. 201, where the suit was on an account for moneys advanced to an agent having authority to borrow, and where it was held that the fact that the money was so advanced on drafts drawn by the agent without express authority, did not affect the case. So, no doubt, the manager of a plantation having authority to obtain advances from a merchant might get such advances through the medium of drafts and though the principal might not be bound as drawer, yet he would be bound for the money advanced just as it had been remitted upon request contained in a letter or otherwise.

But there is no claim here upon an account or for moneys advanced; but is a simple suit by a third holder of a bill of exchange to hold the defendant as drawer thereof. Moreover, it is by no means shown that the bills were drawn in execution of any business of the defendant, or that the proceeds inured to her benefit; and indeed there were no proceeds, strictly speaking, because the drawees never paid them or discounted them, but simply passed them off to plaintiffs as collateral security for an existing debt.

The evidence satisfies us that the business in which the account between Peterkin and Wyche & Morgan was kept, and to which these drafts were passed, was Peterkin's individual business. In addition to the management of his wife's plantation, Peterkin carried on, in his own name and for his exclusive account, a general country store business, with which his wife had nothing to do. His account with Wyche & Morgan arose from this business, and it was only after a large indebtedness had accumulated against him that he sought to placate his creditors by furnishing them with these bills executed in the name of his wife, at the special request of Wyche & Morgan.

The judge *a quo* did not err in rejecting plaintiff's demand.

Judgment affirmed.

No. 1183.

THE STATE OF LOUISIANA VS. LOUIS BROOKS.

That the legality of an officer's appointment cannot be collaterally attacked has been so frequently decided, it cannot be regarded as an open question.

A defendant in a civil suit is not warranted in assuming that a person *acting* as an executive officer is a naked trespasser and on resisting a seizure of his property. If such person is armed with proper warrant for making such a seizure, and is acting in pursuance of an apparently legal appointment to such office.

Parol is not the best evidence of the contents of judicial records, suits and proceedings. Such records should be produced or their absence or loss accounted for.

The facts and details of a civil suit between accused and other parties is not competent evidence on a criminal trial.

A witness must state facts and leave the jury to draw their own inferences therefrom.

Proof of previous threats cannot be adduced by the accused, until it is first affirmatively shown that he was himself previously attacked or threatened with immediate danger by the deceased.

A PPEAL from the Twenty-fourth District Court, Parish of Plaquemines. *Livaudais, J.*

M. J. Cunningham, Attorney General, and *James Wilkinson*, District Attorney, for the State, Appellee:

An overt attempt or act of violence by the deceased against the accused shortly before or at the time of the homicide, must be proved before evidence of prior quarrels, threats or of the dangerous character of the accused can be introduced. 35 Ann. 74; 36 Ann. 148; 36 Ann. 862; 37 Ann. 389; 37 Ann. 489; 37 Ann. 644; 37 Ann. 782; 37 Ann. 897; 37 Ann. 443; 38 Ann. 22, and other authorities.

The judge need only charge on questions of law which he deems applicable to the cause. R. S. sec. 89 1; 35 Ann. 970; 37 Ann. 576, 464.

Where no constable has been elected, or where the constable has resigned and being *functus officio*, no constable has been appointed or elected to fill the vacancy, the justice of the peace has power to fill the vacancy by appointing a constable *pro tempore* until the Governor exercises his power to appoint a permanent or regular constable. R. S. etc. 637; C. P. art. 1158; Const. of 1879, art. 258.

The eligibility of an officer *de facto* cannot be questioned collaterally. R. S. sec. 2593; 21 Ann. 290; 21 Ann. 655; 21 Ann. 710; 26 Ann. 272.

Where ministerial officers of a court are *de facto*, and actually acting as such, their failure to give bond does not deprive them of their official status. 13 Ann. 401; 13 Ann. 607; 2 Ann. 82; 31 Ann. 379.

Where a court is seized of jurisdiction *ratione materiae* its process however erroneous is voidable, not void, and its orders must be respected. *Holdane vs. Sumner*, 15th Wallace, 601.

Witnesses who are not experts are not permitted to give their opinions on facts which they have testified to. 37 Ann. 270.

R. T. Beauregard and *Zacharie & Howard* for Defendant and Appellant:

The accused is always entitled to a reasonable time within which to procure counsel for his defense, and the counsel when so retained is entitled to a reasonable time within which to prepare the defense. regard being always had to the circumstances of the accused

39	817
45	840
39	817
45	803
39	817
47	30
39	817
113	802
39	817
1124	858

State vs. Brooks.

and his counsel so to do. 38 Ann. 24; 16 Ann. 425; 26 Ann. 422; Whart. Am. Crim. Law, p. 941, note; 7 Bay, 1; Lord Kilmarnock's case, 2 Foster; Black. Rep., 514; Const. of 1879, art. 6.

The recent occurrence of a homicide, and the natural excitement of the community consequent thereon, is a good ground for a postponement and continuance, when the accused is brought to trial at the next term, immediately after the occurrence; 37 Ann. 457, not applicable here, as in that case the continuance was sought many months after the homicide, and did not and could not urge the recency. Bishop Crim. Proc., vol. 1, § 951; Wharton's Am. Crim. Law, p. 944, 3d; 9 Ga. 127; 5 Ga. 53; Jollyfer's case, 4 T. R. 285; 32 Ga. 581; 14 Ga. 8; Thach. C. C., 516; 2 Moody & R., 192; 26 Ga. 277; 18 Ga. 383; 7 Watts & Serg., 420.

The right of the trial judge to decide as to whether sufficient proof of an overt act has been adduced to allow the admission of evidence of threats and character and homicide, is not an arbitrary one, but must be the exercise of a sound discretion, and is reviewable by the Supreme Court. 37 Ann. 461; 37 Ann. 645

It "is a rule that positive testimony on a given point must always predominate over negative testimony on the same point." 33 Ann. 800; 37 Ann. 258, Selfridge case.

What occurred at a homicide immediately after the firing is part of the *res gestæ*, as throwing light on what had just occurred. Wharton's Crim. Ev., § 262, *et seq.*; Selfridge case.

No man is bound to submit to the execution of a writ divesting him of his liberty or property issuing from a court without jurisdiction. Roscoe's Crim. Ev., p. 750; Wharton's Am. Crim. Law, p. 554; 3 Gillman, 336; Lieber's Civil Liberty and Govt., vol. 1, pp. 131, 134.

An officer is bound to inquire into the authority of the court from which the writ emanates, and is a trespasser if he executes a writ of a court without jurisdiction. 7 N. S. 192; 8 R. 115; 3 Ann. 577; 9 Ann. 350.

One entering on an office, public or private, without proper authority, subjects himself to all the responsibilities, and cannot claim the benefit of the position he usurps. 4 N. S. 525.

A justice of the peace has no authority to appoint a constable *pro tem.* to a vacancy caused by resignation. Act of 1855, Cons. 1879.

A constable must reside in the ward in which he shall have been elected. (R. S., sec. 194.) He must give bond before entering on his duties. R. S. sec. 632.

In the trial for resisting of an officer, or killing of him, it is competent for the accused to show that the deceased was not a legal officer nor executing legal process. Wharton's Crim. Ev., § 883.

A *de facto* officer in civil cases is one who comes into office by color of right, and performs the duties of the office under a public acquiescence, but is not properly entitled to the office. He must be either appointed or elected by competent authority, or must have for some time acted as such and been publicly recognized. (Cooley on Taxation, p. 125; 13 S. and R. 206.) But this will only give a *prima facie* right, which may be questioned. Blackwell's Tax Titles, * 93; 1 Dill C. C. 268; 7 Jones N. C., 113; 73 N. C., 550; 37 Me., 428; 5 Wend., 234; 24 Wend., 539; 16 Wend., 144; 60 Barbours, 248; 20 Gratt., 66; 33 Gratt., 513; 4 Vroom N. J., 201; 6 East, 368; 38 Conn., 476; 3 Bush., 17; 9 Nev., 334; 69 Ill., 529; 7 N. H., 113, 140; 56 Penn. St., 436; 29 Penn. St., 129; 1 Nev., 188; 45 Miss., 151; 16 Peters, 71; 3 Port, 334.

Nor do 1 Ann. 298; 12 Ann. 719; 21 Ann. 336; 25 Ann. 2; 27 Ann. 568; 32 Ann. 1234; 33 Ann. 82; 33 Ann. 1412, or 35 Ann. 521, militate against this doctrine in any degree.

"Where a trespasser goes with the intent to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force to the extent of killing the aggressor. Owner is not obliged to surrender possession, but may use as much force as necessary for its protection." 8 Cal., 34; Horrigan's Self-Defense, p. 900, and multitude of authorities there cited.

The opinion of the Court was delivered by

WATKINS, J. The accused was indicted for the murder of John Baptiste Allen, tried and convicted, and on appeal to this Court in New Orleans, the verdict and judgment were set aside and he was granted a new trial.

When the cause was, thereafter, called for trial in the court below, the district attorney announced that he should proceed against the accused, on said indictment, for *manslaughter* only; and, the trial being proceeded with, he was convicted of that crime and sentenced to fifteen years at hard labor in the penitentiary, and from that judgment and sentence he prosecutes this present appeal.

His demands for relief are based on several bills of exception taken to rulings of the trial judge rejecting proffered evidence and declining to give to the jury certain special charges, to be found in the transcript.

I.

The record discloses that the fatal rencontre was brought about by certain judicial proceedings had in the court of L. H. Holmes, justice of the peace, in the suit of C. Marrero vs. Louis Brooks (the accused), in which a writ of provisional seizure was issued, directing the seizure of the defendant's rice on the Sarah plantation, in satisfaction of the plaintiff's lien and privilege for the irrigation of defendant's land.

This writ was placed in the hands of the deceased, as the constable of his court, for execution; and he was proceeding to execute same by seizing the defendant's rice when met by his resistance, and from which the homicide resulted.

II.

The first bill was taken to the rejection of certain evidence to prove that the deceased did not reside in the same ward of the parish in which the justice of the peace exercised his official functions, and the consequent illegality of his appointment as special constable, vice R. Perez, who had resigned the office of constable, as a justification of his resistance of his attempted seizure of his rice.

This testimony was objected to upon the ground that the legality of his appointment could not be questioned, or attacked *collaterally*.

This objection was correctly sustained by the trial judge. It has so frequently passed under judicial investigation, and has been so often decided adversely to the pretensions of the accused, that it cannot be considered an open one. The deceased was regularly appointed, and was at the time, and had been for twenty days preceding, in the active discharge of the duties of that office. He was constable *de facto*, if not

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de jure, and acting under color of title. His official acts were not absolute nullities, but entitled to the respect of and obedience from third persons. *State vs. Gilbert*, 10 Ann. 526; *Citizens' Bank vs. Bey*, 3 Ann. 633; *State vs. Judge*, 22 Ann. 33.

A strong presentation of this doctrine is found in *State vs. Fender-son*, 28 Ann. 82. The accused was indicted, tried and convicted of murder, and was sentenced to be hung. He complained that the persons styling themselves as grand jurors, and by whom said bill of indictment was found, were not grand jurors, and had no right or authority to indict him as they did, because the person by whom they had been organized and charged was not judge of the court, and that all proceedings had under said indictment were null and void. In that case the judge *acted* under an appointment *before* he had received a commission. The court declined to entertain the complaint of the accused.

In *State vs. O'Grady*, 31 Ann. 379, the court employed this forcible language:

"We do not desire to be understood, however, as intimating that a party charged with crime can be heard to raise an issue that the ministerial and other officers of court, actually and *de facto* acting as such, have no right to such offices. We should never get a criminal tried at that rate. He would commence with a kind of collateral *quo warranto* as to the judge and then go on down through the official roster of the court."

But the accused urges us to allow him to go to a much greater extreme, and sanction his resort to violence on, and the homicide of a person *acting* as constable, under the color of an appointment, and armed with a writ of provisional seizure, on the theory that such person was a naked trespasser, and his act in self-defense, or the defense of his property from spoliation. Though it was the act of a justice of the peace, and the legality of his appointment somewhat questionable, it was the duty of the accused to have respected the apparent authority of the appointee, and to have sought redress for his grievances in the constituted judicial tribunals. It was not proper that he should have taken the law into his own hands, or the risk of himself deciding the capacity of an officer.

III.

The *second* bill was taken to the judge's refusal to permit him to introduce *parol* evidence of the contents and purport of the judicial record of the suit and proceedings of *Marrero vs. Brooks*, in which the writ of provisional seizure was issued, and for the purpose of showing

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the want of territorial jurisdiction of the justice of the peace. We are of the opinion that the judge correctly held that the records themselves were the *best* evidence and should have been introduced; and, further, that it was not competent on a trial of the accused for manslaughter to inquire into the *particular facts* of the civil suit between Marrero and the accused, and which could have no material bearing on the homicide of the deceased.

VI.

The *third* bill was taken to the judge's refusal to permit him to prove by the justice of the peace the character of the claim on which he issued the writ of provisional seizure. It was objected on like grounds as the evidence discussed in last bill, and the same ruling is applicable.

V.

The *fourth* bill was taken to the judge's refusal to permit him to ask and have answered by a witness the following question, viz:

"What was the impression produced upon your mind as to his action and intention when the deceased threw up his right hand to his hip pocket?"

The judge sustained the objection on the ground that a witness must state *facts*, and not the impressions they create on his mind; that it was the province of the jury to draw inferences from proven facts.

His ruling was strictly in conformity with that made by this court in the case of *State vs. Parce*, 37 Ann. 270, and in which there are cited various adjudicated cases.

VI.

The *fifth* bill was reserved to the judge's refusal to permit him to make proof of previous threats made by the deceased, and subsequently communicated to the defendant.

The judge assigns the following reasons, viz: "That from the evidence, so far, there has been no proof of any *overt act* of violence on the part of the deceased against the accused, immediately *preceding* the act" (of the latter).

He then quoted the purport of, and extracts from the testimony of the witnesses relied upon by the defendant as justifying the introduction of the rejected evidence. It clearly shows that the *slight* demonstration made by the deceased was *subsequent to defendant's first shot*, and while the deceased was *retreating* from the fray as rapidly as possible.

To entitle an accused person to introduce proof of *previous threats* made by the deceased against him, it *must* affirmatively appear that

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immediately before, or at the time of the killing, the deceased had indicated his intention to execute same by some hostile demonstration State vs. Saunders, 37 Ann. 389; State vs. Labuzan, 37 Ann. 489; State vs. Janvier, 37 Ann. 644; State vs. Kerwin, 37 Ann. 782; State vs. Jackson, 37 Ann. 896; State vs. Spell, 38 Ann. 22.

VII.

The *sixth* bill was reserved to the refusal of the trial judge to give certain special instructions in charge to the jury. They were:

1. That a justice of the peace is without jurisdiction to issue a writ of provisional seizure on a rice crop on another piece of land than that on which the rice flume is located; and he cannot, in such case, entertain a suit against a person who does not reside within his jurisdiction.
2. A justice of the peace has no right to appoint a constable *pro tempore* to fill a vacancy caused by a resignation of a prior incumbent.
3. No one can be appointed constable other than a resident of the ward in which it is made.
4. Before *acting* as constable an appointee must give bond.
5. "If one *thus* appointed presumes to *act*, he is a trespasser; and, if he goes armed to meet resistance to the trespass, he commits a felony."
6. A person who has not given bond, nor complied with the law in other respects, has *no color* of title.

The judge declined to give in charge to the jury these instructions, principally on the grounds that are assigned in the *first* bill of exceptions, and on the further ground that if a justice of the peace has jurisdiction to cause the seizure of property situated within his ward, although the defendant and owner reside out of it, he has authority to appoint a constable *pro tempore* to serve the process of his court, when there shall be no such officer elected or appointed.

This ruling is supported by good authority. The law authorizes a writ of provisional seizure or sequestration to issue against a property that is affected with a privilege, or right of pledge, either within the jurisdiction where the property is situated or where the debtor resides. Voorhies, Rev. C. P. 163; Act 64 of 1876.

The Code of Practice distinctly provides that (the) "justices of the State, without the limits of New Orleans, *shall have power to appoint constables pro tempore whenever* there shall be no such officer elected for their respective districts in the manner directed by law." C. P. 1158; R. S. 637.

From the evidence it appears that the incumbent had resigned, and no successor had been elected or appointed by the Governor in his place.

 Succession of Taylor.

This seems to have been just such a situation of affairs as was in the contemplation of the framers of the code, and the act of the justice of the peace, in making the appointment of the deceased, was apparently justifiable, and binding on all third persons, including the accused, until set aside in the manner provided by law.

The proof shows that the appointment was evidenced in writing, and made some days antecedent to the homicide. The judge's ruling was undoubtedly correct.

VIII.

The defendant applied for a new trial on the ground that one of the *petit* jurors had been guilty of misconduct. But inasmuch as no bill was reserved to its refusal by the trial judge, it cannot receive any consideration by us. *State vs. Redwine*, 37 Ann. 780, and authorities cited.

The objections made are not sustained.

Judgment affirmed.

 No. 1173.

SUCCESSION OF J. C. TAYLOR.

Under the laws of Louisiana the only condition on which a null marriage can produce civil effects, is that it was contracted in good faith by the parties or by at least one of them; in case of the latter, the civil effects can benefit only the party in good faith, and the children born of the marriage.

The good faith of the innocent party must be evidenced by circumstances which indicate a reasonable belief that both parties pretending to contract the marriage were able to marry. Good faith cannot be credited to a woman who marries a man who to her knowledge has a living wife, whom she has seen herself a few months before the pretended marriage, and by whom she had been informed that no divorce had been pronounced between the spouses, and who had been informed a few days before the projected marriage that the man was married and not divorced.

The presumption of good faith must yield to positive proof of the reverse.

A PPEAL from the Fifth District Court, Parish of Claiborne.
McOlenon, Special Judge.

Allen Barksdale and *W. A. Vanhook* for Opponents and Appellants:

1. Persons legally married are, until the dissolution of the marriage, incapable of contracting another. C C. 93.
2. Where a woman had full knowledge that the man she was marrying had a living wife she cannot claim the benefit of good faith based on the supposition that the man was divorced, especially when she failed to use the means immediately at hand to ascertain the truth.
3. Neither party to a putative marriage being in good faith no civil effects are produced by the marriage. 24 Ann. 485.

39	823
45	490
39	823
46	985

39	823
119	711
119	713

Succession of Taylor.

4. When a divorce has been decreed on account of adultery, a marriage between the guilty party and his accomplice in adultery is null and void, and no civil effects are produced by such a marriage. C. C. 161. Good faith does not come into a case based on this issue.
5. Good faith in respect to marriages is not a mistaken belief as to the legal effect of one's actions or ignorance of the law itself, but consists in the erroneous though reasonable belief in the existence of facts that would make the marriage valid in the eyes of the law. A pardonable ignorance of the existence of facts that render the marriage null, must exist at the time of contracting the marriage. Ignorance of the law will not suffice.
6. Ignorance is not pardonable when the truth is within easy reach of the ignorant party, and she failed to avail herself of the means to ascertain the truth.
7. The applicant in this case could easily have ascertained whether Taylor had been divorced or not, and it was her duty to do so. 38 Ann. 196. Her failure to do so is destructive of her plea of good faith.

J. A. Richardson, J. R. Phipps and J. W. Holbert for Applicant and Appellee :

A marriage contracted in good faith produces civil effects: C. C. 117 and 118; C. N. 201 and 202; Bishop on Marriage and Divorce, vol. 1, secs 302 and 303.

The burden of proof is upon the party alleging the nullity of a marriage: 24 Ann. 296; 6 Wallace U. S. R., p. 642; 30 Ann. 1297 and 1388; 1 Greenleaf, sec. 81.

A putative marriage is converted into a real one by the removal of the disability; as if there was a former husband or wife living, the marriage becomes good on such person's death or final divorce: Bishop, vol. 1, sec. 302; 1 Ann. 98; 3 N. S. 438; 6 Wallace, 642.

The opinion of the Court was delivered by

POCHÉ, J. The issue presented by the pleadings in the case involve the alleged illegality and nullity of the marriage of the deceased with widow P. J. McFarland, and the alleged illegitimacy of the children born of that union.

Their claim to participate in the property left by J. C. Taylor is resisted on those grounds by four of the heirs, now of age, issue of his marriage with Sarah Castlebury, who is alleged to have been the only lawful wife of J. C. Taylor, who was living and undivorced from him at the time that he pretended to contract marriage with the widow McFarland, and to the latter's knowledge. Opponents prosecute this appeal from a judgment which decreed Mrs. McFarland and the issue of her union with J. C. Taylor entitled to all the rights and privileges in and to this succession which appertain to the surviving lawful wife and to the legitimate children of the deceased party.

The undisputed facts in the record are as follows:

J. C. Taylor and Sarah Castlebury were lawfully married in 1852, and opponents are the issue of that marriage. In 1865 Taylor and his wife voluntarily separated, but both continued to live in the Parish of Claiborne, a few miles apart, the husband having retained the custody and control of the children.

Succession of Taylor.

In July, 1866, Mrs. Sarah C. Taylor instituted a suit for divorce against her husband on the ground of adultery, and in November of the same year judgment was rendered against her. In the meantime Widow P. F. McFarland, who lived and taught school in the same village in which Taylor resided, received the latter's attentions as a suitor for marriage, and accepted his offer of matrimony. On the 9th of December, 1866, accompanied by two or three friends and by a minister of religion, all residents of the Parish of Claiborne, Louisiana, they rode into the State of Arkansas, at a distance of about ten miles from Haynesville, the village in which they lived, where a marriage ceremony, purporting to unite them in lawful wedlock, was performed over them by the minister in question, in accordance with the laws of that State, where a marriage license was not a prerequisite to a legal marriage. From that day, saving an intermission of a few months, they lived together and cohabited as man and wife, and were treated as such by their friends, neighbors and acquaintances down to the death of J. C. Taylor, in December, 1886.

In February, 1867, Mrs. Sarah C. Taylor brought a second suit for divorce against J. C. Taylor, grounding her demand on the alleged adulterous life which he was then leading with his pretended wife under the Arkansas marriage ceremony, and in November, 1867, judgment was rendered in her favor, granting her a full divorce against Taylor.

As, in the opinion of Mrs. McFarland, Taylor was completely liberated by that divorce, she called on him for a second marriage ceremony, which would legalize their union. But he either differed from her, or he simply procrastinated, whereupon she became dissatisfied and left him, returning to her relatives in the State of Tennessee where she remained from July to December, 1868. At Taylor's instance, she returned to him, and on January 24, 1869, a second marriage ceremony was performed over them, this time at their home in Haynesville, and preceded or authorized by a license obtained and issued in accordance with the forms of law.

During the whole time which intervened between the voluntary separation in the summer of 1865 of J. C. Taylor from his wife, Sarah Castlebery, to the date of the second marriage ceremony between him and Mrs. P. F. McFarland, the former constantly resided at her father's house, at a distance of six miles from Haynesville, where she occasionally went for the purpose of seeing and visiting her children at J. C. Taylor's house. It also appears that on several occasions, during Taylor's absence, she remained at that house with her children until

Succession of Taylor.

his return, and for several days. All these facts and circumstances were well known to Mrs. McFarland, who met Mrs. Taylor on three distinct occasions, and who made her acquaintance with full knowledge of her true character and condition. The record shows that on one occasion the two met at Taylor's own house, and while he was there himself, and that they had a conversation together. This last occurrence took place some few months previous to the Arkansas marriage ceremony. Mrs. Sarah Taylor is yet living and gave her testimony on the trial of this case.

As stated above, these facts are not denied or disputed by counsel for appellee, who concede also that the marriage ceremony of December, 1866, was an absolute nullity. But their contention is that the marriage, although null, was contracted by Mrs. McFarland in good faith, under the belief that at that time Taylor was divorced from Sarah Castlebery. Hence they claim protection under the provisions of articles 117 and 118 of the Civil Code, which read respectively as follows:

"The marriage which has been declared null produces nevertheless its civil effects as relates to the parties and their children, if it has been contracted in good faith."

"If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage."

They quote numerous decisions of this court, in which these two articles of the code were construed favorably to the claims of the issue of putative but null marriages.

The purport of these decisions is to practically consecrate and apply the principle incorporated in the two articles of the code. Whenever the record showed that in such marriages one of the contracting parties honestly believed that both were able to contract, and was honestly ignorant of the incapacity of the other, the court invariably extended the protection of the law to the innocent party who had been deceived, and to the still more innocent children born of the marriage. The question therefore resolves itself into an inquiry into the good faith with which Mrs. McFarland contracted the marriage of December 9, 1866, and suggests a special analysis of the reasons which she had to believe that Taylor had been divorced from his wife, Sarah Castlebery.

Assuming the rule to be that her good faith must be presumed, and that the burden of proof is on opponents to rebut that presumption, the record shows to our entire satisfaction that Mrs. McFarland knew

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at the time that Taylor had a living wife from whom he had never been divorced, and that therefore she did not contract that marriage in good faith. We have made a thorough examination and a careful study of all the cases in our jurisprudence which have a bearing on the question herein discussed, and we find that the facts presented in all the cases in which relief was granted under the provisions of articles 117 and 118 of our code were strikingly different from the circumstances disclosed by the record in this case.

In the case of *Clendenning vs. Clendenning*, 3d New Series Martin Reports, p. 438, there was no proof that the woman who contracted the putative marriage had any knowledge of the pre-existing marriage, and much less of the existence of the first wife, who lived in the State of Tennessee, at a time when communications and mail facilities between that State and Louisiana were not equal to those of the present day. The only suspicious circumstances shown against the second wife's good faith was the testimony of a single uncorroborated witness, who stated that he had been introduced to the wife by the husband as being acquainted with the latter's wife in Tennessee, but as it was shown that the introduction was made in a language which the wife did not understand, the testimony carried no weight in the minds of the judges of the court.

In the case of *Patton vs. Philadelphia et al.*, 1 Ann. 98, the assailed marriage had taken place during the Spanish Colonial Government in Louisiana in the year 1799, between Eleonore Hook, a resident of the colony, and Abraham Morehouse, who represented himself as the widower of Abigail Young, whom he had married in New York in 1790; and there was no proof that Eleonore Hook had any reason even to suspect that the wife of Morehouse was living at the time that she consented to marry him. At that time the means of communication between New York and the then District of Ouachita were not as easy as they are now between New York and Europe.

The case of *Abston*, 15 Ann. 137, presented the instance of a third marriage by a man whose first wife was yet living in the State of Alabama, and whose existence was unknown to his third victim.

In the case of *Navarro*, 24 Ann. 298, the court had to deal with the effects of a marriage contracted by a man who had a living wife in Italy, with a woman who was entirely ignorant of his previous marriage, and much more of the existence of his wife in Europe. Our immediate predecessors, in the case of *Barfield*, 30 Ann. 1297, gave civil effects to a marriage contracted between a man who had a wife living in the State of Mississippi and a resident of Louisiana, who had never

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heard of the previous marriage, and who believed in the validity of her marriage with a man who had lived at her father's own house as a single man, and who was reputed to be such.

Greatly different are the circumstances with which Mrs. McFarland was surrounded on the 9th of December, 1866!

She was the teacher of some of the children of Sarah Castlebery and J. C. Taylor, whom she had seen but a few months before with their mother in Taylor's own house. She knew that Sarah Castlebery was living at a distance of but a few miles from her own residence, and on the records of the court of the parish in which she lived there stood a judgment denying the coveted divorce between Taylor and his wife. No one of the numerous witnesses, all residents of the village, who testified in the cause had ever heard even a rumor that Taylor had been divorced from his living, legal wife, and the only reason which appellee holds out in support of her belief in a divorce was derived from the assurances of Taylor himself. But even as to that her own testimony is not conclusive. Her statement in that connection is as follows: "When he proposed to go to Arkansas to marry, I asked him if he was all right, referring to the divorce he had told me of, and he answered yes, or he would certainly have made no such propositions." Confessedly she received no such information from anybody else, and her case depends upon the legal conclusion that such a circumstance is sufficient to show her belief in good faith in the existence of a divorce. If such trust can be placed in the declaration of the man who seeks to deceive a woman into a reprobated marriage, it would be difficult to conceive of a case in which the woman could not be held to have acted in good faith. Such a conclusion would open the flood-gates of legalized concubinage, and the courts in their eagerness to protect the innocent offspring of null marriages would thus lend a helping hand to the destruction of the respectability of society by sapping the only safe foundation of the purity of the family.

But the record discloses more recklessness on the part of Mrs. McFarland in her matrimonial venture. In her conversation with Mrs. Sarah C. Taylor, in the summer of 1866, at Taylor's own house, she inquired of the latter about the divorce, and she was informed that the marriage had not yet been dissolved. Can a stronger case be imagined? Was not that information more than sufficient to make it her imperative duty to seek for reliable information before yielding her consent to marry Taylor?

But without any efforts on her part, the information came to her through two of her lady friends, who both cautioned her against such

Succession of Taylor.

a step. One of those friends told her that Taylor was not divorced, and the other conveyed the very significant information that Taylor had been refused a license for the projected marriage on the ground that he was not a single man or able to contract a legal marriage; and both communications were made to her but a few days preceding the matrimonial trip to Arkansas. And we are satisfied that that was the motive and the sole reason of the trip to that State, in company with the minister who could otherwise and so easily have performed the marriage ceremony at her own home, and in the midst of her neighbors and friends.

We conclude from the record that Mrs. McFarland's conduct in marrying J. C. Taylor in Arkansas, in December, 1866, was not characterized by good faith in law, and that in cohabiting with him thereafter she became his accomplice in adultery.

Hence we conclude that the pretended marriage between them in January, 1869, was stricken with the nullity pronounced in article 161 of the Civil Code, which reads:

"In case of divorce, on account of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under the penalty of the nullity of the new marriage."

It follows therefore that neither of the pretended marriages between Taylor and Mrs. McFarland could produce any legal effects, and that the judgment appealed from is manifestly erroneous.

In their opposition appellants have prayed for the appointment of an administrator in the event of the recognition of the asserted rights of Mrs. McFarland and her children, and the District Judge had made an order to that effect. Under our conclusions that order must be vacated.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed, and it is now ordered that the application of Mrs. P. F. McFarland in her own right, and on behalf of her minor children, to participate in the property belonging to the succession of J. C. Taylor be rejected and dismissed, at her costs in both courts, and that the order of the lower court appointing administrators for said succession be vacated at the costs of the applicants for said administration.

Judgment reversed.

Lallande vs. Trezevant et als.

30 830
45 887

No. 1189.

JOHN B. LALLANDE VS. MRS. JULIA TREZEVANT AND HUSBAND, AND
G. W. MONTGOMERY.

In an action for damages on an injunction and a forthcoming bond, appellee cannot urge in dismissal of appeal, that elements of damages claimed on either of the bonds should be eliminated as fictitious because no recovery could be had under such bond. Such an argument is a begging of the very question, as it can only be adjudicated on a consideration of the merits.

The principal and the security on an injunction bond and on a forthcoming bond, by means of which the principal arrested the sale and obtained the possession and enjoyed the use of working animals seized by a party, will be held in solido for the depreciation in value of said animals as a result of bad treatment while in the possession of the principal on such bonds.

A PPEAL from the Eighth District Court, Parish of Madison.
Delony, J.

Stone & Murphy for Plaintiff and Appellant.

E. C. Montgomery and A. L. Slack for Defendants and Appellees.

The opinion of the Court was delivered by

POCHE, J. Plaintiff claims damages in the sum of \$2,531.58 against Mrs. Trezevant, as principal, and G. W. Montgomery, as security, on an injunction bond and on a forthcoming bond, by means of which Mrs. Trezevant had arrested the sale and obtained the temporary possession of some twenty mules, which had been seized at the instance of plaintiff as the property of defendant's husband, as appears from a case entitled *Trezevant vs. Sheriff et als.*, reported in 38 Ann. p. 147. In the decision of that case this court dissolved the injunction taken out by Mrs. Trezevant and reserved the rights of Lallande to claim the damages occasioned to him by said injunction. The ground of the motion to dismiss is want of jurisdiction *ratione materiae*, for the reason that the elements of damages set up by plaintiff are, in the main, fictitious, and intended manifestly to create an appellate interest which does not in reality exist.

Appellees' principal argument is the alleged admission of plaintiff in his petition that the mules had been returned to the sheriff after the rendition of our judgment, and the admission resulting therefrom that the purposes or the forthcoming bond had been fulfilled and exhausted, and that therefore no action could be maintained on that bond now defunct. Hence her counsel contend that the demand must be restricted to the bond of injunction, which was only \$1,475. They also contend that as our judgment condemned Mrs. Trezevant to the costs of his

injunction, the demand by plaintiff of the sum of \$577.18 for costs incurred in the injunction, and for the subsequent sale of the mules, cannot be entertained, as in that case Mrs. Trezevant could be twice condemned to pay the same costs.

The position is absolutely untenable, and the serious argument which counsel for appellees have been driven to in order to support the contention that no claim could be made out on the forthcoming bond is very conclusive proof that the claim predicated thereon is not absolutely fictitious, and that it forms an important element in plaintiff's real demand.

While it is true that our judgment has condemned Mrs. Trezevant to pay costs in her injunction suit, it is equally true that the surety is not included in the judgment, and that a portion of the costs presently claimed by plaintiff have been incurred since the dissolution of the injunction and partake of the nature of damages resulting therefrom. It also appears that in a supplementary petition, which appellees' counsel have apparently lost sight of, plaintiff corrected his previous allegation in which he had acknowledged that two of the mules had died of a natural death, and that the eighteen others had been turned over to the sheriff and by him sold under the original writ. In his supplementary petition, plaintiff charges that the two missing mules had not died, but that they had been illegally retained by Mrs. Trezevant, who was responsible therefor, together with her surety on the forthcoming bond. It therefore follows that the damages claimed by plaintiff, even if not justified under the law and the facts of the case, are at least not so fictitious as to affect our jurisdiction, which is made apparent on the face of the pleadings.

The motion to dismiss this appeal is therefore dismissed.

ON THE MERITS.

Plaintiff's main demand is predicated on the difference between the value of the mules when they were first seized, which is alleged to be \$3,000, and the price which they brought at the sale, which was \$1,276.75, and he appeals from a judgment which allowed him only \$200. Our examination of the evidence has satisfied us that during the possession of Mrs. Trezevant, the mules were overworked and badly treated to such an extent that when delivered to the sheriff and sold they were too thin and too weak for serious work. Hence it follows that animals which she herself had appraised at the value of \$2,200, brought only \$1,276.75, at the sale. We therefore hold that on the score of that element of damages plaintiff is entitled to recover \$500.

Lallande vs. Trezevant et als.

Now, assuming as suggested by counsel, that the sum of \$200 allowed by the District Court was for attorneys' fees, on which we are in accord with him, we find evidence in the record sufficient to entitle him, under the law, to recover the following additional sums :

For costs of transcript in injunction suit.....	\$85 00
For costs paid to witnesses in injunction suit.....	168 32
For costs of Clerk of Supreme Court in injunction suit.....	19 80
For costs of printing briefs in injunction suit.....	40 00
For cost of sale of 18 mules.....	156 38
Total	\$469 50

Adding this to the sum allowed by the District Court, and to the sum of \$500 hereinabove allowed by us, we foot up the amount of damages which plaintiff should recover at \$1,169.50. In thus concluding, we liquidate in precise figures the amount of costs to which Mrs. Trezevant had been condemned in our decree in the injunction suit. And it must be understood as making part of our present decree that these items include all the costs which can be taxed against Mrs. Trezevant as resulting or flowing from her injunction suit.

- It is therefore ordered, adjudged and decreed that the judgment of the District Court be amended by increasing the amount therein allowed to plaintiff from two hundred dollars to eleven hundred and sixty-nine dollars and fifty cents, and that, as thus amended, said judgment be affirmed at the costs of appellees in both courts.

Mr. Justice Todd dissents from the decree on the Motion to Dismiss, and takes no part on the Merits.

DISSENTING OPINION.

TODD, J. The defendant, Mrs. Trezevant, enjoined the sale of twenty mules, seized under executory process, together with a plantation, as the property of her husband, George T. Trezevant, claiming to be the owner of the same.

During the pendency of the injunction suit, she was permitted to take possession of the mules and retain the same until the final decision of the cause. Her injunction was dissolved by a decree of this court. After this decree eighteen of the mules were delivered to the sheriff and by him sold.

The present suit was then brought by the plaintiff against Mrs. Trezevant and G. W. Montgomery, the surety on her injunction bond, to recover the damages caused by the injunction—the bond being for the amount of \$1475.

The damages set forth in the petition were :

1. For the difference in the value of the mules when seized and the amount for which they sold after the injunction was dissolved.
2. For the costs of the injunction suit and those incurred in the sale of the mules after the dissolution of the injunction.
3. The attorneys' fee in the injunction suit.

These damages are set forth in the petition as amounting to \$2,531. The appellees in the motion to dismiss charge that the claims are largely fictitious, and only asserted to give jurisdiction to this court ; that, for instance, the large sum claimed for costs and so on to be recovered as damages, were covered by the judgments which dissolved the injunction wherein Mrs. Trezevant was condemned to pay these costs, and that there could not be a separate suit and a second judgment for this same charge.

As confirmatory of this view, and of the proposition embraced in the motion to dismiss and urged by the appellees' counsel, we need only refer to the brief of the plaintiff and appellant's counsel, in which he sums up his actual demands, and all that he now claims he should have judgment for, thus :

The plaintiff had judgment in the lower court for \$200. In addition thereto his counsel claims \$873.25, the loss on the mules, certain items of costs stated, the whole amounting, according to his calculation, to \$1,502.75, which is the total amount he claims to be entitled to, and for which only he asks that judgment shall be rendered.

This statement plainly shows to my satisfaction that this court has no jurisdiction of the cause, even as to Mrs. Trezevant, the principal on the injunction bond, but the want of jurisdiction of this court as to the demand against the surety, Montgomery, is still more conspicuous. The full amount of the bond is \$1475, and for all damages caused by the injunction the full limit of his liability is that amount, the amount of his obligation. Beyond that he cannot be held under the law. On the delivery bond on the face of the petition he cannot be held except for the value of two mules not delivered, \$220. Add this to \$1475, making \$1725. So that to this sum there is an absolute limit to his liability. Certainly all beyond that can only be held as purely fictitious.

For these reasons I dissent from the opinion to dismiss, and thus dissenting take no part on the merits.

Bank vs. Cotton Press Company et als.

No. 1177.

STATE NATIONAL BANK VS. MONROE COTTON PRESS COMPANY ET AL.

SAME VS. L. D. ALLEN ET AL.

L. D. ALEXANDER & CO. VS. L. D. ALLEN, JR., ET AL.

(Consolidated.)

A contract by which an insolvent debtor, in fraud of creditors, transferred to a creditor in satisfaction of his debt, a number of notes and accounts, and paid the difference in cash. If subjected to revocation, must be revoked as a whole, and the payment made, though of a "just debt in money" being part and parcel of the illegal contract, must fall with it.

The evidence establishes that part of the money delivered consisted of the identical bank notes and cash which the debtor, in his capacity as treasurer of a corporation, had received from stockholders thereof, and which he had set aside in a particular drawer by itself as the property of the corporation. Held, as to such moneys that they were the property of the corporation, which the treasurer was bound to deliver and the corporation had the right to receive, and that such delivery is not subject to revocation.

Under Article 1977, C. C., a creditor cannot, by the simple fact of being the first to bring a revocatory action, exclude other creditors from joining in the attack and participating with him in the benefits of the judgment.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Ludeling & Stillman for Plaintiffs and Appellants.

Stubbs & Russell, and *F. G. Hudson*, and *C. J. & J. S. Boatner* for Defendants and Appellees.

M. J. Liddell, *W. N. Potts* and *F. Garrett* for Intervenors and Appellees.

The opinion of the Court was delivered by

FENNER, J. L. D. Allen, Jr., engaged in the banking business in Monroe, under the style of the Bank of Monroe, failed and closed the doors of his banking-house on June 21, 1886, under circumstances which need not be detailed, but which undoubtedly affected the parties concerned here, with notice of his insolvency.

Allen was, at the same time, treasurer of the Monroe Compress Company, and in that capacity was indebted to the company in the sum of nearly five thousand dollars, a considerable portion of which had been paid into his hands by stockholders in the days immediately preceding his failure.

On the day of his suspension the officers of the Compress Company presented him for a settlement of his indebtedness as treasurer, and succeeded in bringing about such a settlement by which Allen turned

over to the company nine hundred and forty-five dollars in money and a number of bills receivable amounting to \$3981 40.

The plaintiffs, judgment creditors of Allen, brought this suit to annul and revoke this transfer as made in fraud of creditors.

Certain other judgment creditors of Allen intervened and joined in the demand for revocation, and prayed a *pro rata* participation with plaintiffs in benefits of the judgment.

Judgment was rendered in favor of the plaintiffs and intervenors, setting aside the transfer of the notes and accounts, but refusing to interfere with the money payment, and making a *pro rata* distribution of the proceeds among the plaintiffs and intervenors.

From this judgment plaintiffs alone have appealed.

They urge two complaints :

1. Error in not revoking the payment in money.
2. Error in allowing the intervenors to participate with them in the benefits of the judgment.

I.

In so far as the money delivered was, properly speaking, a payment with Allen's money, we think the complaint of appellants is well founded. It was an integral portion of a reprobated transaction, and tainted with the illegality which infected the whole. It was not such a "payment of a just debt in money" as is exempted from the revocatory action under Art. 1986 C. C. It was part and parcel of an unlawful contract, and must fall with it. But the evidence is positive and uncontradicted that of the money delivered, seven hundred and sixty dollars consisted of the identical notes and cash which had been paid to Allen, as treasurer, by stockholders of the Compress Company, and had been set apart in a drawer by itself as money of the company.

We think this money was the property of the company, which it was the plain duty of Allen to turn over, and which the company had the right to receive.

Plaintiffs should have had judgment for the rest of the money paid, viz: \$185. And as intervenors have not appealed, our judgment for this amount will enure to the exclusive benefit of plaintiffs.

II.

We think the claim of plaintiffs to a preference over intervenors, on the ground that their attack was prior in time, is unfounded.

This Court has heretofore construed Art. 1977 (formerly 1972) of the Code, using the following language: "We think the fair and equitable meaning of the article is that when creditors commence the prosecution of their rights about the same time, and use proper diligence

Curator vs. Succession of McIntosh.

afterward, one should not have an exclusive privilege on the property simply because his suit was first commenced. It would be an unjust interpretation to give the law in many cases. The case might be different if it were apparent that one of the creditors had slept upon his rights and neglected to assert them with reasonable diligence." *Walton vs. Bemiss*, 16 La. 144.

The same authority recognizes the right of other creditors to intervene in the first revocatory action.

The case establishes the principle that other suing creditors are not subordinated to the one first bringing the revocatory action, simply by reason of the latter's priority, and leaves it to the discretion of the courts to determine whether the former have been guilty of such *laches* as to conclude their rights.

We are not prepared to say that intervenors in this case should be debarred from asserting their rights, and approve the judge *a quo's* ruling on this point.

It is, therefore, ordered adjudged and decreed that the judgment appealed from be amended by adding thereto a judgment in favor of plaintiffs and against the Monroe Cotton Press Company, for the sum of one hundred and eighty-five dollars, with 5 per cent interest thereon, from July 3, 1886, the same to be applied exclusively to the debts of plaintiffs, and that, as thus amended, the same be now affirmed, the Monroe Cotton Press Company to pay costs of this appeal.

No. 1187.

HELEN STAFFORD AND CURATOR *ad litem* vs. SUCCESSION OF W. S. MCINTOSH.

(Consolidated with)

OPPOSITIONS TO ACCOUNT OF ADMINISTRATOR.

The fees of an attorney for services rendered in the defense of suits against a tutor, on account of debts of a minor's parents, are a legitimate charge against the succession of the parents.

When the proof shows that an administrator has used an honest endeavor to protect the interest of the succession and the heirs, the maxim *contra spoliatorem omnia presumuntur* does not apply.

Unless it has been shown that a succession representative has neglected his duty and has not used an honest effort to collect rents, he cannot be mulcted in damages therefor, but he must account for all he has received.

A PPEAL from the Twenty-Seventh District Court, Parish of Richland. *Williams, J.*

Curator vs. Succession of McIntosh.

David Todd for Plaintiff and Appellant.

R. G. Cobb and *J. H. Toler* for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. The historical facts of this controversy will be more easily understood by a recital of them in the narrative form, in so far as they exercise a material bearing thereon.

I. Q. C. Stafford, surviving husband of Margaret Stafford, resided, and did business as a country merchant, in Richland parish, for several years, and, his affairs becoming embarrassed, the latter obtained a judgment of separation of property against him in January, 1871, and he made to her, in satisfaction of her claims, a *dation en paiement*, among other things, of his undivided one-half interest in the stock of merchandise of the firm of Stafford & Co., of which he was a member.

This firm was subsequently dissolved, and she assumed control of the business in her own name and continued it up to the date of her death, on the 10th of August, 1872.

Helen Stafford — the present plaintiff — then a minor, was called to her succession, as her sole surviving issue and heir at law; and her father was at once qualified and confirmed as her natural tutor.

The inventory he caused to be taken showed the total value of the estate of M. Stafford to be \$31,295 86, "subject to debts, \$14,649 17;" and of the total value of assets, the rights and credits represented the sum of \$23,906 11. These consisted of ordinary mercantile accounts, that appear to have been wholly unsecured, and, though manifestly of little value, were appraised at their face.

The stock of goods was put at \$1200; personal property at \$1869 74; and the real estate at \$4820. The last item consisted of eighty acres of woodland, appraised at \$4 per acre, and which was subsequently sold for a much smaller sum; the "White-store" and one acre of land, appraised at \$1500, was worth in 1876 only \$500; the Helen plantation, valued at \$2000, worth in 1876 \$1500; and a strip of 190 acres of land, adjacent to the "White-store," valued at \$1000. During the administration of Stafford, tutor, the improvement known as the "Stafford Mansion" was erected upon this last mentioned tract of land, and twenty acres were segregated therefrom and attached thereto, and in 1876 it was valued at \$3000.

He also acquired during his administration, in the name of the minor, the Beret place and a half interest in the Cherry-Bluff place, both of which are valued at about \$600. A policy of life insurance adds to the value of the minor's estate \$1400, and altogether an in-

crease is shown, in the value of the minor's estate, of \$2065 25; yet it did not equal the actual depreciation in other real estate, in the meanwhile.

In the interval between the date of his qualification and that of his death, Stafford, tutor, became involved in various law suits, many of which were brought by the commercial creditors of the plaintiff's deceased mother—and by which he was greatly harassed and annoyed, and through the instrumentality of which, in a great measure, the affairs of the estate he represented were left, at his demise, in a crippled and embarrassed situation. Appreciating the great difficulty of it, Stafford made an informal will, in which he requested W. S. McIntosh,—a highly respected citizen of the vicinity—to undertake the care of his, then, infant daughter, and the administration of her estate, and in pursuance thereof the latter applied for and was appointed to those trusts in August, 1876.

He caused two separate inventories to be taken. That of the *separate acquisitions* of the minor amounted to \$2017 25, and that of Mrs. M. Stafford amounted to \$7596 93. Taken together they show a *loss in value* of \$21,681 68.

His respective administrations continued until the 21st of December, 1883—the date he surrendered the real estate and the residue of personal property to the agent of the plaintiff, by a notarial act—though he departed this life on the 11th of March, 1884. The only account McIntosh ever filed of his gestion was the one he presented on the 28th of August, 1882, in obedience to an order of court provoked by her *curator*.

Soon after the death of McIntosh, D. T. Chapman was qualified as the administrator of his estate, and Helen Stafford—having been emancipated and joined by a curator *ad litem*—filed this suit; rather, she inaugurated the proceedings, which have brought up for review Dr. McIntosh's tutorship and administration, of very nearly seven years. She makes claim for the large sum of \$30,000, and the principal part of this is on account of the *supposed large* value of the rights and credits that are mentioned above, as having only a *nominal* one. The proof in the record fully establishes that this demand is entirely groundless. Indeed there seems to have been a strong probability of Mrs. Stafford's succession having been brought to the verge of insolvency during the administration of his predecessor. Before his death, McIntosh surrendered to the agent of plaintiff all of the real estate mentioned in each of the two inventories he had taken. During the period of his administration, he diligently addressed himself to

the settlement and adjustment of those claims and suits which had so embarrassed, and well-nigh bankrupted the estate under the administration of Stafford, tutor; and, by his assiduous efforts, and unremitting zeal, he succeeded in relieving the estate from those complications and satisfied most all of the complaining creditors, and enabled the minor, upon her emancipation, to go into peaceable possession of a fair inheritance.

Instead of the evidence disclosing reckless disregard of the rights of the minor, and the maladministration of her estate, it is in proof, by witnesses of high character and of unimpeachable veracity, that Dr. McIntosh's administration was, at all times, and in every respect, characterized by an *honest* and *earnest* desire to *protect* and *defend* the best interest of his ward, to the uttermost. This was the *result* and *general* effect of his gestion. An examination of his accounts shows that the taxes have been paid; the minor was sent to Nashville, Tennessee, and educated at a good school; the rents upon some of her property have been regularly collected and accounted for, and some valuable property acquired for her account, and of which she is now in the enjoyment and possession. During the term of his administration he succeeded in restoring to the estate the Helen plantation — one of its most valuable properties — that had, by means of certain irregular proceedings, passed into the possession and apparent ownership of certain creditors of Stafford, tutor; and, in the accomplishment of which he expended \$635, for which he is entitled to credit, in reimbursement.

The plaintiff challenges the correctness of the McIntosh accounts, mainly on the following grounds, viz:

1. She claims that he has failed to charge himself with the rents of the Helen plantation for any part of the time it was under his administration, and on that score he is chargeable with the amount thereof, \$3000, with interest.

2. She opposes the allowance of the item for gin-stand, press and fixtures placed on the Helen place, \$369.

3. Also fees due to Cobb & Gunby for services rendered by them during two last years of the administration of Stafford, tutor, and by them retained out of collections made by them, \$500.

4. Fees of same counsel for opening the succession of M. Stafford, and having McIntosh qualified, and the inventories taken, \$500.

5. Other fees aggregating \$600, in different independent suits during *last* administration.

She likewise objects to various smaller items of credit that appear on his accounts, but which need not be detailed particularly.

1. There is nothing charged on the accounts against McIntosh for the rents or revenues of the Helen plantation during his administration of it, which terminated on the 31st of December, 1882. The rents for which he may be chargeable are those of 1877 to 1882 — say six years. The plaintiff's opposition only claims that there are one hundred acres of open land on the place, and the property is situated on Bayou Bœuf. The proof shows that the administrator collected the rents for only a portion of the time, and that \$200 per acre would be a fair rental, approximating \$150 per annum. We have been unable to arrive at any *exact* figures, or to make any *positive* estimate of the amount due, but are of the opinion that \$150 per year, for three years, would be a just and proper allowance on that score.

2. With regard to this item of \$369 for the gin-stand, press, etc., we do not regard plaintiff's claim equitable or well founded. The administrator seemed to have used his best endeavors to keep the plantation in good shape, and this *small* investment was well intended and well directed, and doubtlessly inured to the benefit of the plantation.

3. The \$500 charged for attorneys' fees in various suits — about twenty in number, some in the parish, and others in the district court — does not seem unreasonable in amount; and the testimony is in keeping with the statement. It is true that those fees were incurred in litigation that was carried on during the administration of her father; but we think it is fairly shown that if he had not *resisted* the torrent of litigation that set in upon him, the debts of her mother — and which are mentioned on the first inventory of her estate — would have *except all the property away*; and she is the sole beneficiary of the results.

That item must be allowed.

4. The fees of same counsel for services rendered McIntosh, administrator, for opening the succession and superintending the taking of the inventories, appears to us to be excessive, and should be reduced to two hundred dollars.

5. The remaining fees charged in the different suits mentioned are not objectionable.

We do not feel disposed to be critical in casting up the accounts of an administrator who has acted in such perfect good faith, and has fulfilled the trust confided to him by the *plaintiff's father*, in conformity to his best interest.

The demands of defendant for an increase of judgment in his favor cannot be *listened* to nor allowed.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended and increased, in favor of the plaintiff, in the sum of seven hundred and fifty dollars, and that as thus amended same be affirmed with costs against the succession of M. Stafford.

Mr. Justice Todd takes no part in this opinion.

No. 1182.

THE STATE OF LOUISIANA VS. CLEMENT COLLY.

In a prosecution for obtaining money or property by false pretences, the indictment must contain averments that the accused made false representations of a state of things past or present, and it will not be good if the alleged false representations refer to the future only.

A promise is not a pretence within the meaning of the statute, even when the party making the same does not intend to keep it.

Hence an indictment charging the defendant with falsely offering or promising to procure the release on bail of a person in actual custody, by means of which he obtained money, does not disclose an offence covered by the statute.

A PPEAL from the Twenty-sixth District Court, Parish of St. Charles. *Rost, J.*

Gervais Leche, District Attorney, and *Chas. A. Baquie*, for the State, Appellee.

James D. Augustin for Defendant and Appellant.

The opinion of the Court was delivered by

POCHE, J. This appeal is from a conviction under a charge that the accused "feloniously, unlawfully and knowingly did falsely pretend to one Turner Wilson that he, the said Clem. Colly, would, for and in consideration of the sum of twenty-five dollars, procure the release upon bail of one Manuel Billup, then in custody charged with murder; by which said false pretence he, the said Clement Colly, did unlawfully obtain from the said Turner Wilson \$12.50 in cash money, and was then and there entrusted with a certain horse in pledge for the remaining balance of \$12.50, with intent to defraud, whereas, in truth and in fact, the said Clement Colly, at the time he so falsely pretended, as aforesaid, well knew said pretences to be false."

The information was framed under section 813 of the Revised Statutes, which reads:

"Whoever by any false pretence shall obtain, or aid and assist another in obtaining, from any person, money or any property with intent to defraud him of the same, shall on conviction be punished by imprisonment at hard labor or otherwise not exceeding twelve months."

State vs. Colly.

Among other complaints, the defendant urges in a motion in arrest of judgment that the information filed against him cannot sustain a conviction, for the reason that it does not contain the charge of an offence known to the laws of Louisiana.

The offence denounced by section 813 of the Revised Statutes as construed in conformity with the common law of England (Sec. 976 R. S.) contemplates a false statement by the accused of a past event or of an existing fact, and it excludes any representation in regard to a future transaction. Wharton, American Criminal Law, secs. 2085, 2087, 2096, 2112; Bishop on Criminal Law, vol. 2, secs. 397, 400, 401.

Hence it follows that a promise is not a pretence, and that a promise which a man makes and which he does not intend to keep, does not fall within the scope of the legal definition of a false pretence.

In the case in hand, it is not denied that the person whom the accused offered or promised to have released on bail was then in actual custody on a charge for murder; on the contrary it is admitted and made the basis of an argument, hence the representation of the "existing fact" was true and made no part of the alleged false pretence by means of which the defendant obtained the money and the horse of the prosecutrix. But the false pretence is alleged to rest on the promise made by the accused, and which he is charged to have known to be false.

Manifestly such a representation, which has reference to the future only, and not to the past or to the present, is not a pretence within the meaning of the statute.

Wharton and Bishop both refer to a case in which the defendant was charged with obtaining money by the false pretence that he could tell to the owner of certain animals which had strayed, where they could be found; the conviction was set aside because the false pretence referred to the future; it was held that the indictment should have stated that the defendant had pretended that he knew where the animals were.

Thus in the instant case the indictment would have been good either if the statement that Manuel Billup was in custody had been untrue or if the accused had been charged with falsely pretending that he had already procured the release of the prisoner on bail.

Our conclusion is that the motion in arrest of judgment was well founded and that it should have been sustained.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, that the verdict of the jury be set aside, and that the case be remanded for further proceedings according to law.

 Bank vs. Boatner.

No. 1178.

STATE NATIONAL BANK vs. C. J. & J. S. BOATNER.

Garnishment process is a method of seizure and not a bill of discovery. Interrogatories should be confined to matters tending to disclose indebtedness to, or possession, or control of property belonging to the debtor.

Garnishees have the right to except to impertinent questions and to withhold answers thereto until such exception has been ruled on.

When such exceptions have been taken, failure to answer before ruling thereon cannot be ground for judgment *pro confesso*.

When answers to proper interrogatories unequivocally disclose that the garnishees have owed nothing and had no possession or control of any property of the debtor, since the garnishment proceeding, and such answers have not been traversed, garnishees cannot be required to answer other interrogatories touching the disposition and whereabouts of property which may have been in their possession at some time prior to the garnishment. Such inquiries could be proper only under a traverse.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

John T. Ludeling for Plaintiff and Appellant.

Millsops & Sholars for Defendants and Appellees.

The opinion of the court was delivered by

FENNER, J. Plaintiff having obtained a judgment against L. D. Allen, caused execution to issue and then filed a petition making C. J. & J. S. Boatner, attorneys-at-law, garnishees, and propounded to them the following interrogatories:

"1st. Have you now in your hands or possession or under your control any notes, accounts or other obligations belonging to L. D. Allen, Jr.? If yea, please state explicitly what notes, accounts or other obligations. Describe them fully, giving dates, time when due, amounts and names of obligors.

"2d. Have you in your possession now and have you had under your control or in your possession since the garnishment process was served on you, * * any note or notes, due bills or accounts in favor of or belonging to L. D. Allen, Jr., against the following parties or any of them and calling for the following sums or thereabout?" [Followed by a list of particular obligations.] "*If you have had control or possession of any of said notes and haven't them now, where are they? What has become of them? What did you do with them and when did you part with them? If so, please describe the obligations and give the residences of the debtors.*

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"3d. Are you indebted to L. D. Allen, Jr., in any sum whatever? Have you any moneys in your hands or in your possession or under your control belonging to L. D. Allen, Jr.? Do you owe him as much as the amount of this judgment? Have you in your possession property or effects of any description belonging to Allen sufficient to satisfy the judgment, etc."

The garnishees filed answers distinctly negating any indebtedness to Allen or the possession or control of any notes, bills or other property belonging to Allen, either at time of answering or at any time since service of garnishment process, except that they qualify their negative answer to the last interrogatory by this statement: "I am almost certain that we have a note of Mrs. Grayson for \$200, which was sent to us by Mr. Allen for the purpose of settling two small debts due by him. We cannot give the date or maturity of this note for the reason that we cannot presently find it, and have no memoranda showing it. I will make search for the note and if we have not returned it, will amend our answer and give the exact dates." They also qualified their answer to the third interrogatory by the statement: "We have a note of M. J. Liddell for \$305, sent us by the Laclede Bank of St. Louis, who claim that they own the same by transfer from L. D. Allen, Jr. We do not, however, hold the same as the property of L. D. Allen, Jr., nor for his account."

Garnishees, however, filed on the same day with their answers an exception to that portion of the second interrogatory which we have *italicised* above, on the grounds that it is impertinent to the question of their liability as garnishees, and that it calls for disclosure of facts, knowledge of which was acquired in the course of professional employment. Under this exception, they failed to answer this portion of that interrogatory.

Plaintiff then filed a motion to have a judgment *pro confesso* entered against the garnishees "for the claims and amounts stated in the interrogatories which they have failed to answer."

Obviously this motion presented no issue except as to the *sufficiency* of the answers, which must be decided on the face of the papers. Nevertheless, the judge permitted the introduction of certain evidence over the objection of defendant. This evidence was immaterial and irrelevant to the issue and should not have been received. There was no traverse, in any form, of the answers, and the only question was their sufficiency and responsiveness.

Counsel for plaintiff contends that garnishees had no right to *except* to the interrogatories, but were bound to answer or take the conse-

quences of failure in case their excuse therefor should be held not good.

The contrary practice, recognizing the right to except and withhold answer until the exception has been ruled on, has been repeatedly recognized by this court. *Maduel vs. Monseur*, 28 Ann. 691; *Shaughnessy vs. Fogg*, 15 Ann. 330; *Laville vs. Hebrard*, 1 Rob. 435; *Samory vs. Hebrard*, 17 La. 555.

If his exception were overruled, he would then be ordered, and have opportunity, to answer.

In this case, however, the judge *a quo* sustained the exception, and the plaintiff complains that this is error. Even if it were error, its correction would, in no manner, tend to support the motion of plaintiff to have the interrogatory taken for confessed. The utmost effect would be to order the garnishee to answer; and the plaintiff's motion would, in any event, be denied. We take occasion, however, to say that, considering the unqualified denial in the answers of the garnishees that they had any possession or control of the notes and bills referred to at any time since the garnishment herein, the questions referred to seem utterly irrelevant and impertinent. What difference can it possibly make, as to the effectiveness of this seizure, *where* these bills now are, or *what* was done with them, and *when*, in view of the untraversed answers that they have not been in the possession or under the control of the garnishees at any time since the garnishment herein? The code of practice is very explicit in declaring the purpose for which garnishment is allowed and the object and scope of interrogatories to be propounded.

Thus art. 246 authorizes the citation of a garnishee "to declare on oath what property belonging to defendant he has *in his possession*, or in what sum he is *indebted* to defendant." Art. 247 authorizes interrogatories "as to the nature of the property belonging to the defendant *which may be in his possession*, and as to the amount of the sums for which he may be *indebted*." And the act of 1839 authorizing garnishment under execution now added to C. P. 246, only authorizes interrogatories touching "*indebtedness*" and "*property and effects in the possession or under the control*" of the garnishee. The process of garnishment is a method of seizure and not a bill of discovery. No interrogatories are proper except such as have for their object the disclosure of indebtedness or of property in the possession or under the control of the garnishee and thus seized in his hands. When answers to such

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proper interrogatories, not traversed, unequivocally negative such indebtedness, possession or control, the garnishee cannot be required to answer other interrogatories as to property which may once have been in his possession, but which had passed therefrom before the seizure. If the plaintiff wishes to go into such questions, he should first traverse the answers and he may then, under proper *contestatio litis*, show any fact tending to establish the effectiveness of his seizure.

This renders it unnecessary to consider the validity of garnishees' objection based on ground that the knowledge of the facts referred to was acquired in the course of professional employment. The allegation is duly sworn to, and it would be a delicate matter to enforce such disclosures.

We have considered the authorities quoted by plaintiff's counsel (18 La. 479, 20 Ann. 188 and 15 Ann. 330), but they do not, when properly scrutinized, affect our conclusions in this case.

Plaintiff contends, however, that judgment should have been entered for the Grayson and Liddell notes under the special answers in reference to them heretofore quoted. We do not see how this is possible. He might force further disclosures touching the Grayson note, and might traverse the answer touching the Liddell note, but on the face of the answers, as they stand, there is no ground for judgment against the garnishees.

We think, however, the judgment of the court, in ordering the garnishees to be *discharged*, went too far. It may be that the time allowed for traversing the answers has passed, but certainly the plaintiff has not lost his right to further disclosures as to the Grayson note. At all events, the only question submitted to the court was under the motion of plaintiff to have the interrogatories taken for confessed; and a denial of this motion was the only judgment called for.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from in so far as it discharged the garnishees be annulled, avoided and reversed, and that in lieu thereof there be judgment in favor of garnishees and against plaintiff, denying and refusing the latter's motion for judgment *pro confesso*, plaintiff to pay costs in the lower court and defendant those of this appeal.

State ex rel. Wickliffe vs. Judge.

No. 1188.

THE STATE EX REL. J. C. WICKLIFFE, DISTRICT ATTORNEY, vs. W. F. BALCKMAN, JUDGE OF TWELFTH JUDICIAL DISTRICT.

Under the laws of Louisiana the accused in a criminal prosecution has no right to exact a list of the State witnesses. Hence the District Attorney cannot be required by the court to furnish such a list as a condition precedent to a trial of the cause.

An order to that effect by a District Judge cannot be justified as resting on his judicial discretion, and not being sanctioned in law it must be rescinded.

APPPLICATION for Mandamus.

J. C. Wickliffe, District Attorney, Relator.Respondent *in pro per*.

The opinion of the court was delivered by

POCHÉ, J. Relator's complaint is predicated upon the following facts:

When the case entitled "The State vs. John Clements," then pending in respondent's court, was called for trial according to previous assignment, and after the District Attorney announced that he was ready for trial, the accused moved for a continuance of the case for the main reason that the names of the State witnesses were not written on the back of the indictment, and had not otherwise been disclosed. Whereupon the judge entered an order requiring the District Attorney to disclose the names of the State witnesses, and on the latter's refusal to comply with said order, he continued the trial of the case "until such time as the District Attorney disclose name of prosecuting witness."

In his answer the respondent admits that, under the law, the omission of the District Attorney to endorse the names of the State witnesses on the indictment is not fatal, and that the call on behalf of the accused for information on the subject is not a matter of right or of law, but he contends that, as the law is silent on the subject, his order in the premises is within the scope of his judicial discretion.

A careful consideration of the question has led us to the conclusion that our learned brother of the District Court is in error and that his order cannot be sustained in law.

If, as he concedes, the law does not require, as a matter of right, the disclosure of the names of the State witnesses, the court cannot coerce the District Attorney to comply with an order which is not supported

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by law; and if, on the other hand, the court can at its discretion insist on a compliance with such an order as a condition precedent to a trial of the cause, it is clear that the State can thus be deprived of her right to prosecute offenders, or to enforce her own laws in her own courts.

A discretion which would lead to such a confusion or chaos has certainly no claim to be considered as a sound judicial discretion: hence it becomes the duty of a judge to recede from a position which would produce such effects, unless he is sustained by a clear and mandatory law.

The question therefore hinges upon a proper consideration of the requirements of the law in the premises.

The controversy was set at rest by this court in the case of Kane and Hunter, 36 Ann. 153. In that case the defendants urged in a motion in arrest, error through the omission of the prosecuting officer to endorse the names of the State witnesses on the indictment. The court, after a thorough review of the common law, as adopted and modified by our statutes, concluded that the common law provision which conferred that right to the accused had been *ex industria* omitted from our statute on the subject, sec. 992, Revised Statutes; and that the omission of the District Attorney in that regard had deprived the accused of none of his rights. It requires no argument to justify the conclusion that a formality which is not essential in law to the legality of a criminal trial cannot be imposed by the court, as a condition, precedent to the trial.

It is therefore ordered that a peremptory writ of mandamus issue to the respondent judge, directing him to rescind his order continuing the trial of the case of the State vs. John Clements, now pending in his court, until such time as the District Attorney disclose the names of the prosecuting or other State witnesses, and to proceed to such trial without requiring the District Attorney to disclose the names of the State witnesses, and that the costs of these proceedings be taxed against the respondent.

No. 1179.

THE SIMMONS HARDWARE COMPANY ET AL. VS. J. E. MCGUIRE,
SHERIFF AND TAX COLLECTOR.

A law of a State cannot impose license taxes upon persons passing through, or coming into it merely for a temporary purpose, especially if connected with interstate commerce: nor can it impose such taxes upon property imported into it from abroad, or from another State, and not yet become part of the common mass of property therein.

30 846
44 806

39 648
50 579

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A State cannot enact any law or establish any regulation affecting interstate commerce. Same would be an unauthorized interference with the power given to Congress over the subject.

Interstate commerce cannot be taxed at all by a State statute, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State.

The negotiation of sales of goods, which are in another State, for the purpose of introducing them into the State, into which said negotiation is made, is interstate commerce.

That part of sec. 12 of act 101, of 1886, which declares that "all traveling agents offering any species of merchandise in this State for sale, or selling same by sample, or otherwise, shall pay * * a license of \$50," is repugnant to paragraph three, section 8, article 1, of the United States Constitution, which declares that Congress shall have power to regulate commerce among the several States, and same is unconstitutional, and in so far as such traveling agents may represent principals domiciled in other States are concerned, the tax is null and void.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

John T. Ludeling for Plaintiffs and Appellants.

Thomas O. Benton for Defendant and Appellee.

The opinion of the court was delivered by

WATKINS, J. Plaintiffs are merchants domiciled and doing business in the City of St. Louis, State of Missouri, and in the prosecution of same, they are and have been importing their goods and wares into this State for sale in unbroken packages, through their traveling agents, or drummers, who travel therein soliciting customers and making sales by samples.

They aver that they have paid all licenses and taxes required of them as merchants in the State of Missouri, and the City of St. Louis, and claim the right to thus sell and dispose of their wares and merchandise, without the payment of any other license or tax, in this State.

They aver that defendant, as the sheriff and tax collector of the Parish of Ouachita, has demanded of their traveling agent, or drummer, a payment of \$50 license for selling their goods as aforesaid, and upon his failure to pay the same, he has seized their property in satisfaction thereof.

In seeking to collect said tax, the defendant is acting under the authority of section 12, of act 101, of 1886, and this statute, plaintiffs insist, is repugnant to paragraph third, section 8, article 1, of the Constitution of the United States, which declares that Congress shall have

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power to regulate commerce with foreign nations, and between the States; and same is unconstitutional, and the license tax void.

The sole question presented for consideration is the constitutionality *vel non* of the statute in question.

The chief reliance of the plaintiff's counsel is upon the recent decision of the Supreme Court in the case of Sabin Robbins vs. The Taxing District of Shelby County, Tennessee, not yet reported.

The facts of that case are that Robbins was engaged at the City of Memphis, in the State of Tennessee, in soliciting the sale of goods for the firm of Ross, Robbins & Co., of the City of Cincinnati, Ohio, who were dealers in stationery, and exhibited samples for the purpose of effecting sales.

There was a statute of that State which declared that "all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods * * therein by sample, shall be required to pay to the county trustees the sum of \$10 per week, or \$25 per month, for such privilege." Robbins failed to pay the \$10 license, and was prosecuted therefor, and convicted, and on appeal to the Supreme Court of that State the sentence was affirmed. Thereafter the case was taken to the United States Supreme Court upon the ground herein assigned for the unconstitutionality of the statute of this State.

On this state of facts and upon the strength of various authorities that were cited, that court held that the following principles are established, viz.:

1st. That the Constitution having given to Congress the power to regulate commerce among the several States, that power is necessarily exclusive.

2d. That where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions; and that any regulation of the subject by the States is repugnant to such freedom.

3d. The only way in which commerce between the States can be *legitimately* affected by State laws is when, by virtue of its police power, and its jurisdiction over *persons and property within its limits*, it provides for the security of life and property, or imposes taxes upon *persons residing within the State, or belonging to its population, or upon avocations pursued therein, not directly connected with foreign or inter-state commerce.*

The court say: "But in making such internal regulations, a State cannot impose taxes upon *persons passing through the State, or coming*

*into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; * ** and no regulations can be made directly affecting interstate commerce. Any taxation, or regulation of the latter character would be an unauthorized interference with the power given to Congress over the the subject."

The court then proceeds to discuss the facts of the case, and apply the principles of law enumerated, and then says: "To deny to the State the power to lay the tax, or require the license in question, will not, in any perceptible degree, diminish its resources, or its just power of taxation. It is very true that if the goods, when sold, were in the State, and part of its general mass of property, they would be liable to taxation; but when brought into the State in consequence of the sale they will be equally liable; so that, in the end, the State will derive just as much revenue from them as if they were there before the sale. * * But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on interstate commerce itself.

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States—that all are taxed alike. But that does not meet the law at all. *Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State.*

* * * * *

"The negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce.

"A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case it is an act of foreign and in the other of interstate commerce, both of which are subject to regulation by Congress alone.

* * * * *

"If the selling of goods by sample, and the employment of drummers for that purpose injuriously affects the local interests of the State, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system, applicable to the whole country, and not left to the varied,

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discordant, or retaliatory enactments of forty different States. The confusion into which the *commerce of the country* would be thrown by being subject to *State* legislation in this matter would be but a repetition of the disorder which prevailed under the articles of confederation."

These copious extracts from this luminous and most important decision of that enlightened tribunal show it to be of the greatest consequence to commercial relations between the States. It is upon this theory, exclusively, that it proceeds. It draws a line of demarcation between the persons and property over which a State has jurisdiction to exercise the taxing power and those over whom she has none. If the person sought to be taxed, or of whom a State license is required, be one who is merely passing through the State, or one coming into it for the temporary purpose of selling by sample goods to be imported from another State; or if the goods, the sale of which is thus negotiated, are imported into the State from another State, and not yet become a part of the mass of property therein, neither the person or property have become subjected to the taxing power of the State; and any State law imposing such a license tax is repugnant to the Federal Constitution, and void.

They say that this is no unjust restriction upon the taxing power of the States, but merely the subjection of the States to the Constitution of the United States in the matter of interstate commerce. It meets the objection that the law makes no unjust discrimination between *domestic* and *foreign* drummers—and that is perfectly true, in this instance—but that all are taxed alike, by announcing the underlying principle to be that interstate commerce cannot be taxed by the States at all, even though the same amount of tax or license should be laid on each class, or on that business which is carried on exclusively *within* the State. It is the negotiation in one State, by sample, of sales of goods in another State that cannot be taxed. The State license, or tax, is treated as being an unconstitutional restriction upon the *business* or calling of introducing into one State the goods and wares that are manufactured in another. The power of the State to tax interstate commerce was considered the leading and prominent feature of the law of Tennessee; and the statute of this State under consideration is very similar, if not an exact parallel.

On all questions appertaining to the construction of provisions of the United States Constitution and laws of Congress decisions of the Supreme Court are paramount to our own, and we regard it our duty to follow them. Hence under the interpretation it has placed on the

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Tennessee statute, and the constitutional power of Congress to regulate interstate commerce, we feel constrained to pronounce that part of section 12, of act 101, of 1886, which declares that "all traveling agents offering any species of merchandise in this State for sale, or selling same by sample, or otherwise, shall pay a license of \$50," repugnant to paragraph three, section 8, article 1, of the Constitution of the United States in respect to the plaintiffs; and that the license tax demanded of them is illegal.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that the plaintiffs' demand be sustained, their injunction reinstated, and perpetuated, and all cost be taxed against the defendant and appellee.

No. 1180.

H. W. McLEOD vs. A. C. SIMONTON ET AL.

In a suit for the liquidation of a partnership, to which the suing partner engrafts a demand against a third party, for the ownership of certain property, as an alleged asset of the partnership, the test of jurisdiction is the value of the property in dispute.

In such a case there is no demand for any portion of a fund to be distributed.

The Supreme Court can allow no damages in an appeal not within its jurisdiction. The only judgment it can render is one of dismissal.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

C. J. & J. S. Boatner for Plaintiff and Appellant.

E. M. Graham and Thos. A. Garrett for Defendants and Appellees.

The opinion of the Court was delivered by

POCHÉ, J. The original purpose of this suit was to liquidate and settle the commercial partnership of "Simonton, Kidd & McLeod," heretofore engaged in the construction and repair of levees.

As an incident of the main demand, plaintiff claimed for the firm the ownership of a judgment obtained by A. C. Simonton, personally, against L. D. McLain, in the sum of nine hundred and fifty dollars and interest, and rendered by this court in the case entitled Simonton vs. McLain et al, reported in the 37th volume of our annual, p. 663.

Pending this litigation, in which the question of the true ownership of that judgment was involved, D. P. Ford, of the Parish of Lincoln, who held a judgment against A. C. Simonton, rendered by the district court of the latter parish, issued execution thereon and levied on the judgment standing in the name of Simonton against McLain.

That seizure was enjoined in the district court of Ouachita by McLeod, plaintiff in this suit, on the ground mainly that the judgment

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being the property of the firm of "Simonton, Kidd & McLeod," could not be applied to the payment of Simonton's personal debts, and for other reasons not necessary to mention herein. This appeal is prosecuted from a judgment sustaining an exception by D. P. Ford, the defendant in injunction, to the jurisdiction *ratione materiæ et personæ* of the district court.

As stated by appellant's counsel, the only question which this appeal presents to us is that of the disputed jurisdiction of the district court. From this proposition follows another equally clear, and it is that the only issue before the district court, as between McLeod and Ford, was the contested right of ownership or control of the Simonton judgment against McLain, amounting, as stated, to the sum of \$950.

Hence we conclude that appellee's suggestion that we have no jurisdiction of this appeal *ratione materiæ* is well founded, and that the same must be dismissed.

In his attempt to engraft his injunction proceedings against Ford to his main suit for a liquidation of the partnership of "Simonton, Kidd & McLeod," plaintiff cannot succeed to change the issue which he clearly tendered to Ford. This is not a matter in which our jurisdiction is to be tested by the amount of the fund to be distributed. As far as the record shows, there is yet no fund under control of the court, or in the hands of any one for distribution. That branch of the action which seeks to assert the ownership of the firm to the McLain judgment is simply an effort to secure an asset which would constitute the first element of a fund to be distributed. And even that would not be equal to the lower limit of our jurisdiction. *La. W. R. Co. vs. Hopkins et al*, 33 Ann. 806.

The issue presented in McLeod's demand against Ford is precisely that which would be involved in an action by an executor, administrator or syndic for the recovery in behalf of the estate which he represents, of a claim, or of property, of the value of \$950.

In such an action as in the present controversy, the amount in dispute is the true test of our jurisdiction, and under that test the present appeal cannot be sustained.

We note appellee's prayer for damages as in case of a frivolous appeal. But having no jurisdiction of the appeal, we cannot look into its merits, even with the view of determining its character. Damages cannot be allowed in an appeal over which the court has no control for want of jurisdiction. *Thomas vs. Guilbeau*, 35 Ann. 927.

It is therefore ordered that the present appeal be dismissed at appellant's costs.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA, AT OPELOUSAS.

IN

JULY. 1887.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice.*

Hon. FÉLIX P. POCHÉ,

Hon. ROBERT B. TODD,

Hon. CHARLES E. FENNER,

Hon. LYNN B. WATKINS,

} *Associate Justices.*

No. 1284.

BENJAMIN F. EDWARDS ET AL VS. POLICE JURY OF AVOYELLES ET ALS.

Act 104, of 1886, relative to the removal of the parish seat in Avoyelles Parish, is constitutional in all its parts.

It embraces but one object, and that object is expressed in its title.

It was within the power of the Legislature to allow the removal, on conditions provided for in such cases by the Constitution, viz: The adoption of the law by the electors of the parish and the consent of the property taxpayers voting at such election to pay an increase of taxation beyond the constitutional limit.

It was needless to express the conditions in the title of the law. The enumeration of the one without the other was a superfluity, and is not destructive of the law.

Until the conditions prescribed by the Legislature had been complied with, there existed no authority to undertake the removal.

It is shown that the property taxpayers were not consulted and did not vote at all on the question of increase of taxation beyond the constitutional limits.

The announcement by the Secretary of State that the law had not been adopted was correct.

Edwards et al. vs. Police Jury et als.

A PPEAL from the Twelfth District Court, Parish of Avoyelles. Blackman, J.

Cullom & Son for Plaintiffs and Appellees.

1. A special privilege, or power, must be availed of, *Stricti Juris*.
2. The mode, manner, time and extent of enforcing any special right, privilege or authority, granted exclusively by the Constitution, must be construed in accordance with it, and is mandatory.
3. Any special tax authorized to be assessed by the General Assembly, for special purposes, such as are mentioned in articles 202 and 209 of the Constitution of Louisiana, must be fixed definitely by the General Assembly, 2 Curt. 439, and the time, manner and mode of carrying such an act into execution must be regarded and treated as mandatory. 12 Wheat 419; 2 A. K. Marsh 75; 3 Gill 14.
4. The power to levy a tax is an incident of sovereignty and cannot be delegated by the *Mit souveraine* to another subordinate authority, such as the police jury. 4 Wheat 315; 33 N. Y. 161; S. C. Barb 550; 8 Hon. 73; 4 Cal. 46.
5. Sovereignty is necessarily a unit, the incidents of which cannot be exercised beyond constitutional authority, and then only *Stricti Juris*.
6. That which the Constitution requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory merely.
7. The Act No. 104, of 1886, is unconstitutional, because it authorizes a vote of the property taxpayers to be taken, without specifying the sum to be raised, or fixing the limit of the tax. Parish vs. Gaddis et al., A. 931-2.
8. If it be held to be constitutional, the election of Nov. 2, 1886, was illegal and void, because the entire act was not submitted to the voters of Avoyelles, which should have been done, and because of an necessary consequence the act was never adopted in its entirety; and because the property taxpayers of Avoyelles were never permitted to vote as such, on the question of a special tax, as was provided for in the act, and required by article 209 of the State Constitution.
9. If the act be constitutional, then the special tax authorized by it was but a necessary incident of, not required to be covered by, the title.
10. If the tax authorized to be voted upon was a necessary incident of the act, then the entire act has never been adopted,—the election of Nov. 2, 1886, was null—the life of the act has expired, and no election can hereafter be held under it.
11. The consent of the property taxpayers to the special tax was a condition precedent to the adoption of the Act No. 104, without which the act was null, whatever was the vote on the question of its adoption. Or if this be not so,
12. It follows: That a majority of the votes having been cast for the adoption of a part only of the act, it was adopted in its entirety, whether the property taxpayers are willing to pay a special tax or not. The *reductio ad absurdum*.
13. By the Act No. 104, of 1886, the police jury of Avoyelles was "authorized and directed to pass ordinances and make all and every provision for carrying out the provisions" of the act. No other could do this. The police jury has not done it, either in whole or in part; and all that was done was illegal and null.
14. The General Assembly had the right to make the adoption of the act depend upon specified conditions. The vote of the property taxpayers as such, *first taken*, on the question of consent to pay the necessary special tax, was a condition precedent, under penalty of the annulling clause of the act.
15. The General Assembly cannot delegate its authority to legislate. Cooley's Con. Lim., p. 116, nor can it make mere propositions to the people, and constitute them law-makers by the ballot. It alone is the law-making power, and specially is it so with regard to all that tends to fix the rate of a special tax.

T. H. Thorpe for Defendants and Appellants.

1. Special elections authorized by Statute, fixing time and places, may be validly held notwithstanding the refusal or failure of the police jury or other local authority to order or proclaim the same, as required by the Statute. Cooley's Con. Lim. 757; Dillon Mun. Corp. § 197 (3d ed.); Act No. 58 of 1877, sec. 4.
2. Omissions and irregularities in the holding of an election and return of votes will not vitiate the same, unless they are in matters of essence, and such as effect the result, and a party suing to avoid an election upon such grounds must both aver and prove that they changed the result. Cooley's Const. Lim. 777, 778, 779; 12 Ann. 366; 15 Ann. 175; Ibid. 301; 9 Ann. 573; 27 Ann. 507; 29 Ann. 610; Act No. 58 of 1877, secs. 18, 19, 35.
3. The duties of the Secretary of State relating to elections are purely ministerial, and he is without jurisdiction to decide their legal effect. Cooley's Const. Lim. 782, 783, 784; Act No. 58 of 1877, sec. 39; 32 Ann. 579.
4. Courts will not declare a Statute unconstitutional where the record presents other clear grounds of judgment. Cooley's Const. Lim. 196.
5. A proviso repugnant to the body or purview of a Statute will be rejected and the Statute preserved. Kent's Com. 462, 463; Dwarria on Stat. 118.
6. A part of a Statute relating to an object not expressed in the title is void and will be rejected; if the remainder of the Statute is complete, sensible, capable of being executed and effecting the purpose declared in the title, without the aid of that which has been rejected, it will be sustained. Cooley's Const. Lim. 211, 212, 213; 13 Ann. 306; 32 Ann. 726; 33 Ann. 783; Ibid 254; 35 Ann. 1141; 35 Ann. 960.
7. The title of a Statute is the conclusive index of the legislative intent as to what shall have effect. Cooley's Const. Lim. 179, 170.
8. In order that the unconstitutionality of a part of a Statute shall have the effect of nullifying the whole, the two parts must be so mutually and necessarily dependent upon and connected with each other in essence and meaning that the constitutional portion is utterly incapable of effecting the apparent legislative intent without the aid of that which is unconstitutional. Cooley's Const. Lim. 211, 212, 213; 32 Ann. 726.
9. An unconstitutional condition is powerless to avoid an otherwise valid law, unless it be a condition of necessity; if it be merely matter of option or permission, it will not have that effect. It does not warrant the belief that the Legislature would not have passed the Statute without such condition. U. S. Sup. Ct. Rep. (April, 1887), p. 588.
10. When it is possible so to do, it is the office and duty of courts so to construe legislative enactments as to give them effect. Cooley's Const. Lim. 220; 19 Ill. 376, 384; 4 N. H. 16, 18; 17 N. Y. 241; 16 Gray, 417.
11. The Legislature is powerless to add to the constitutional qualifications of electors, or to take away or limit power directly conferred by the Constitution.
12. The enabling act of an article of the Constitution can contain no provision antagonistic to the title or spirit of the article which the Legislature proposes thereby to render effective, and if such antagonistic provision be found, it will be rejected by the courts, and so much of the Statute will be sustained as gives effect to the constitutional article. 35 Ann. 960.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The object of this suit is to prevent the removal of the parish seat of the Parish of Avoyelles from Marksville to another point in the parish.

The grounds upon which the suit rests are: That the Act of 1886, No. 104, relative to such removal, is unconstitutional, and if not such, that the requirements of said act have not been complied with.

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The defense is that the act is constitutional to a certain extent, and unconstitutional as regards part of a section, and that the constitutional exigencies having been observed, the removal can be legally effected.

The district judge considered the act as unconstitutional in all its parts, and made peremptory the injunction issued *in limine* to prevent the removal.

From this judgment the defendants appeal.

In relation to the grounds upon which plaintiffs rely to assail the constitutionality of the act, it may be sufficient to say that the power of the General Assembly cannot be doubted to authorize, by appropriate legislation, the removal of the parish seat; but that this power can be exercised only when the qualified electors, or a majority of them, consent to it, and, if the constitutional limit of taxation is to be increased thereby, where the property taxpayers of a parish, entitled to a vote, or a majority of same, voting at such election, shall have voted for such increase.

Indeed, the power to remove a parish seat is not only not denied the Legislature by any constitutional limitation or prohibition, but is expressly conferred by article 250, which is to the effect that any law passed, contemplating such purpose, shall not go into effect until after submission to and approval by the qualified electors of the parish. This is so truly so that it is left entirely discretionary with the Legislature to initiate the question, or refrain altogether from agitating it.

The electors of the parish have no constitutional right to operate the removal. All they can claim is a law authorizing the removal, subject to their approval; but this right is subordinate to the will of the Legislature to move or not in the premises.

The real ground of complaint urged by the plaintiffs is simply that the conditions imposed by the act of the removal have not been complied with, namely: That the police jury did not act as the Statute had commanded, and that the sense of *both* the electors and the property taxpayers, touching the removal and the increase of taxation, have not been ascertained.

The contention of the defendants is that the act is constitutional so far as it refers to the action of the police jury and provides for an election by the electors; but that it is unconstitutional in that portion of it which requires as a *sine qua non* condition that the property taxpayers shall be likewise, and at the same time, called upon to vote.

In support of this position, it is urged: That the act could not legitimately embody the obnoxious provision and that the title could not and did not embrace it.

It is further contended that, although true it be that the General Assembly required that the police jury should make all necessary provisions to hold the election, yet the omission on their part, as a body, to observe those directions, did not invalidate the election held to take the vote of the electors, for the reason that the electors could themselves — the essential provisions having been made in the Statute — have held the election validly, independent of any action of the police jury.

It would be premature to consider, at this stage, the questions of fact raised by the plaintiffs respecting the non-observance of the conditions imposed by the Legislature, in as much as the validity or invalidity of the Statute must, at the threshold, be determined, for it is only on the assumption of its constitutionality in its entirety that the inquiry can arise, whether its behests have been observed.

The defendants admit and insist that the act is constitutional, as concerns all its provisions, save the portion of the *fourth* section, directing the taking of the sense of the property taxpayers, at the same election, and providing that, in the event of there being a majority of votes against the special tax, the act is to be of no effect, whatever may be the vote cast on the vote of removal.

We will therefore now proceed to consider the question of unconstitutionality raised by the defendants, viz: Whether the last *proviso* of section 4 could legitimately have been inserted in the act, and is or not covered by the title of the act.

The Constitution assuredly provides that "every law enacted by the General Assembly shall embrace but *one* object, and that shall be expressed in the title."

Hence, it is argued by the defendants that, as the act contains *two* distinct and discordant objects, only one of which is indexed in its title, it follows that the other object, which could not be incorporated in the act and was not expressed in the title, must be deemed unconstitutional, and therefore not included in the law, which, without it, can well stand and be executed as a piece of legislation.

The premises granted — *positis ponendis* — the conclusion would be irresistible; but the premises are a fallacy, resulting from a confusion of ideas on the subject.

It is elementary that, although no act can have more than one object in view, which must be announced in its title, still it is needless that the title should enunciate the various ways and means to which the law-giver may resort to accomplish the purpose in view, for it has been well observed, from a practical consideration, that otherwise the title

would be as lengthy as the body of the act, which by all means should be, as much as practicable, avoided, as titles ought to be brief and generic.

It is error to suppose that the *proviso* of the fourth section could not form part of the act, for not only is it germane and congruous, but also an eminently proper and wise appendage.

It is not, in itself, susceptible of forming the isolated purpose of independent legislation, disconnected from all reference to the other portions of the act, without which it would be unintelligible.

The adoption of the act by the Legislature, and its approval, on submission, by the electors, without a vote, ordered expressly or impliedly, by a majority of the property taxpayers in case of an increase of taxation, might have proved *brutum fulmen*, for how could the parish seat be removed, and another provided for, where the limit of taxation has been reached, unless provision were made for the removal and relocation of the same?

In the petition it is alleged, and the record shows, and it is not denied, that an increase of taxation would be unavoidable.

It is apparent that the legislative intent, the sole object which the General Assembly had in contemplation, was the *removal* of the parish seat from Marksville to another point in the parish, and, as a precautionary measure, the ways and means required to accomplish such removal were provided for.

The General Assembly was well aware of the provisions contained in articles 250 and 209 of the Constitution, which provide: the *former*, that laws removing parish seats shall, before taking effect, be submitted to the electors of the parish to be affected thereby, at a special election held for that purpose, and be adopted by a majority of votes cast at such election; the *latter*, that for the purpose of erecting and constructing public buildings, the rates of taxation limited by the article may be increased, when the rate of such increase, and the purpose for which it is intended shall have been submitted to a vote of the property taxpayers of the parish, entitled to vote, under the election laws of the State, and a majority of same, voting at such election, shall have voted therefor.

The Legislature may well be presumed to have had knowledge of the financial condition of the parish in question, or at least to have foreseen the contingency of an increase of taxation, beyond the constitutional limit, to accomplish the removal, including the price of the acquisition of the necessary spot, and the cost of construction and fitting up of the building.

Edwards et al. vs. Police Jury et als.

It was therefore legitimate and prudent for the General Assembly, when legislating on the removal, to embody in the act the conditions upon which it would be effected, namely: the consent of a majority of *both* the electors generally and property taxpayers voting on the occasion.

The conclusion seems irresistible: That the act had but one object—the removal—which was expressed in its title; that the conditions attached to the removal are not discordant; but on the contrary, harmonious; that it was useless to insert them explicitly in the title; that mention of the one therein, without the other, was a superfluity, and that the omission to mention that other is not destructive of the act.

The contention may also be considered from another determining standpoint.

The legislative power and authority to abstain from removing the parish seat are absolute and unlimited.

The first essential prerequisite to the removal is the expression of the legislative will to that effect, in the shape of a law for the purpose. It is perfectly clear that it cannot be removed, except in execution of such a law.

In this case the Legislature has clearly refused to give its consent to such removal, except in compliance with the condition expressed in the *proviso*.

The statement made by the counsel for the removalists establishes this beyond a doubt, for he tells us that the bill, as originally passed by the House, contained no such *proviso*; that the Senate refused to pass it without such *proviso*, and amended the bill by inserting it, and that, as amended only, it received the concurrent vote of the two Houses and the signature of the Governor.

How can it be said that the Legislature has authorized the removal, except on compliance with the explicit requirements of the *proviso*? not being complied with, the legislative authority does not exist, and matters stand as if the law had never been passed.

It is of no consequence, possibly, whether the *proviso* is constitutional or not.

If constitutional, of course it must be complied with.

If unconstitutional, then it is clear that the whole law must fall, because obviously the Legislature would not have passed the law at all, without the *proviso*, as it actually refused to pass it until the *proviso* had been inserted.

State vs. Newhouse.

The legislative assent does not exist except on condition of compliance with the *proviso*. The *proviso* has not been complied with. The parish seat cannot be removed without the consent of the Legislature. *Ergo*, it is not removed.

Coming now to the questions of fact averred in the petition, it is enough to say that it is needless to determine whether the police jury had to comply with section 2 of the act, which contemplated setting them in motion, for had the police jury complied with its provisions, our conclusions would remain unaffected.

It is evident that the sense of the property taxpayers voting at the election was not sought and ascertained.

Their abstention from voting at all cannot be construed into a vote *in favor*, but ought rather to be regarded as a vote *against* the increase of taxation, as the Constitution requires, to justify such increase, that "a majority of same, voting at such election, *shall have voted therefor*." Art. 209.

The Secretary of State was therefore correct when promulgating the result of the election he announced that the act had not been adopted.

Judgment affirmed.

Poche, J., absent.

No. 1285.

THE STATE OF LOUISIANA vs. THOMAS J. NEWHOUSE.

The true test of the admissibility in evidence of a dying declaration is the belief in the mind of the party making it that he would soon die.

It is not necessary to prove expressions implying apprehension of immediate danger if it be clear that the party does not expect to survive the injury, which may be collected from the general circumstances of his condition, as when a party suffering from a mortal wound expresses his desire to make his dying declaration, stating that he felt that he was going to die, and that his time was very short, and dies a few hours after making the declaration.

A PPEAL from the Criminal District Court for the Parish of Orleans. *Baker, J.*

M. J. Cunningham, Attorney General, and *A. D. Henriquez*, Assistant District Attorney, for the State, Appellee:

1. A dying declaration made under a sense of impending dissolution is admissible in evidence. 30 Ann. 362; 31 Ann. 95; 32 Ann. 1086; 36 Ann. 920, *State vs. Molles*; 38 Ann. 660, *State vs. Keenan*; 1 Gif. sec. 158; Wharton, Cr. Ev. § 281.
2. There is no law making it necessary for the dying man to say that he will immediately die, as a condition precedent to the validity of his declarations as evidence; it is sufficient if such belief is established by his actions and the surrounding circumstances. 1 Greenleaf, sec. 158; Wharton, Cr. Ev., § 282, 284; *State vs. Keenan*, 38 Ann. 662.

39 862
46 1144
39 862
47 1528
39 862
48 535
39 862
51 1413
19 862
e113 484

State vs. Newhouse.

3. The admissibility of the dying declaration, as evidence, is for the judge. When the circumstances under which the declarations were made are shown to the trial judge, it is his province to determine whether they are admissible. 1 Gilf., § 160; Wharton. Cr. Ev., 297; Poscoe Cr. Ev., Sixth Ed., p. 34.
4. The Supreme Court cannot review questions of fact; a question of law necessarily based upon certain facts will not be reviewed unless the evidence is properly presented. State vs. Ewen, 32 Ann., 782; State vs. Nelson, 32 Ann., 842; State vs. Miller, 36 Ann., 158; State vs. Backarow, 38 Ann., 317.

James C. Walker for Defendant and Appellant.

It is the impression of almost immediate dissolution and not the rapid succession of death in point of fact that renders the testimony admissible. Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declaration is inadmissible. 1 Greenleaf, Ev. 158.

On the other hand, a belief that he will not recover, is not in itself sufficient, unless there be also the prospect of "almost immediate dissolution." 1 Greenleaf, Ev. 158.

Says Lord Chief Baron Eyre, Ibid, 156, "they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone."

They are relevant only when the declarant is shown to the satisfaction of the judge to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made. Stephen's Dig. of Ev., art 26.

"A wishes to prove a dying declaration by B. Then A must prove B's death, and the fact that he had given up all hope of life when he made the statement." Stephen's Dig of Ev., 119.

"It must be first proved that the deceased was conscious of his impending dissolution, and had given up all hope of recovery." Garde on Ev., 43.

"Are admissible only when it appears that they were made under a sense of immediate and impending death." State vs. Spence; 30 Ann., 362.

"To render them admissible, the dying declarations must have been made while the deceased was under the settled conviction that he was about to die." Circuit Ct. D. C., 1834, U. S. vs. Woods, 4 Cranch., C. Ct., 484; U. S. vs. Veitch Id., 115. vol. 1.

The opinion of the court was delivered by

POCHÉ, J. The complaint of the defendant, who has been convicted of manslaughter under a charge of murder, is that the trial judge erroneously admitted in evidence a statement of the deceased as his dying declaration. His contention is that the evidence introduced by the State as the test of the character of the declaration, was not sufficient to prove that the deceased was under the consciousness of an approaching death when he made it.

The record shows that the statement was made under the following circumstances: The deceased was in the Charity Hospital in New Orleans, under treatment for the wounds from which he subsequently died, when, at his request, a magistrate took down in writing the statement in question as his *dying declaration*, so designated by himself. Before making his declaration, the deceased said in connection therewith that "his time was very short," and at the conclusion thereof

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he made the statement that he felt he was going to die, and he died but a few hours later.

The mere recital of the foregoing facts and incidents is sufficient to bring the case within the scope of the familiar rule of law which regulates the admission of that kind of evidence, and to fully justify the ruling of the District Judge in the premises. No authority can be successfully invoked to support the contention of counsel for the defendant that the only test of the admissibility of such declarations is evidence that the party making the same had stated in terms that he felt an immediately impending dissolution, or other impressions to that effect.

The true test is evidence showing to the satisfaction of the legal mind that the party making the declaration believed at the time that he was soon to die. The existence of such a consciousness in the mind of the declarant may be shown as effectively by his acts and the circumstances which surround him as by expressions or impressions which he may utter.

The rule has been variously formulated, but its uniformity is clearly traced in a strong array of concurrent judicial authorities.

In the case of *Morlisse*, 36 Ann. 921, this court said: "The test of the admissibility of a dying declaration is in the belief of the deceased that death is fast approaching (*State vs. Trivas*, 32 Ann. 1088), and that his mind and his heart are under the influence of that belief at the time that he makes the declaration."

In *State vs. Keenan*, 38 Ann. 662, this Court held "Dying declarations are those made under a consciousness of impending death, which, however, the declarant need not express in direct terms. His bodily condition and appearance, his conduct and language, as well as statements made to him by his attendants, may be considered and his consciousness therein inferred."

A similar rule has been culled by Wharton from numerous adjudications of English and American courts; he says: "But it is not necessary to prove expressions implying apprehensions of immediate danger, if it be clear that the party does not expect to survive the injury, which may be collected from the general circumstances of his condition, as when the party was a member of the Roman Catholic Church, and had confessed, been absolved, and received extreme unction before making the declaration." Wharton's Criminal Evidence, sec. 282.

A construction of the rule which would tend to require as a test of the admissibility of a dying declaration that it should have been made while the party was in the very agony of death would effectively

Bank vs. Cason.

defeat the very object of the law in sanctioning the introduction of that kind of evidence.

The circumstances exhibited by the record of this case show to our satisfaction that when the deceased made his declaration he believed that he would soon die and never recover from the injury which he had received in the conflict which he therein depicted, and hence we conclude that his statement was in truth and in fact a dying declaration, legally admissible in evidence as such, and that therefore the trial judge committed no error in the premises.

Judgment affirmed.

No. 1291.

STATE NATIONAL BANK VS. ADDIE L. CASON.

39	866
45	867

If it were known to the transferee of a negotiable promissory note, acquired for value and before maturity, on taking it that the consideration was future and contingent, and that there might be offsets against it, this would not make him liable for the equities between the original parties.

It cannot affect the negotiability of a note that its consideration is to be thereafter realized, or that from some contingency it may never be enjoyed.

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Overton, J.

Farrar & Montgomery and Wm. Hall for Plaintiff and Appellee :

A bank taking a note before maturity as collateral security for money loaned, becomes the holder in good faith for a valuable consideration. 21 Ann. 555. One holding a note as collateral security is practically owner of it to the extent of his debt. 27 Ann., 561.

The pledgee of a promissory note payable to the drawer's own order and by him endorsed, may sue and recover on the note. 21 Ann. 555.

The law, from considerations of public policy, and in order to favor the free circulation of bills of exchange and other negotiable paper, looks with favor upon the holder of a bill who has given value for it, and requires very cogent evidence to convict him of *mala fides*. 7 Ann. 197.

It cannot affect the negotiability of a note that its consideration is to be realized in future, or that from some contingency it may never be realized, and if the consideration of the note had not failed at the time of its transfer, the maker cannot set up as a defence that the holder knew that there might be offsets against it. 14 Ann. 177.

If the consideration of the note is legal in its nature, though contingent and so expressed on its face, its negotiability would not thereby be affected, and the holder taking it before maturity and with knowledge of the contingency of the consideration, and that there might be in the future some offset to it, would not be liable to the equities between the maker and payee; for if such a defence could be successfully made against the holder, it would destroy materially the negotiability of notes. 14 Ann., 177.

It cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that from some contingency it may never be enjoyed. 14 Ann. 177.

Any one having sufficient confidence in another to give his written obligation for something to be realized and enjoyed hereafter is at liberty to do so, and the maker cannot censure

Bank vs. Cason.

any future holder of the note for having purchased it and for seeking to hold him liable. for it was the faith of the maker in the payee that he would execute his promise. and allow no obstacle to defeat it, that created the note and gave it currency. 17 Ann. 177,

The policy of the law is favorable to the holder of negotiable commercial paper and requires very cogent evidence to convict him of bad faith. 20 Ann. 141.

A note being negotiable and having been acquired before maturity by the plaintiff, the equities between the original parties cannot be noticed. 27 Ann. 561.

When one of the parties must bear a loss, he who has made it possible must suffer. 27 Ann. 561.

Thorpe & Peterman for Defendant and Appellee:

1. The nature of a contract depends upon the obligation it imports; its form is subordinate to its real character. 3 Ann. 294.
2. When the holder is aware of the conditions upon which a bill or note was given, he is not entitled to invoke the law of negotiable instruments. 1 Ann. 148; 10 R. 23; 1 R. 8; 12 R. 486; 3 R. 159.
3. To preclude the legal or equitable defences of the maker, the note must be transferred in good faith, in the ordinary course of business, before maturity and without any circumstances to induce a reasonable belief of the existence of such equities. 17 L. 153.

The opinion of the Court was delivered by

TODD, J. The plaintiff, as holder and endorser of a promissory note executed by the defendant for \$2,500, sued to recover the amount thereof, with interest.

The defence presented by the answer is in substance that the note was given as collateral security for plantation supplies to be furnished the defendant for the year 1884 by Gidiere, Day & Co., the payees of the note; that shortly after the execution of the note, and when only a small part of the supplies had been furnished, Gidiere, Day & Co. failed. That one W. A. Pollack succeeded to the business of the firm, and he in turn was succeeded by one C. S. Farrar, by whom advances to the plantation were continued. That by shipments of cotton to the latter her accounts for supplies, which the note was given to cover, was fully paid. That the consideration of the note was known to the bank at the time it became the holder of it.

There was judgment in favor of the plaintiff for the amount of the note, less \$271.11, allowed as a credit thereon. Defendant has appealed, and plaintiff asks an amendment of the judgment, rejecting the credit allowed by the lower court.

It is shown that the note was transferred to the bank before maturity and for value, and that the bank was informed of the consideration of the note; and the single question is presented whether such knowledge on the part of the bank deprived it of the right to recover on the note.

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The consideration of the note was a lawful and valuable consideration. At the time the plaintiff became the holder of the note there had been no failure of the consideration, for it was before the surrender of Gidiere, Day & Co., and when the contract between defendant and Gidiere, Day & Co. was being executed, and part of the supplies had been advanced.

As the consideration of the note was a valid one, plaintiff could not have been affected prejudicially by the knowledge of it. If the consideration be lawful the knowledge of that consideration can of itself have no bearing on the rights of the transferee. It is the knowledge of the failure of the consideration or of secret equities between the original parties thereto that would prevent recovery thereon as between said parties.

The right of plaintiff to recover on the note is the more apparent when we consider that in this instance, in accordance with the mode in which business is usually conducted between commission merchants and planters, this note we must infer was executed for the purpose of being negotiated, that by means of such negotiation and discount of the note a sufficient sum might be realized and placed to the credit of the defendant to enable her merchants to furnish the promised supplies.

Of course there is no need to cite authorities in support of the proposition that the *bona fide* holder of a promissory for value acquired before maturity is not effected by equities between the original parties. The principle is elementary, but as peculiarly applicable to the instant case and touching the rule where the consideration relates to something in the future is the case of *Sadler vs. White*, 14 Ann. 177, from which we quote:

"Plaintiff received the note before maturity and before a failure of the consideration. Even if it were known to him taking it that the consideration was future and contingent, and that there *might* be offsets against it, this would not make him liable to the equities between the defendants and payee."

"It cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that from some contingency it *may* never be enjoyed. Any one having sufficient confidence in another to give his written obligation for something to be given or enjoyed hereafter is at liberty to do so, and the maker cannot censure any future holder for having purchased it, and for seeking to enforce it, for it was the faith of the maker in the payee that he would execute his promise and allow no obstacles to defeat it that created the note and gave currency to it."

State vs. Moncla.

However sensitive we may be to cases of individual hardship—and that of the defendant is particularly one, if the allegations of her answer are true—to swerve from this established rule touching the consideration of promissory notes, would be greatly to impair if not wholly destroy their negotiability, for in nearly all cases of the purchase of a note the buyer knows there *might* be equities between the original parties to the same.

We find no ground on which the credit on the note was allowed; there is nothing in the record that we can discover that justifies it. The amendment asked for must therefore be allowed, rejecting it.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be amended by striking therefrom the words “subject to a credit of two hundred and seventy-one dollars and eleven cents, to date from July 2, 1884.” And as thus amended, it be affirmed, defendant to pay costs in both courts.

No. 1287.

THE STATE OF LOUISIANA VS. VICTOR MONCLA.

An order made by the judge, in course of a trial, in anticipation of the exhaustion of the regular jury panel, directing the sheriff to summon *tales* jurors and hold them to serve, if necessary, for the purpose of saving time and avoiding delay, is not illegal, and will not invalidate a jury formed from such taleamen tendered only after exhaustion of the regular panel.

When immediately after the swearing in of the complete jury, and before any further proceeding is taken, one of the jurors is incapacitated by illness from serving, the judge may excuse him and fill his place from the panel, particularly when the bill of exception exhibits no denial of any rights accruing to accused on account of such action.

While concomitant circumstances tending to explain a flight from justice, as arising from other motives than consciousness of guilt, are admissible, yet proof of subsequent return after some time, and submission to arrest are of doubtful admissibility, and at all events of too little weight to justify disturbance of judgment because excluded.

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Overton, J.

John N. Ogden, District Attorney, for the State, Appellee.

Cullom & Barbin, Joffrion & Bordelon, A. V. Coco and J. H. Ducoté
for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Defendant, convicted of larceny, and sentenced to one year's imprisonment in the penitentiary, assigns the following errors:

1. While the empaneling of the jury was in progress, and before

39	868
46	199
46	866
39	868
48	438
39	868
106	384
39	868
108	471
39	868
114	94

the regular venire had been exhausted, the judge, at the request of the State's attorney, ordered the sheriff to summon twenty-five *tales* jurors, to be ready for service if required. To this order the defendant objected, on the ground that "no talesmen could be ordered under the law, before the regular panel was exhausted."

The judge assigns the following reasons for his action: "There were in attendance upon the court a large number of witnesses from every portion of the parish, summoned by the defendant to testify in the matter of the motion of the State for a change of venue, which motion had just been disposed of. This case had already undergone two trials, had been much discussed, and great difficulty would have been experienced in getting *tales* jurors from the neighborhood. Feeling confident that the regular panel would be exhausted, and to save time and delay, I ordered the sheriff to summon twenty-five *tales* jurors, to serve as necessity might require."

The complaint of accused is not that jurymen *de talibus* were imposed on him before the regular panel was exhausted, but simply that the order for their summoning was issued before the panel was exhausted.

Had the jury been completed from the regular panel, the order would have been of no effect. As the panel was exhausted, the order simply served to secure the presence of by-standers, from whom the jury was lawfully completed.

We think the action of the court was proper under the circumstances, and fail to perceive any injury or abridgment of his legal rights resulting to defendant.

2. The next bill of exceptions recites that: "After the twelve jurors had been selected and empaneled to try the above cause, one of said jurors, viz: Christophe F. Bordelon, announced that he was sick. The judge ordered the discharge of the juror and caused the sheriff to call an additional juror to fill his place. Defendant's twelve challenges having been exhausted, defendant, through his attorney, objected to the discharge of the juror, and also to the order to fill his place, for the reason that the proceeding was irregular and not authorized by law." This took place immediately after the jury had been completed, and before the indictment had been read or any other proceeding had before the jury. It appears further, from the judge's statement, that the juror was only excused after being first sworn as to his illness and then examined by a physician, who confirmed his statement.

Defendant relies upon the following passage from Mr. Bishop's work on criminal procedure: "Where, during the trial, a juror is taken too

sick to proceed, this is a visitation of God which shows the prisoner never to have been in jeopardy, and he cannot claim to be discharged, though the hearing is here broken off. Still it is competent for the court to add another jurymen returned in the panel; but the prisoner should be offered his challenges over again as to the eleven; the eleven should be sworn *de novo*, and the trial begin again. Bishop' Cr. Proc., § 809.

We have not, at this place, access to the English authorities referred to by Mr. Bishop, but, from his own language, it appears to refer to cases where the sickness intervenes after the *hearing* has begun, and that in using the words "during the trial" he refers to proceedings before the jury after it has been impaneled and sworn."

This appears from the words: "Though the *hearing* is here broken off," and from the concluding phrase that the jury "should be sworn *de novo* and the trial begin again," showing that the *trial* referred to is something occurring after the swearing of the jury.

This accords with reason, for he himself states in the same section that if, while the jury is being made up, but before the list is completed, a particular juror is excused for sickness, the case stands on a different ground, and one more juror is simply elected in the usual course."

It is difficult to conceive of any reason why a different rule should prevail if a sworn juror should be taken sick when the eleventh juror is sworn, than if his sickness should happen immediately after the twelfth juror had been sworn, and before any other proceedings had been taken.

We should be loth to recognize so flimsy a distinction.

But under either rule, in this case, the bill discloses, on its face, no error. The objection was only to the discharge of the juror and to the calling of another to fill his place. The right of the judge to discharge the sick juror and to fill his place with another is distinctly recognized by Mr. Bishop in the very passage quoted; the only question is whether, in making such orders, he was bound to restore to accused his challenges and to swear the eleven anew. But the bill does not disclose that the prisoner asserted such rights and was denied them, nor even that the judge did not offer them. This, alone, is fatal to the bill, and such merely technical defenses, supported by no suggestion of injury to defendant, should be confined with the greatest strictness.

3. The next exception was to the exclusion of the following question, propounded on cross-examination to the sheriff, a witness for the State: "You have stated in your examination in chief that the ac-

State vs. Moncla.

cused fled from your custody and made his escape; please state whether he did not afterward return to this place, Marksville, and without any further arrest by you or your deputies?" The judge says: "The accused was permitted to show the circumstances attendant on his flight, such as that he was very much excited at the time, and his mother and brother advised him to it, and accordingly he made this proof. All this formed part of the *res gestæ*. The alleged fact that some time after his escape he returned to Marksville, and appeared on the public streets, without further arrest, does not form a part of the *res gestæ*, and was, therefore, inadmissible. The testimony showed that after escaping, the accused went to Natchez."

We are compelled to hold that the reason of the court for excluding the testimony is not sound, and that the principle of *res gestæ* has no application in this matter.

Under the humaner spirit of modern law the weight attributed by the old common law to flight from justice as a presumption of conscious guilt, has been greatly diminished. It is now merely regarded as a circumstance which, though "by no means strong enough by itself to warrant a conviction, yet may become one of a series of circumstances from which guilt may be inferred." Wharton Cr. Ev., § 750.

Other circumstances explaining the flight and tending to show that it was prompted by other motives than conscious guilt, may undoubtedly be proved. Wilson Cir. Ev., pp. 89, 90; 1 Bishop Cr. Proc.

It appears, however, that the accused was allowed to prove all the circumstances attending and surrounding his flight and having any tendency to show the motives operating on his mind at the time of his escape.

His subsequent voluntary return and submission to arrest certainly do not form a circumstance tending to show the motives which prompted his flight; and, even if not absolutely irrelevant, they were of so little weight that we should treat them as we did a like matter in a much graver case, where we said: "We are satisfied that it had no influence in the case, and that, even if the ruling were erroneous, it did not prejudice the fair trial of the accused, and would not justify us in disturbing the verdict." State vs. Melton, 37 Ann. 81.

There are other bills of exception in the record, which even defendant's counsel have ignored in their brief, and to which the remark last quoted is even more strongly applicable.

We can discover nothing in this record to show that defendant has not had a fair and legal trial, or has been deprived of any substantial right which could have aided him in his defense.

Judgment affirmed.

 Block vs. Bordelon.

No. 1288.

SIMON BLOCK vs. REMI BORDELON, ADMINISTRATOR.

A proceeding taken by an interested party, under the provisions of R. S., secs. 10 and 3008, on an administrator to show cause why he should not furnish additional security upon his bond, may be by rule.

But with the demand for this *specific* relief, that for the destitution of such fiduciary cannot be cumulated. The latter can only be accomplished by means of suit in the ordinary form.

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Overton, J.

A. V. Coco for Plaintiff and Appellant.

Joffiron & Bordelon and Thorpe & Peterman for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. Plaintiff alleging that the sureties on the bond of defendant as the administrator of his wife's succession are insufficient, and have not means, or property, adequate to meet their liability thereon, instituted this proceeding, by *rule* upon defendant, to show cause why he should not furnish additional security.

The prayer of his petition is that said administrator show cause why he should not furnish additional security; and that a day be fixed by the court for the *return of the rule*;" and, after hearing, "that the same be made absolute, and that said * * administrator be ordered to give *additional and sufficient security* * * *within a delay to be fixed*," etc.

Then follows the further and additional prayer, viz.: "and should he fail to *give such security* within the time thus fixed, that he be deprived of his office, and petitioner appointed in his stead, upon his furnishing the security required by law."

Thereupon the District Judge granted the rule on defendant to show cause why he should not furnish additional security, and fixed the 28th of May, 1887, for the return to be made in open court; and directed that the defendant be duly notified thereof.

On the 20th of May, 1887, service of the petition and order was regularly made on the defendant.

Without making an answer to the merits, he excepted *in limine* on the *sole* ground that plaintiff is not entitled under the law "to obtain the relief and decree prayed for, by proceeding by *rule*, but is required to proceed therefor by *direct action*;" and he prayed that the rule be discharged.

This exception was sustained and the rule discharged and plaintiff has appealed.

The statute on the authority of which this proceeding was instituted provides that any person interested shall have the right to require an administrator to furnish new or additional security "as often as once in every twelve months, and oftener, if the court, *on motion to that effect*, may judge it to be necessary." R. S., sec. 10, 3698; R. C. C., 1195, 1673.

We do not understand this language to import the necessity of citation, in the ordinary form, to the administrator; nor does it, by any fair interpretation, imply that an ordinary suit should be brought against him.

In a similar matter a complaining heir proceeded by *rule* against an administrator to show cause why he should not furnish new and additional security, and it was approved by this court. Succession of Labauve, 38 Ann. 235.

The defendant's reliance is placed on Fischel vs. Mercier, 32 Ann. 706, as expressing a contrary view; but we think there is no analogy between the two decisions; and the one is not opposed to the other. In the latter, the court had under consideration a clause of the revenue law of 1874, directing the mode to be pursued by purchasers at tax sales, in causing themselves to be put in possession of property purchased. It said of that statute, that it *did not provide* that such proceeding should be by *rule*, though it was "no doubt the intention of it, that the proceedings should be *summary* in their character." The court held that the one authorized "was a judicial proceeding with all of its incidents and characteristics," and must be governed by the general rules of law applicable thereto. "Those general rules undoubtedly require every judicial demand to be commenced by petition and citation."

But the language of the law invoked by the plaintiff does not contemplate that resort be had to petition and citation, as in ordinary suits; but that such proceeding should be by simple *motion*. Nor is such a proceeding an *independent* one. It is merely *ancillary* to the mortuary proceedings, and pertains to the proper conduct and efficient administration of the succession, under the administrator's control. In the attainment of that object, simplicity of form and celerity of action are manifestly necessary, as indicated by the statute.

The only difficulty that is presented here arises from the plaintiff's alternative prayer, that the defendant be removed in case he fail to furnish such additional security as the judgment of the court shall require, and that he shall be appointed in his place and stead.

Farquhar vs. Iles et al.

In so doing plaintiff has improperly blended with his demand for relief under the statute above quoted that permitted under R. S. 17 and 3717.

Under the latter sureties may be relieved from *further* liability, and, on due proof of maladministration by the administrator, he may be required to furnish a *new* bond; and upon his failure to do so, within three days after that fact has been judicially ascertained, he may be "forthwith removed," and another appointed in his place.

But that statute, in terms, provides that such proceedings shall be by petition and citation.

The two proceedings are intended to accomplish different results. One is predicated upon the insufficiency of the sureties; and the other upon maladministration by the administrator.

If, after judgment has been rendered upon the trial of the rule to show cause, determining the insufficiency of the sureties on defendant's bond, the latter should fail or refuse to furnish such additional security as is thereby required, he might be destituted; but it could only be accomplished by a *direct action*. Succession of Boyd, 12 Ann. 611.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and proceeding to render such judgment as should have been rendered in the court below, it is ordered, adjudged and decreed that the defendant's exception be overruled, and the cause remanded to the lower court to be further proceeded with, according to law, upon the rule taken upon the defendant to show cause why he should not furnish additional security; and that the plaintiff's alternative prayer be disregarded; and that all cost be taxed against the plaintiff and appellee.

No. 1289.

H. C. FARQUHAR VS. H. S. ILES ET AL.

A real tender is a condition precedent, *sine qua non*, to authorize a suit to rescind a judicial sale. When it is alleged, denied and not proved, the plaintiff's action must be dismissed.

A PPEAL from the Fourteenth District Court, Parish of Calcasieu.
Read, J.

R. L. Belden for Plaintiff and Appellant.

Mitchell & Gorham for Defendants and Appellees.

Farquhar vs. Nes et al.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The appellees claim that the value of the real estate, the judicial sale of which is sought to be annulled, is not shown to exceed two thousand dollars, and that this court has no jurisdiction over the controversy.

The plaintiff seeks to recover not only the land, but \$500 besides, for the occupancy from the time of sale to the institution of the suit. He swore that the property is worth \$2,850, with the buildings and improvements upon it, valuing the land at \$900, the gin house at \$1,200, the barn at \$750, the dwelling and outhouses at \$500. A witness places the value at between \$1,600 and \$1,800. Another appraises it at between \$1,000 and \$1,500.

The testimony of the defendants, who values the property at \$280, which is the amount at which it was adjudicated to him, and the sum at which it was assessed, \$600, previous to the sale, are insufficient to outweigh the valuation put upon the property by the plaintiff.

It may well be that bidders were deterred at the sale, for the reason that, like the plaintiff, they considered that the proceedings in execution of the writ of seizure and sale were irregular and void, and did not expropriate the debtor.

The motion to dismiss is overruled.

ON THE MERITS.

The plaintiff claims that the adjudication made of the property to the defendants is a nullity, for the main reason that the sheriff never did seize and take possession of the same, either actually or constructively, and never placed a keeper on it, though the same was worked as a plantation and was occupied by him and his family.

Other charges are made to affect the validity of services of notices issued under the writ and to establish a conspiracy between the adjudicatee and others, to secure an adjudication at a low price.

Then plaintiff avers a tender to the adjudicatee and to an alleged purchase from him.

The defence is a denial of the tender, the prescription of one year, and the general issue.

From a judgment of *non suit* the plaintiff appeals.

There is nothing to show that the alleged tender was made, previous to the institution of the suit, which is an essential condition precedent.

Luneau vs. Edwards.

The offer, during trial, does not cure the omission which is destructive of the right to institute this suit.

Article 417, C. P., relied upon, refers to tenders by a *defendant* at any stage previous to definitive judgment, and does not apply to those which a *plaintiff* is bound to make previous to suit, to have a standing in court.

This view of the case renders it unnecessary to consider the other questions raised.

Judgment affirmed.

No. 1290.

EUGENIE LUNEAU, TUTRIX, vs. ELLEN EDWARDS, ADMINISTRATRIX.

The privilege granted by law in section 128 of the Revised Statutes, in favor of attorneys-at-law for the amount of their professional fees on all judgments obtained by them, cannot be extended so as to affect property which the creditor may have acquired in execution or in satisfaction of the judgment.

When the judgment has been satisfied it ceases to have a legal existence, and hence it cannot be applied to any privilege or other legal purpose.

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Blackman, J.

L. J. Ducoté for Plaintiff and Appellant.

A. V. Coco and *E. N. Callum* for Defendant and Appellee.

The opinion of the Court was delivered by

POCHE, J. The only question presented on appeal in this case, which properly should have been entitled "Succession of Fielding Edwards, on Oppositions to Tableau of Debts," is the asserted privileges of an attorney-at-law, predicated on section 128 of the Revised Statutes (acts of 1868, p. 209), which reads as follows:

"From and after the passage of this act, in addition to the privileges enumerated in title twenty-first of the Civil Code of this State, a special privilege is hereby granted in favor of attorneys-at-law for the amount of their professional fees on all judgments obtained by them, to take rank as a first privilege thereon."

The following are the facts which bear on the issue presented:

Opponent was the counsel of Fielding Edwards a short time before his death in an action for the revindication of the possession of a tract of land established as a plantation, and its appurtenances, which had gone into the possession of the defendant in the suit, under an agreement of a future sale between him and Edwards.

That litigation was ended by a compromise between the parties, which was made the judgment of the Court, and under which Edwards obtained possession of all the property in question, save a small portion thereof.

Opponent asserts a privilege, for the amount of his professional fees for obtaining the judgment above stated, on the property thereby revindicated, and which was inventoried in the succession of Fielding Edwards. He prosecutes this appeal from an adverse judgment.

The question for solution involves a proper construction of the statute which creates a privilege in favor of attorneys-at-law for their fees on judgments obtained by them, and whether the privilege thus created can affect property which the owner of the judgment may obtain or revindicate in execution, or by virtue, of the judgment.

Under our laws privileges arise from the nature of the act or contract as an effect of the law, and not as a result of the stipulations and consent of the parties. Hence flows the rule that privileges must be strictly construed, particularly when the enforcement of the same, as in this case, would affect the interests of third persons.

It appears from the foregoing statement of facts that the judgment obtained by opponent has ceased to exist as an effective judgment, from the fact that the possession of the property which it called for has been obtained by the creditor, and that nothing could now or hereafterward be obtained or realized under it. As a mandate of the Court it has filled his mission, has served all purposes which it could accomplish, and hence it has ceased to have a legal existence. Therefore it does not appear in the inventory as an asset of the succession, and it thence follows that under the terms of the statute, opponent is asserting a privilege on "something nothing," on a thing of the past, and which can no longer be reached.

To grant the relief which he now seeks, would require a construction of the statute under which the privilege would not only attach to the judgment which the attorney has obtained, but to the property which the owner of the judgment had acquired under the same.

This would simply be judicial legislation, by means of which a new provision would be interpolated in the statute.

The law has restricted the effect of the privilege which it created to the judgment obtained by the attorneys, and courts are powerless to extend it to another and different property. We therefore conclude and we hold that opponent has no privilege on the property the possession of which had been revindicated by means of the judgment which he had obtained.

Judgment affirmed.

Cole and Husband et al. vs. Cole et al.

No. 1296.

DENAISE COLE AND HUSBAND, ADMINISTRATORS, ET AL.} VS. JACOB
COLE, JR., ET AL.

By the act 5 of 1884 the right of forced heirs to establish by parol the simulation or acts or conveyances executed by those from whom they claim to inherit extends to the entire estate and the restriction of such right to the *legitime* is removed.

Where an act of sale is attacked as simulated the attacking party is not debarred from proving its simulation, and committed to the truth of its stipulations, by the offering of the act in evidence without reservation. Where the vendor remains in possession and control of the property after the execution and date of the written transfer the sale will be presumed to be simulated.

A PPEAL from the Twenty-fifth District Court, Parish of Vermilion. *De Baillon, J.*

O'Bryan & White for Plaintiffs and Appellees:

- 1st. Forced heirs when attacking simulated sales of their ancestors are not compelled to produce a counter letter; but may prove simulation by parol evidence. And in such proceedings their right of action is not restricted to their *legitime*. Act No. 5, of 1884.
 - 2d. Representation is a fiction of the law, the effect of which is to put the representative in the place, degree and rights of the person represented." C. C. Art. 894.
 - 3d. "In suits to uncover simulations, the largest latitude is allowed in the reception of testimony." 33 Ann. 1057; 56 Ann. 684.
 - 4th. "Conversations and admissions of one of the parties to a simulation are admissible in evidence, though made out of the presence of the other party." 29 Ann. 4; 15 Ann. 177.
 - 5th. A price is an essential requisite of a sale. C. C. 2439.
 - 6th. "Simulation is presumed where the vendor remains in possession." 28 Ann. 357.
"Where the vendor of property remains in possession until its death, it cannot be recovered from his succession under a title by transfer from the deceased, unless the claimant establishes good faith, and the reality of the sale." 15 Ann. 555.
 - 7th. *Prima facie* proof of simulation will be considered as conclusive, and sufficient to set aside the transaction complained of, if the parties charged with such simulation do not even attempt to rebut it by their own testimony. A party's silence under such circumstances is construed against him. 33 Ann. 1057; 10 Ann. 691; 15 Ann. 663.
 - 8th. Prescription cannot remedy the defects of a simulated title. 30 Ann. 1099.
 - 9th. Where the simulation of a sale is the subject matter of a suit, and the party attacking offers the act in evidence in order to lay before the Court the cause of his complaint, he is not thereby precluded from contradicting the recitals of the deed.
- The doctrine of estoppel only goes to the extent of prohibiting a party from impugning his own self-serving acts.
- A harsh and rigid application of the doctrine of estoppel is not favored by the law. 24 Ann. 210; 38 Ann. 102; 93 U. S. 335. Succession of Harris, 39 Ann. p. —.

Mitchell & Gorham on same side.

George H. Wells & Son for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. This is a suit by a number of the forced heirs of Jacob Cole, deceased, to have declared simulated certain conveyances of

property made by the deceased to two of his sons, James Cole and Jacob Cole, Jr., a few years prior to his death.

From a judgment in favor of the plaintiffs, declaring the acts simulated, and restoring the property to the succession of the deceased, the defendants have appealed.

Jacob Cole passed most of his life on an island off the coast of Vermilion Parish, known as Mulberry Island. There isolated from the world, with no neighbors nearer than twenty miles, a numerous progeny grew up around him. As his children and grandchildren attained their majority they left him, and for many years he led the life of a hermit, feeble and almost entirely blind, and was attended and nursed by an ex-slave, who remained with him, watched over him and cared for him with the greatest fidelity and devotion.

The wealth of the deceased, besides his land, mainly consisted of his cattle, which rapidly increased in numbers, and at his death were estimated to be worth at least \$15,000.

Shortly after his death these conveyances to his two sons, assailed in this suit, and which embraced his lands and his cattle, were produced, and which, it appears, up to that time had remained unknown to his other heirs; and under these the sons, defendants herein, set up claim to his entire estate.

We have made an exhaustive examination of the record, and therein we find proof conclusive of the simulation charged.

1. In the first place it appears to have been a transfer of his whole property—a sale *omnium bonorum*—which, of itself, ordinarily carries with it a presumption of simulation.

2. It is shown that after this purported transfer, the deceased remained in the exclusive possession and control of the property as before, selling cattle from time to time, and also part of the land; and this continued up to his death—a condition of things that also gave rise to a presumption of simulation.

3. The stipulated price was wholly inadequate, bearing no comparison to the real value of the property.

4. James Cole, through whom the alleged purchase was made, and who signed the deed for himself and brother, was shown to have been without means, and could not have possessed, at the time, the money to pay the inadequate price stipulated in the acts of sale.

5. There is also evidence in the record that leads strongly to the conclusion that, in executing these acts, the deceased never really intended to convey the absolute ownership of the property to his sons. He seemed to possess a morbid sensitiveness respecting the interference

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of courts and officers of the law in the settlement of his affairs after death, and a horror of the attendant costs and charges, and was under the belief that these dire consequences could be averted by putting his estate in the hands of his sons, and leaving to them the distribution of his estate and the settlement with his other heirs. And this impression is confirmed by the acts and declarations of the defendants themselves, who, at first, were profuse in fair promises to the other heirs of a just and full settlement of their rights in the estate, but which promises became fewer and more stinted in time, and at last ceased; when on their vantage ground they gradually yielded to the silent but insidious promptings of avarice, which gradually and quietly led them to conclude that it were better and wiser to hold fast to what they had, as they thought, so safe within their grasp.

Their conduct best illustrates the wisdom and keen appreciation of the immortal Scottish bard when thus in verse he moralizes:

“I no say men are villians all,
The real, hardened, wicked,
Who hae nae fear but human law
Are to the few restricted;
But ah! mankind are unco weak
And little to be trusted,
When *self* the wavering balance shakes,
’Tis rarely right adjusted.”

It is to be noted that the defendants made no effort to break the force of this strong array of evidence against them, nor to repel the legal presumptions confronting them, by any proffered personal explanation. The real facts were within their knowledge, the truth within their keeping, but their voices were not heard on the witness stand giving testimony in their own behalf; they were wholly silent, and their silence was significant.

The counsel for the defendants urge, with seeming seriousness, the contention that plaintiffs committed themselves irrevocably to an affirmation of the truth and reality of the stipulations of the several deeds as to price or consideration therein expressed, by themselves offering these deeds in evidence without reservation. This contention is really trivial. These were the very acts assailed in the petition as simulated; they constituted the very gravamen of their complaint, the *corpus* of their action, and the first step could not have been taken in its prosecution until they produced and submitted to the Court the alleged acts against which the action was directed. The authorities

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cited by the counsel have no bearing whatever on the point in question.

And there is just as little force in the further contention that the claim of the plaintiff to the property, included in the deeds, and their right to prove the simulation of the acts by parol is confined to their *legittime*.

This proposition could only have been made in ignorance of the existence of Act 5, of 1884, which expressly grants such right without restriction.

The judgment of the lower court is affirmed, with costs.

No. 1292.

MILLER, LYON & CO. vs. JOSEPH CAPPEL AND D. A. CURRY.

When suit is brought on a note in names of three members of dissolved firm, and is excepted to on ground that one is dead, plaintiffs may amend by striking out name on proof that his interest had been fully transferred to one of the others.

A judgment rendered on the verdict of a jury defective in being for plaintiff without specifying amount, cannot be sustained; but in reversing it this Court, when satisfied that the record presents all the facts and evidence necessary to a decision of the cause, will not remand it, but will render such judgment—following 13 La. 109, and 14 La. 343.

Where the judgment maintaining exception to an intervention declares that it was rendered by reason of the law and the evidence taken thereon, and the record presents no such evidence, the judgment will be affirmed.

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Blackman, J.

E. N. Cullom, A. V. Coco, David Todd and E. N. Cullom, Jr., for Plaintiffs and Appellees.

Thorpe & Peterman for Defendants and Appellants, and for Intervenor, Appellant.

The opinion of the court was delivered by

FENNER, J. The action is upon a mortgage note, and was brought in the name of Thos. D. Miller, T. Lytt. Lyon and Branch M. King, members of the firm of Miller, Lyon & Co.

An exception was filed that Lyon was deceased at the time of filing the suit. Thereupon plaintiffs were allowed to amend their petition by striking out the name of Lyon, on full proof that his entire interest had been duly transferred to Miller, and by praying for judgment in the names of Miller and King alone, and the exception was then overruled.

39	881
46	1237
39	881
40	337

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We see no error in this, and the matter is too trifling for further consideration.

A plea of prescription was also filed, but it has no merit and is not urged in this Court.

The only serious defense is the charge of defendants that plaintiffs are not the owners of the note sued on, but that they acquired the same, with others, from a third holder, at the request of, and as agents of, defendants, to whom they merely advanced the money to buy or take up the notes; whereby the notes became the property of defendants and, with the mortgage securing them, were extinguished by confusion, leaving plaintiffs in the position of mere ordinary creditors for the amount advanced.

This defense is not sustained.

The only evidence supporting it is that of Mr. Cappel, one of the defendants, and it is directly contradicted by the evidence of Mr. Miller, Mr. B. M. King, and Mr. Fred. King, as well as by the letters and acts of the parties.

The preponderance of the evidence is so overwhelmingly in favor of plaintiffs on this issue, that the matter needs no further discussion, particularly as it is confirmed by verdict of the jury and the judgment of the court.

We have also examined the accounts between the parties, and are satisfied that the amount accorded by the judgment, at least when reduced by the *remittitur* entered thereon by plaintiffs, is correct.

The verdict rendered by the jury is in the following form: "Nine in favor of judgment for plaintiff, and recognize the mortgage."

The defendants contend that this verdict cannot support a judgment in the court below, and none should have been entered on it. Article 522 C. P. requires that the verdict shall be: "verdict for plaintiff for so much, with interest," etc.

All authorities agree that a verdict not stating the amount either in exact terms or their equivalent is bad. But as to the remedy applicable in this Court, the decisions are apparently conflicting.

In two cases, it was held the judgment on such a verdict must be reversed, but that this Court, being in possession of all the facts and evidence necessary to pronounce judgment in the case, would proceed to render such judgment as should have been rendered in the court below, regardless of the defective verdict, but throwing the costs of appeal on plaintiffs, even though the same judgment be rendered. *Hosea vs. Miles*, 13 La. 109, *Collins vs. Hamilton*, 14 La. 343.

In another case, the Court reversed the judgment and remanded the

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case, but the remanding was made because there were errors in the proceedings in the court below. *Hampton vs. Watterston*, 14 Ann. 239.

In yet another case, the Court refused to disturb the judgment because defendant had failed to have the defect corrected in the lower court or to make it a distinct ground for new trial. *Simon vs. Brashshear*, 9 Rob. 59. Also to same effect, 2 Ann. 472; 6 Ann. 727; 7 Ann. 678.

But in the instant case, defendants did seek relief in the court below by assigning this defect as a distinct ground for new trial, which was denied.

We shall, therefore, follow the practice adopted in the two cases first cited, being satisfied that we have before us all the evidence to enable us to determine the controversy, and that plaintiffs are entitled to the same judgment which was rendered below, though, as determined by those precedents, this will subject plaintiffs to costs of appeal.

ON THE INTERVENTION.

An intervention was filed in the case by defendant, D. A. Curry, in the capacity of natural tutor of his minor children, alleging, nakedly and without any specification whatever, that "at and before the execution of the mortgage of plaintiffs, one undivided fourth part of the property therein described belonged to said minors, and was, therefore, not stricken with said mortgage, neither of said mortgagors being authorized to bind the property of said minors; and that another undivided fourth thereof belonging to their tutor was, prior to the mortgage set up by plaintiffs, affected by a mortgage in favor of said minors for \$3,075, resulting from the recordation of the inventory of their deceased mother on December 23, 1872."

To this utterly vague petition plaintiffs filed an exception that "the said Curry, tutor, is without suable interest therein."

The exception is almost as vague as the intervention; but it was separately taken up, tried and decided in the following terms: "Upon the exception of plaintiffs to the intervention of D. A. Curry, as natural tutor in the foregoing matter, the law and the evidence fully sustaining the exception, etc., it is by reason thereof ordered, adjudged and decreed that said exception be sustained, and the said petition of intervention be dismissed at intervenor's cost."

It thus conclusively appears that the judgment was based on evidence and rendered by reason thereof. The record fails to exhibit any evidence taken on the exception, and it is, therefore, impossible for us to revise the judgment or to say that it was erroneous. The rule is that this Court will presume that the evidence, with which it is not

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furnished and upon which the judgment complained of was rendered, authorized it. *Miller vs. Whittier*, 6 La. 72; *Thomas vs. Kean*, 10 Rob. 80.

We take this course with less hesitation, because the rights of the minors, whatever they may be, will not be prejudiced but will be open to assertion in proper proceedings.

It is, therefore, ordered, adjudged and decreed, that the judgment dismissing the intervention be now affirmed.

It is further ordered, adjudged and decreed, that the judgment in favor of plaintiffs and against defendants, rendered by the court below, be annulled, avoided and reversed; and it is now ordered, adjudged and decreed that the said Thomas D. Miller and Branch M. King do have and recover of the said defendants, Joseph Cappel and Dudley A. Curry, the sum of four thousand dollars, with eight per cent per annum interest thereon from February 9, 1874, until paid, subject to a credit of one hundred dollars, to take effect from April 7, 1878, and subject to a further credit of \$637.98, amount of *remittitur* entered by plaintiffs in court below; and it is further decreed that the special mortgage made part of plaintiffs' petition, dated at Evergreen, La., on May 6, 1873, before Wm. M. Ewell, notary public, and affecting the lots nine, eight and six, situate in the corporate town of Evergreen, parish of Avoyelles, La., and all the buildings, improvements and appurtenances and privileges thereunto belonging, and containing eight acres, more or less, bounded as follows, to wit; north, by property belonging to H. M. Miles, Mrs. S. E. Pearce and W. B. Buck; east, by property of Mrs. E. E. Fuqua and S. C. Cappel; south, by Mrs. E. A. Fuqua, S. C. Cappel, Mrs. E. H. Bassett and Joseph Cappel; and west, by H. and A. Kahn, Mrs. S. E. Pearce, H. M. Miles, Joseph Cappel, and the public road—be recognized, and that the said property be seized and sold to satisfy this judgment, interest and costs; defendants to pay costs of the lower court, and plaintiffs to pay those of this appeal.

No. 1293.

VICTOR GARNIER vs. L. A. JOFFRION, SHERIFF, ET AL.

The homestead legislation of 1865 required no registration of exemptions claimed under it, and such a requirement cannot be now exacted.

In construing exemptions under the law of 1865 reference must be had to the condition of things existing at the date of seizure.

The *proviso* incorporated into the act of 1865, which declares that "no debtor shall be entitled to the exemption provided for in this section, whose wife shall own, in her own right, and be in the actual enjoyment of property worth more than one thousand dollars," was

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evidently intended to operate as a restraint upon its exercise, under the conditions imposed, and has reference to the time of its assertion judicially, and to a wife then in being.

39	885
f118	187
118	186

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Overton, J.

A. V. Coco for Plaintiff and Appellee:

- 1st. The right to a homestead under obligations existing prior to the Constitution of 1879 must be discussed under the law of 1885. 35 Ann. 927, affirming cases 34 Ann. 331 and 32 Ann. 980; but the concurrence of facts necessary to a homestead must co exist at the time of the seizure. 33 Ann. 242; 35 Ann. 322; act Constitution, 219.
- 2d. The cases reported in 26 Ann. 156; 28 Ann. 355 and 608, not applicable to the case at bar, Marcotte vs. Messick, Manning's unreported case, p. 43. Luoques' Digest. from p. 300 to 302.
- 3d. The renunciation of the debtor to his homestead exemption is against public policy and is therefore void. 29 Ann. 333.
- 4th. The homestead is specifically exempt from seizure, whether the debtor owns any other property and whether he has disposed of property pending the suit to recover the debt. 29 Ann. 572.
- 5th. Where plaintiff's homestead is sustained and his injunction perpetuated it is proper to accord him reasonable counsel fees spent to protect him from further wrong. 29 Ann. 572.

J. C. Cappel and David Todd for Defendants and Appellants:

- Exemption under the homestead act does not apply to succession property. Therefore, if such property has passed into the succession property, it may be sold for the payment of the debts thereof. 23 Ann. 335.
- The homestead law cannot affect contracts entered into anterior to its passage. 25 Ann. 142; 20 Ann. 244.
- That no debtor shall be entitled to this exemption whose wife shall own in her own right property worth more than one thousand dollars. 28 Ann. 667.

The opinion of the court was delivered by

WATKINS, J. Plaintiff seeks to restrain, by injunction, a sale, under execution, of a certain tract of land he claims as his homestead. The writ issued under a judgment in a suit entitled S. Cambon & Co. vs. Victor Garnier, the plaintiff herein.

The debt evidenced by the judgment was one of the community previously existing between plaintiff and his deceased wife, Elizabeth Fouquier. It was contracted in 1871, and she died in 1879. Of her succession her surviving husband qualified as administrator; and one-half interest in the land constituted an asset thereof. In 1880 the plaintiff contracted a second marriage, and in 1881 he and the heirs of his former wife partitioned the property of the said community, and the land in controversy was allotted to him, in his own right, and the other half was allotted to him as the tutor of his children—upon the condition that he should assume the payment of community debts.

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On the 29th of September, 1880, the plaintiff set apart as a homestead, and had same duly recorded, the *whole* of this tract of land, and the buildings and improvements thereon situated; and which he occupies as a residence, and has so occupied since its acquisition in 1866.

There is in the whole tract seventy acres, and it is estimated to be worth about \$1,600, *i. e.*, \$800 for the plaintiff's one-half.

Plaintiff is the head of a family and has a wife and five children dependent upon him for support, two of the latter having been born since September 24th, 1880.

The plaintiff's *present* wife does not own and is not in the enjoyment of any property of any kind.

The seizing creditor resists this injunction on two grounds, *viz.*:

1st. That at the date of the *registry* of plaintiff's homestead, the property belonged to the succession of his deceased wife, and was at the time under administration.

2d. That plaintiff failed to establish that his *predeceased* wife owned no property in excess of \$1,000 in value.

From a judgment rejecting the plaintiff's demand as of nonsuit, the defendant has appealed; and in his answer to the appeal, plaintiff prays the perpetuation of his injunction with \$150 damages.

I.

The foregoing statement of facts brings this case within the purview of the homestead law of 1865. Of it this Court said in *Thomas vs. Guilbeau*, 35 Ann. 927: "The homestead legislation of 1865 required *no registry* of homestead exemptions, and no such requirement can be invoked to affect the claim of the plaintiff to the present one. Hence, his declaration has no weight or effect, either for or against him, in the determination of his rights under the pleadings."

We must therefore consider plaintiff's claim without reference to the Constitution of 1879, or the recordation made in pursuance thereof. The property claimed as a homestead was not succession property in its entirety; though one-half of it was, at the date of said registry, but not at the date of the seizure enjoined. It had been partitioned long before, and plaintiff's ownership restricted to the thirty-five acres that were seized. The succession, as well as the joint ownership, terminated therewith; and *Henderson vs. Hoy*, 26 Ann. 157, is not applicable. In that case the *seizure* was made of the plaintiff's own undivided sixth interest, in indivision, in a tract of land, in which he set up a homestead exemption.

In construing exemptions under the law of 1865 reference must be had to the condition of things existing at the date of seizure.

In *Barron vs. Sollebillos*, 28 Ann. 356, the Court said on this subject: "As the plaintiff did not have this right (of homestead) *when the seizure was made* * * she cannot claim it now. The thing seized, and about to be sold, is an incorporeal thing—the undivided half of certain property—and to this right the homestead does not attach."

The proof in that case showed that a partition was made *after seizure*, and it did not avail.

The more recent case of *Marcotte vs. Messick*, Manning's Unreported Cases, p. 42, is applicable in principle to the state of facts presented in this record. The Court said: "In this case the thing seized is a tract of land. The fact that it belonged to the community does not affect the right of homestead. The surviving husband has the usufruct during his natural life, or until his second marriage, of the share of the community inherited by his minor child. It may never be necessary to have a division of the property; and if it should become necessary, nothing in the record authorizes the presumption that the property is not susceptible of division in kind. The homestead, or family residence, might fall to the husband, on the partition."

Just that particular contingency has happened in the instant case. In the partition of the effects of the community, the portion on which the family residence was situated was allotted to the surviving husband. While it is unnecessary to approve all that we have quoted from that case, it furnishes a forcible illustration of the legality of plaintiff's contention here. We are of the opinion that the property seized is, and was, at the date of seizure, exempt from seizure and sale under execution.

II.

The failure of the plaintiff to prove that his predeceased wife did not own and was not in the actual enjoyment of property, in her own right, of the value of \$1,000, does not preclude the assertion of his homestead right. That was not a condition precedent thereto. The language of the law is: "And *provided* further, that no debtor shall be entitled to the exemption provided for in this section *whose wife shall own*, in her own right, and *be in the actual enjoyment* of property worth more than one thousand dollars." R. S., sec. 1691.

This proviso was evidently intended to operate as a restraint upon the exercise of the right of homestead, under the conditions imposed therein; and it must, of a necessity, have reference to the date of its assertion judicially. The phrase "and be in the actual enjoyment of property," indicates that the "wife who shall own" it, is *in being* at the time.

The defendant's second objection was not well taken.

Mullen vs. Zuberhier & Behan.

III.

We are of the opinion that the amendment prayed for by the plaintiff and appellee should be made, and that a final judgment should be rendered, maintaining the homestead and perpetuating his injunction; but we are disinclined—under the circumstances of this case—to award him any damages. As we have declined to give effect to the *registry* of plaintiff's homestead in one respect, we cannot in another.

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided, annulled and reversed; and it is further ordered, adjudged and decreed that plaintiff's right of homestead upon the property seized be recognized, and enforced, and his injunction perpetuated.

It is further ordered, adjudged and decreed that the demands of both plaintiff and defendant for damages be rejected, and that all costs be taxed against the defendant and appellant.

No. 1294.

MRS. CLARA J. MULLEN, WIFE, ETC., VS. ZUBERHIER & BEHAN.

The Supreme Court has no jurisdiction over a suit in nullity of a judgment rendered on an hypothecary action, when the amount, to pay which the property is sought to be subjected, does not exceed two thousand dollars.

The circumstance that the demand in nullity is coupled with a prayer for damages exceeding that sum, does not make the case appealable.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette.
DeBaillon, J.

L. J. Bourges for Plaintiff and Appellant.

Felix Voorhies & Son for Defendants and Appellees.

The opinion of the court was delivered by

BERMUDEZ, C. J. This is a suit to annul a judgment. The complaint is, that the judgment was rendered without any citation issued to and served on the then defendant, but contradictorily with a curator *ad hoc*, whom the court was powerless to appoint and who could not represent her.

The suit in which the judgment complained of was rendered, had for its object the enforcement of a money judgment for five hundred and forty dollars and thirty-five cents (\$540 35) by the hypothecary action. That judgment had been rendered against the party from whom the

39 888
48 1335
39 888
115 489

defendant had acquired the property, and was recorded at the time of the transfer.

The action of nullity is therefore brought to relieve the property from a claim which does not exceed \$2000, the actual lower limit of our jurisdiction.

It is true that the plaintiff sues besides for \$3000 damages, said to have been sustained in consequence of the judgment attacked, which it is said prevented plaintiff from selling the property, and also in attorney's fees for bringing the present suit; but there is nothing to show that the judgment was executed and that injury was entailed in consequence.

The claim for damages clearly appears to have been made for the sole purpose of bringing the case within the jurisdiction of this Court; and, unfounded as it seems on the face of the papers, it must be deemed frivolous.

In the case of *Young vs. Duncan*, 39 Ann. 86, in which an attorney claimed a fee of \$1500, with privilege on a judgment valued at more than \$2000, the appeal was dismissed, the title to the judgment not being involved and the only question at issue being the value of the services of counsel and the existence *vel non* of the security claimed.

This Court could pass on the question of damages only after having annulled the judgment attacked.

It is therefore ordered that the appeal herein be dismissed with costs.

No. 1295.

THE STATE EX REL. JOSEPH LEVY & BROTHER VS. JUDGE THIRD
CITY COURT OF NEW ORLEANS.

39	889
115	661

Act No. 45 of 1880, which is entitled "An Act to organize the City Courts in the city of New Orleans, to regulate the territorial jurisdiction thereof and proceedings therein, and to fix the salaries of the judges," is not unconstitutional as violative of either Article 46, or Article 135 of the Constitution.

Its provisions, which define the territorial jurisdiction of the city courts, far from conflicting with, were enacted in furtherance of, Article 135 of the Constitution, in which the courts aforesaid are created. Under its provisions, it is clear that no resident of the left bank of the city of New Orleans can be sued in the Third City Court, whose jurisdiction is restricted to that portion of the city of New Orleans which lies on the right bank of the Mississippi river.

APPPLICATION for Certiorari and Mandamus.

Bernard Titcher for the Relator.

State ex rel. Levy & Bro. vs. Judge.

The opinion of the Court was delivered by

POCHÉ, J. This controversy presents the question of a proper definition of the territorial jurisdiction of the Third City Court of New Orleans.

Under the provisions of Act No. 45 of 1880, its jurisdiction is limited to that portion of the parish of Orleans which lies on the right bank of the river Mississippi; and in an attempt of relator to sue a party residing in New Orleans on the left bank in that court, the respondent judge maintained the exception of the defendant to his jurisdiction *ratione personæ*.

Hence arises the complaint of relator, who makes the following points in support of his proposition that the jurisdiction of the Third City Court extends to all portions of the parish of Orleans:

1st. That the Legislature had not the constitutional authority to limit the jurisdiction of the city courts created by the Constitution, to any portion of the parish of Orleans.

The city courts were created by Article 135 of the Constitution, which provides: "There shall be in the city of New Orleans three city courts, one of which shall be located in that portion of the city on the right bank of the Mississippi river." * * * "The General Assembly shall regulate the salaries, territorial division of jurisdiction, the manner of executing their process, the fee bill and proceedings which shall govern them." * * *

From this plain and unambiguous language it appears clearly that after creating three city courts, and providing that one of them should be located on the right bank of the river, the framers of the Constitution wisely vested the Legislature with full and exclusive power to enact all laws which might prove necessary to set those courts in motion. It is worthy of note that the power to regulate their jurisdiction as to territory, which is contested by relator, was expressly delegated in the article.

Hence, it was competent, under that power, for the Legislature to enact the third section of the Act No. 45, which reads: "That no person shall be sued before any other court than the one having jurisdiction over the place of his residence; but all the constables of said city courts shall have authority to execute process throughout the entire parish of Orleans."

There is no inconsistency, as argued by relator's counsel, between the restriction of the territorial jurisdiction of the courts and the authority granted to their various and respective constables to serve process throughout the entire parish of Orleans.

The manifest object of the Convention in creating the city courts was to facilitate and to expedite the administration of justice in New Orleans among litigants in suits involving sums not exceeding one hundred dollars; hence, it created several courts and vested each with a well defined territorial jurisdiction. But foreseeing that witnesses might not all live within the territorial jurisdiction of the court, but within the limits of the parish of Orleans; and that it might become necessary to sequester, attach or seize property situated outside of the jurisdiction of the court, but in other portions of the parish, the Legislature properly extended to constables the power to serve such process, either of summons, sequestration, attachment or seizure and the like throughout the entire parish.

2d. Relator's second point is that Section 2, of Act 45 of 1880, which defines the territorial division of jurisdiction of the three city courts is violative of Article 46 of the Constitution, which reads: "The General Assembly shall not pass any local or special law on the following objects: * * * regulating the practice or jurisdiction of any court or changing the rules of evidence in any judicial proceeding or inquiry before courts." * * *

When weighed in the scales with the undisputed fact that the enactment of the section thus assailed was in obedience to the formal constitutional mandate contained in Article 135, the argument of relator is too trivial to justify any further notice than a mere mention. Like all over-zealous litigants, relator, having gone beyond his depth, reaches out for a support which can but destroy him. If that enactment is unconstitutional, the city courts are yet in a state of chaos, and the very court which he invokes would thus be stripped of all power to entertain and determine his demand.

3d. His next contention is, that in extending the jurisdiction of the first and second city courts concurrently to all portions of the city of New Orleans on the left bank of the river, while it restricted the jurisdiction of the Third City Court to the right bank, the Legislature made an unconstitutional discrimination against said Third City Court. The injustice of the discrimination is not easily discernible. Under its effect the first and second city courts are denied jurisdiction over the right bank of the river just as clearly and effectively as the Third City Court is denied jurisdiction in that portion of the city which lies on the left bank of the river.

The reason which prompted the wisdom of locating a city court on the right bank of the river, which was manifestly the purpose of avoiding to litigants of that portion of the city the necessity of crossing a

Thompson vs. Walker.

mighty river for the purpose of minor litigation, is very suggestive of a like protection to the residents of the left bank.

But after all, the Legislature had the constitutional power to make the enactment, and the wisdom of its course is not a subject within the scope of judicial investigation.

4th. Relator's fourth and last point is to the effect that the legislative delegation of power to the constable to execute process throughout the entire parish, necessarily includes that of citation, and that therefore the court must also have the power to issue such citation without territorial restriction.

That contention involves the proposition that the jurisdiction of the court must be measured by the powers of the constable. The argument is so weak that similar to brittle glass it falls to pieces by the mere handling. It has already been shown what the law meant by the process which the constable can serve or execute in all portions of the parish. The Legislature surely did not mean process which did not and could not exist, under its own prohibition contained in the same section.

Our conclusion is therefore clear that the Third City Court of New Orleans has no jurisdiction *ratione personæ* over residents of the left bank of the city, and that the respondent judge committed no error in maintaining defendant's exception in the case of Joseph Levy & Bro. vs. J. F. Oser.

The writs prayed for by relator are therefore denied, and his application dismissed at his costs.

The Chief Justice takes no part.

No. 1297.

DAVID B. THOMPSON VS. GEORGE C. WALKER, TESTAMENTARY EXECUTOR.

In an action by one partner against another praying for a full and final settlement of the partnership affairs, a demand that the defendant, who had been left in charge as liquidator after the dissolution, file an account of his gestion, is only incidental to, and not inconsistent with, the main demand.

Neither is a prayer to recover *at least* a certain amount and such further amount as may be found due on settlement, inconsistent with the action of settlement.

A plea of full and final settlement is not sustained by evidence of only a partial settlement.

A PPEAL from the Nineteenth District Court, Parish of St. Mary.
Allen, J.

Breaux & Renoudet, for Plaintiff and Appellant.

Don Caffery, for Defendant and Appellee.

Thompson vs. Walker.

The opinion of the Court was delivered by

FENNER, J. The action is brought by plaintiff, surviving partner of the late firm of Walker & Thompson, against the defendant as executor and legal representative of the deceased partner, Charles H. Walker.

The prayer of the petition is: "That a full settlement be made by said defendant of all the business affairs of Walker & Thompson (partners as before-mentioned), in manner and form required, and that defendant file a full statement and account on trial, showing amounts received and disbursed and everything in that connection necessary to a final settlement. He further prays that said defendant be condemned to pay plaintiff *at least* the sum of \$1500 before mentioned, and the sum of \$544 with interest, and that defendant be condemned to pay *as much more as may be found due on general settlement*, and that judgment be accordingly rendered.

He further prays that all accounts, claims and demands be finally settled, and for general relief."

Defendant filed the following exceptions: "1st. That the only action plaintiff is entitled to, if any, is an action for settlement of partnership accounts, and not an action compelling defendant to account.

"2d. That no action can be brought by one partner against another for items of indebtedness of an individual character, but that the action is limited to one for settlement of partnership affairs and accounts, and for whatever amount may be found due on balance.

"3d. And in case the foregoing are overruled, defendant says that, by notarial act of date 19th July, 1879, plaintiff and defendant fully and finally settled all the partnership affairs of the firm of Walker & Thompson, and that in consequence this action cannot be maintained."

From a judgment maintaining these exceptions and dismissing the suit, the present appeal is taken.

We think the exceptions have not the slightest merit. The action is unquestionably one for the settlement of the partnership.

The demand on defendant to account is a mere incident of the action, based on the allegation contained in the petition that, by the terms of the dissolution, defendant was charged with liquidation and settlement and with the duty to render such account.

The claim to a judgment for *at least* the specific sums named is also entirely subordinated to the prayer for a general settlement, in which, of course, the judgment will be for the amount found due, whether greater or less than the sums named. These particular sums undoubt-

Hart vs. Caffery.

edly grow out of the partnership relations, and will form elements of the settlement, accordingly as they are sustained or not.

The last exception is inconsistent with the first two. Although we find the act of settlement referred to in the record, we find no note of its having been offered in evidence. But, in any event, it is, on its face, only a partial settlement, and not full and final; and, furthermore, the defendant denies the authority of the agent who acted in his behalf, and also attacks it on the grounds of error and fraud.

All these matters should be settled on the merits of the cause.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed; that the exceptions interposed by defendant be, as such, overruled; and that the cause be remanded to the lower court to be there proceeded with according to law; defendant to pay costs of the exceptions in the lower court and those of this appeal.

No. 1299.

E. J. HART VS. C. D. CAFFERY, CURATOR.—J. H. MOSES, INTERVENOR.

An ancient debt, secured by mortgage, always kept alive, and finally acknowledged formally in a notarial act, whereby it is declared to be secured by mortgage on the same property, specially described, and which is duly and seasonably recorded in the parish in which the real estate encumbered lies, is entitled to be paid with a first rank, in preference to a debt acknowledged subsequently and secured by an act afterwards executed and next recorded.

In such a case it is immaterial whether the ancient act of mortgage was or not reinscribed within the ten years following its inscription.

The second act accomplishes the purposes of a reinscription and secures the debt as effectually as if the previous act had been reinscribed, at least as concerns the first subsequent mortgage creditor.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette.
DeBaillion, J.

O. C. & J. Mouton for Plaintiff and Appellee:

1. An act by which property is transferred to another, with the right in the latter to sell the same in satisfaction of a debt due by the transferer, and the surplus, if any, after payment of said indebtedness to be returned to the debtor is not a sale or a giving in payment. 32 Ann. 949; 36 Ann. 439; 35 Ann. 108.
2. The intervenor has elected his plea of mortgagee and is bound by it. 23 Ann. 699; 35 Ann. 108.
3. When a title or a real right upon real estate is claimed to be valid under the laws of another State, where it was acquired, those laws must be produced in evidence or proved, otherwise the validity of that title or real right will be made to depend upon our own laws, more especially when that validity is denied. 15 Ann. 491; 9 R. 151; 8 Ann. 134; 14 Ann. 391; 17 Ann. 73; 24 Ann. 387.

Hart vs. Caffery.

The form of written instruments are governed by the law and usages of the place where they are passed; but their effect must be regulated by the laws of the place where the property to be affected is situated. C. C. Art. 10; 34 Ann. 797; 3 Ann. 212.

A conventional mortgage is a contract by which a person binds the whole of his property, or a portion of it only, in favor of another, to secure the execution of some engagement, without divesting himself of the possession. C. C. 3290.

An instrument by which mortgaged property is authorized to be sold extra judicially, is not valid under the laws of Louisiana, as far as third persons are concerned, whatever may be its effect between the parties; and that, even if executed out of the State. 3 Ann. 212; 34 Ann. 797.

An act purporting on its face to be a trust conveyance or deed of trust in fee simple will not be given the effect of an act of mortgage binding on third parties. 34 Ann. 797.

Reasonable doubt as to the true character of the Act will protect effectually third parties from its operation. 34 Ann. 800-1, opinion Associate Justice Fenner.

An act executed in Alabama, and avowedly a mortgage under the laws of that State, and affecting real estate in this State, will not, even between the contracting parties, have the effect here which is claimed for it in Alabama, and as a mortgage will not operate as a divestiture of title. 38 Ann. 890.

Mortgages should be inscribed in the proper book, otherwise third parties are protected. Louque's Digest Verbo Registry, II (C) Nos. 2, 3, 4, 6 and 7.

To novate a debt two conditions must concur. 1st, to extinguish an existing obligation; 2d, to substitute a new one in its place. C. C. 2185.

Novation is never presumed; it must clearly result from the terms of the agreement or by a full discharge of the original debt. C. C. 2190; Hennen Digest, p. 992, Verbo Novation, Nos. 1 and 2.

If the pre-existing obligation be only modified in part, and any stipulation of the original obligation is suffered to remain, there is no novation. C. C. 2187; 9 An. 228; 22 Ann. 184; 34 Ann. 534; Code Napoleon, 1273; Marcadé, vol. 4, p. 582; No. II, 765-768.

The transfer of a debt without subrogation is not the substitution of a new creditor. Marcadé, Vol. 4, p. 587; No. III, 769, 770. C. N. 1273; Civil Code, art. 2161; 21 Ann. 5; 27 Ann. 547.

The laws of registry is to give public notice with reasonable certainty of the essential particulars of a mortgage; and when that is done the purposes of the law are satisfied. 1 Ann. 219; 2 Ann. 251; 5 Ann. 225.

When the inscription of a mortgage by authentic act contains a copy of all portions of the act upon which the mortgage is based, it complies with the requirements of art. 3348, C. C., although it be not a copy of the entire act. 35 Ann. 984; 5 R. 225; 6 Ann. 242-249.

M. E. Girard for Intervenor and Appellant.

The opinion of the court was delivered by

BERMUDEZ, C. J. This is a suit *via ordinaria*, to enforce the payment of a mortgage note, executed on December 3, 1872, and secured by mortgage by a notarial act, which was recorded on December 11 following in the Recorder's office of Lafayette Parish, in which the property is situated.

From time to time the mortgagor, Perry Moses, made payments on said note.

On March 3, 1880, plaintiff, as the holder of the note and the drawer

School Directors vs. Judice et als.

thereof, liquidated the indebtedness. Five notes, for different amounts, aggregating the amount due, were furnished by Perry Moses, to represent the former note and to be secured by the mortgage by which the payment of said note was guaranteed, on the same property which was specially described, with the express stipulation that neither the original debt nor the first mortgage would be considered as novated, and that payment of the five notes would extinguish the note and mortgage of 1872.

On October 20, 1885, Perry Moses appears to have executed a mortgage in favor of J. H. Moses, to secure payment of an indebtedness on the same property.

This act, the validity of which was impugned, was recorded on October 25th following.

This second mortgage creditor intervened, claiming priority over plaintiff, on the ground that the original act of mortgage had not been duly reinscribed, in fact, has not been reinscribed *at all*, and that the original inscription having perempted, by the lapse of the ten years following it, the debt claimed by plaintiff, although due, has ceased to be secured by mortgage on the real estate originally encumbered.

There was judgment in favor of plaintiff for the amount of his debt, recognizing it as secured by mortgage, and dismissing the intervention.

The intervenor alone appeals.

It is unnecessary to pass upon the question of formal reinscription raised by the intervenor.

Admitting that the original act was never reinscribed, it is enough to entitle plaintiff to recover, that the amount which he sues for was acknowledged as due him, and that its payment was secured by mortgage on the same property, which was specially described in the act, and that the instrument, complete in itself, was duly recorded at a date anterior, *years* previous, to the inscription of intervenor's act of mortgage.

The act subverts all the purposes which a technical reinscription would have accomplished, at least as concerns the first subsequent mortgage creditor.

Judgment affirmed.

No. 1302.

BOARD OF SCHOOL DIRECTORS PARISH OF LAFAYETTE VS. J. N.
JUDICE, ET ALS.

Principal cannot urge that he has not taken the oath of office, neither can his sureties: and the law will presume that he did take the oath when he has performed other requirements of the law.

School Directors vs. Judice et als.

Persons signing an official bond admit the capacity of the principal, and cannot afterward deny his capacity.

Persons signing an official bond as sureties waive defects of form. As they bind themselves so shall they be bound. Where no separate book is kept, registry in the mortgage book is sufficient.

Sureties cannot complain of any act of omission or commission, which does not affect their rights as against the principal.

Sureties cannot set up ineligibility of their principal when he has acted in the official capacity mentioned in the bond.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette.
DeBaillon, J.

R. C. Smedes and C. D. Caffery, for Plaintiffs and Appellees.

M. E. Girard, for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. This is a suit by the plaintiff board against John N. Judice, as treasurer of the school funds of said parish and the sureties on his official bond for \$2640, the amount for which the said Judice is charged with being a defaulter.

Judice made no defense and no appearance.

The sureties, besides the general issue in their answer, set up special defenses, as follows :

1st. Said Judice never was Parish Treasurer ; that he did not qualify as such in 1885, not having taken the oath required by law.

2d. The document upon which the plaintiffs rely is not a bond legal in form or substance, or in any way binding on defendants, having none of the requirements of such documents to make it binding—that it is not completed.

3d. It is not attested or authenticated by two witnesses and the Recorder—it is not recorded in a separate book kept for that purpose to operate a mortgage upon all the estate of the principal.

4th. It is not accepted by the Parish Board of School Directors and Recorder of the parish, nor has a copy thereof been sent to the Superintendent of Education and State Treasurer.

5th. That the Board failed to adjust his accounts in proper time, (annually at least), and thus through their laches allowed him to become and remain a defaulter.

6th. That a parish treasurer is elected for one year only, and at the end of that or any time, he is ineligible to the same or any other office unless he has duly and regularly obtained a discharge for any amount of public moneys with which he may been entrusted in that or any

School Directors vs. Judice et als.

other capacity. Defendants also specially allege that in August, 1885, Judice was not eligible to any office of honor, profit or trust, as he had not obtained a discharge for the public moneys entrusted to him.

There was judgment against the defendants, and the sureties, Hazard Easton and Louis G. Breaux, have appealed.

There is no dispute as to the amount of Judice's defalcation. It is charged and admitted to be \$2641 72.

We will now proceed to consider *seriatim* the special defenses set forth :

I.

This relates to the defense that the sureties are not bound because Judice never qualified as treasurer by taking the required oath, and whether he took the oath is a disputed fact. It is not necessary to determine it, since it is well settled that the sureties on the bond of an officer acknowledge that he is such officer *de facto*, and are not permitted to deny the capacity of their principal thus recognized. *Police Jury vs. Howet*, 2 L. 47; *Duncan vs. State*, 7 Ann. 378; *State vs. Blohm*, 26 Ann. 538.

The same reasoning and authorities will apply to the contention that the sureties are not bound because Judice was not eligible to the office of treasurer by reason of his having previously filled positions of public trust and been custodian of public moneys, and failing to produce his *quietus* on account of such previous employments before his appointment as treasurer, in the instance before us. See also *State vs. Hayes*, 7 Ann. 118; *State vs. Securities of Breed*, 10 Ann. 492; *State vs. Dunn*, 11 Ann. 549.

II.

As to the defects in the bond : It is not authenticated by two witnesses and Recorder, and not recorded in separate book, nor accepted by the School Directors, etc.

The requirement for attestation of such bond is merely directory. The omission of such formality, it has been expressly held, will not affect the liability of the sureties thereon. *State vs. Wenfred*, 12 Ann. 643; *State vs. Hampton*, 14 Ann. 725.

There was no separate book kept for recording such bonds as the witnesses testify. The bond was recorded in the book of mortgages, which was sufficient. *Copley & Newman vs. Sheriff*, 7 Ann. 595; *State vs. Hampton*, 14 Ann. 725; *State vs. Bradley*, 11 Ann. 643.

The bond was really accepted by the School Board when Judice was permitted to take charge of the school fund. There was an acceptance of it by the President of the Board, acting under instructions.

Bush & Levert vs. Police Jury.

If, however, there was any omission in this respect, it would not avail the sureties. Expressly ruled in *Police Jury vs. Houet*, 2 L. 47; *Elam, Tutor vs. Barr*, 14 Ann. 471; *Ib.* 725.

The other special defenses appearing in the answer are not insisted on in argument, and we presume are abandoned. We have, however, not omitted to examine them, but we fail to see their force or bearing.

The conclusions reached on the several points of the defense dispense with the consideration of the numerous bills of exceptions.

After a critical review of the whole case, we find no reason to disturb the judgment of the lower court, and it is therefore affirmed with costs.

No. 1303.

**BUSH & LEVERT VS. FELIX BÉRARD, PRESIDENT, AND MEMBERS OF
POLICE JURY OF ST. MARTIN ET ALS.**

A contestation as to the constitutionality or legality of a tax does not arise in a proceeding directed solely against the assessing officers of the State and attacking only the assessment of property.

In such cases, this Court only has jurisdiction when the amount in dispute exceeds \$2000; and the amount in dispute is the difference between the taxes due on the assessment assailed and those which would be due under the reduction asked.

A PPEAL from the Twenty-first District Court, Parish of St. Martin.
Mouton, J.

Breaux & Renoudet for Plaintiffs and Appellants.

Felix Voorhies for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. The assessor of the parish of St. Martin assessed the property of plaintiffs, situated in said parish, at certain valuations, in which plaintiffs, though dissatisfied, acquiesced. Subsequently, the police jury, acting as a board of reviewers under authority of sections 23 and 24 of act 98 of 1886, revised the assessment rolls, and made certain increases in the valuation of plaintiffs' property.

The object of the present action is to correct and reduce these assessments.

The petition is lengthy, and not only assails the assessments as excessive, but attacks the legality of the proceedings of the assessor and of the police jury, and asserts the unconstitutionality of the whole system of assessment adopted by the legislation of the State.

39	899
45	725
39	899
52	833
39	899
108	688
39	899
125	686

Bush & Levert vs. Police Jury et als.

We must look, however, to the prayer of the petition in order to determine the true object and nature of the action, and, though long, we here transcribe it in full. They pray: "That, after legal proceedings had, it be decreed that said assessment is excessive, extravagant, un-uniform, inequitable, incorrect and far beyond the cash value of the property mentioned; that same be reduced to the real cash value of the property, and that the assessment be made to conform; that it be decided that said board of reviewers has no legal existence and the said police jury no authority in the premises, and that they have acted illegally in every respect; that the increase made on the appraisement of said assessor be declared null and void; that said assessor be directed and ordered to assess said property at its cash value, and that the judgment of the court shall be his appraisement; and lastly, they pray for such orders and decrees as law, justice and equity demand."

It is obvious that nothing in this demand involves "the constitutionality or legality of any tax, toll or impost whatever, or of any fine, forfeiture or penalty imposed by a municipal corporation."

So far as the relief sought is concerned, it touches nothing but the assessment of the property, and asks only a reduction thereof to a proper valuation.

In such cases, we have determined by repeated decisions that our jurisdiction is measured by the pecuniary "amount in dispute," and that this amount is the difference between the taxes payable on the assessment complained of and those which would be due on the reduction claimed. *Minor vs. Budd*, 38 Ann. 99; *Favrot vs. City*, Id. 230; *Adler vs. Board*, 37 Ann. 507; *State ex rel. David vs. Judges*, Id. 898; *Cobb vs. Maguire*, 36 Ann. 801; *State ex rel. Rivet vs. Judge*, Id. 286; *Block vs. Assessor*, 35 Ann. 965; *New Orleans vs. Blanks (N. R.)*, 35 Ann. 1201; *Gillis vs. Clayton*, 33 Ann. 286; *Stubbs vs. Maguire*, 32 Ann. 817; *State ex rel. Newman vs. Hayles*, Id. 1135; *State ex rel. Crean vs. Bouny*, Id. 1191.

It is difficult to conceive how a contestation as to the "constitutionality or legality of a tax" could arise in a suit directed solely against the assessing officers of the State.

In one case, we said: "There never was an issue between the State or parish and the relator as to the legality or illegality of the tax, and it is only in such cases that an appeal lies to this court, regardless of amount. It may be that the assessment was illegal, and that consequently the adjudication and the sale attacked are nullities, but that does not justify the conclusion that the tax is illegal or unconstitutional."

Puckette vs. Judge.

A tax is deemed illegal or unconstitutional only when there is no law authorizing it, or where, there being such a law, that law is unconstitutional and so, void.

An erroneous assessment does not make the tax illegal. A tax may be legal and constitutional though the assessment be defective. State ex rel. David vs. Judges, 37 Ann. 898.

The foregoing disposes of the case.

It appears from the record, that the total taxes due by plaintiffs on the assessment as fixed by the board of reviewers are \$3180 52, and if the assessment was reduced to the lowest cash value admitted by plaintiffs in their petition, the difference in the taxes due would fall far short of two thousand dollars.

It is, therefore, ordered that this appeal be dismissed at appellants' cost.

No. 1305.

C. McD. PUCKETTE vs. A. W. O. HICKS, JUDGE.

Where the co-proprietor and editor of a newspaper has, under contract with his co-partner, the absolute right to have full editorial control and to dictate its policy and formulate its utterances upon any and all topics and subjects without hindrance or interference from his partner or any other source, the deprivation and denial of such right by the acts of his co-partner constitutes an injury for which pecuniary damages would be an inadequate compensation, and, therefore, in the sense of the law, irreparable.

If an injunction, restraining the party from violating and depriving the other of the exercise of such right, be dissolved on bond, such order of dissolution is an interlocutory decree which may cause an irreparable injury, and is, therefore, subject to a suspensive appeal.

APPPLICATION for Mandamus.

Alexander & Blanchard and Wise & Herndon for the Relator.

R. J. Looney and Bell & Randolph for the Respondent.

The opinion of the Court was delivered by

FENNER, J. The application is for a mandamus to compel the respondent judge to grant a suspensive appeal from an order dissolving a preliminary injunction on bond.

Art. 566, C. P., provides: "One may likewise appeal from all interlocutory judgments, when such judgment may cause him an irreparable injury."

Art. 307, C. P., authorizes the courts, "in their discretion," to dissolve an injunction on bond, "whenever the act prohibited by the injunction is not such as may work an irreparable injury to the plaintiff."

It is held that the discretion thus vested in the courts is limited to

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39	901
104	79
104	86
39	901
106	706

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cases where the act prohibited may not work an irreparable injury; that, in the latter case, they have no right or power to dissolve on bond; and that an order dissolving on bond in such cases is itself an interlocutory judgment which may cause an irreparable injury, and is, therefore, appealable under C. P., 566. It is further held that where the judge refuses to grant an appeal from such an order the plaintiff may resort to this Court for a mandamus to compel him to do so.

On application for such mandamus the inquiry in this court is, simply, whether the act, which is prohibited by the injunction and is unfettered by the dissolution, is such as may cause to plaintiff an irreparable injury. If found to be such, the mandamus is granted; if not so found, it is denied.

In this inquiry, the allegations of the plaintiff's petition for injunction are to be taken as true, so far as the facts therein set forth are concerned.

By the foregoing it is not meant that we are to be concluded by mere allegations in the petition that the acts restrained will occasion irreparable injury. Such allegations are mere inferences and deductions from the acts and facts charged, the verity and soundness of which we may review.

We are to examine the facts charged and the nature and character of the injury which may be inflicted by the acts complained of, and are thus to determine whether such injury may be irreparable *vel non*.

It is difficult to lay down any precise rule as to what gives to an injury the quality of being irreparable; but the general principle is that an injury the damage from which is merely in the nature of pecuniary loss and can be exactly and fully repaired by compensation in money, is a reparable injury for which a bond of sufficient amount and properly secured may afford all adequate indemnity. But as we have heretofore said: "There are many injuries which, in the very nature of things, cannot be repaired by any money consideration, such, for instance, as result from acts which outrage the feeling and wound the sensibilities, or deprive us of objects of affection or of things, perhaps, trivial in themselves, but of inestimable value by reason, solely, of being associated with some precious memory or touching incident of our lives. Or it may be that the maintenance of the writ is required to preserve to us our homes, and to establish us in a state or condition which, lost for the moment, can never be recovered, nor the loss atoned for by money. In this class of cases, the injunction should be maintained because the injury from its dissolution would be irreparable." *Crescent City vs. Police Jury*, 32 Ann. 1194.

The foregoing was quoted not as an exhaustive, but as an illustrative, statement of the kind of injuries which are considered irreparable.

Pucketie vs. Judge.

Thus it was held that an injunction restraining the destruction of forest trees upon land claimed by the plaintiff to belong to him involved an irreparable injury and could not be dissolved on bond. *Delacroix vs Villeré*, 11 Ann. 39.

So it was held that an injunction to restrain the sale of plantation, which sale would involve its transfer and loss to the claimant, cannot be dissolved on bond, because while the bond might indemnify for the value of the plantation, it could not restore the plantation itself. *White vs. Cazenave*, 14 Ann. 57.

So an injunction against acts operating a change of possession of immovable property involves an irreparable injury, because the possession thus obliterated cannot be restored for the time during which it was lost. *Marion vs. Johnson*, 22 Ann. 512; *Boedicker vs. East*, 24 Ann. 154; *Sigur vs. Judge, etc.*, 33 Ann. 133.

Injunction to restrain emptying of nuisance-boat in a river, polluting plaintiff's water supply and constituting a nuisance, was held not dissoluble on bond. *Water Works Co. vs. Oser*, 36 Ann. 918.

Where members of a Masonic fraternity enjoined their fellow members from excluding them from the enjoyment of the common property and depriving them of the intellectual and moral enjoyment of participating in Masonic meetings and rites, the Court said: "It would be difficult to estimate in dollars and cents the damage the plaintiffs may sustain by being deprived of their supposed privileges as members of the corporation. A compensation even in damages could not, therefore, be readily awarded plaintiffs. If the plaintiffs have any right at all, they are entitled to maintain their injunction until they can be heard contradictorily with their opponents." And the order dissolving on bond was reversed. *Knabe vs. Fernot*, 14 Am. 847.

Such are a few illustrations of the principles guiding this Court in these matters. Each particular case, however, is to be considered on its own facts and circumstances and the relief determined thereby.

Let us now, therefore, examine the case in hand.

Plaintiff alleges, in substance, that the establishment constituting the "*Shreveport Times*" newspaper was leased jointly for the period of *three* years, by himself and his co-lessee, Johnson, to be conducted by them as a newspaper; and that it was, at the time, agreed between them that plaintiff "was to be the editor of the paper and was to have full editorial control of the newspaper, its policy and utterances upon any and all topics and subjects without hindrance or interference from any source; and his co-lessee was to have charge of the mechanical department of said paper in the capacity of superintendent of the type-setting and printing department of the paper;" that, accordingly,

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during the first year of the enterprise plaintiff had enjoyed sole control as editor; but that, within a few days prior to the suit, Johnson had assumed to interfere with the editorial control, and had given instructions to insert no article of a political nature prepared and offered by Puckette, and had actually thrown out and refused to print such articles and had given a continuing order to the employees in the printing department not to insert such.

The foregoing are pure allegations of fact, which, for the purposes of this proceeding, must be taken as true.

He alleges that this conduct of his co-lessee is a usurpation and invasion of his rights; that it operates a change in the possession and control of the newspaper and deprives him of his just control over its policy and editorial utterances; that it deprives him of the intellectual enjoyment of editing the paper and prevents him from carrying out the policy he had adopted as regards said paper; that he cannot be maintained in his rights as editor without the aid of the court; and that the action of the defendant was calculated to injure and would injure his reputation and standing as a newspaper man and bring him into contempt and disrepute in his vocation.

Upon such allegations the injunction was originally granted, and upon a rule to dissolve it as improvidently and illegally issued on the face of the papers, the judge, after full hearing and with an elaborate opinion, maintained it.

It is impossible and would be eminently improper for us to follow the learned respondent judge in his discussion of the legality and propriety of the injunction itself, unless, on the face of the papers, it was perfectly manifest that the granting of the injunction was an abuse of the powers of the court. This is not the case. The contract set out cannot be treated as one merely for personal services, nor is there any dubiety about the terms or construction of the contract, which must be absolutely accepted as stated in the petition. Therefore, the case of *Healy vs. Allen*. 38 Ann. 867, does not apply.

It is a suit for the specific performance of a contract and to restrain the violation thereof by one party, and we have very considerably held that, "in proper cases" (there indicated), "the courts of this State may and should enforce specific performance of contracts, by both mandatory and injunctive relief," quoting articles 1926 and 1927, C. C., the latter of which declares: "In ordinary cases, the breach of such a contract (to do or not to do) entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing his contract, he may be constrained to specific performance by means prescribed in the laws

Puckette vs. Judge.

which regulate the practice of the courts." *Levine vs. Mitchell*, 35 Ann. 1126.

The case was quite similar to this one, being for an injunction to restrain violation of a partnership contract.

The question is whether, where the editor of a newspaper has by contract the absolute right to have full editorial control and to dictate its policy and formulate its utterances upon any and all topics and subjects without hindrance or interference from his co-partner or any other source, the deprivation and denial of such right constitutes an injury for which damages would be an inadequate compensation, and, therefore, in the sense of the law, irreparable.

If we could treat a public newspaper as a purely mercantile enterprise and the vocation of an editor as merely mercenary, perhaps we might maintain the contention of respondent and treat the injury to relator as a simple question of profit and loss, to be adjusted by pecuniary compensation. But surely newspapers have some objects and purposes higher than mere money making. As operated in modern times, they are something more than mere advertising mediums or even purveyors of news. They are organs of public opinion, instructors of the people, advocates of certain fixed policies and principles, the promotion of which must gratify the intellectual and moral desires of their proprietors, even if they do not, in all cases, advance their pecuniary interests. We might well conceive that, though offered the amplest pecuniary inducements to advocate principles or causes which they disbelieved, or to abstain from advocating those which they approved, worthy journalists would reject such propositions with the scorn which they would deserve. We must apply the same rule to the editor of a newspaper. He, too, must be treated as a man who has principles and convictions, a sense of public duty, a devotion to the interests of the people as he understands them; and we must assume that, in executing the functions of his high calling, he sets a value upon the advancement of such objects far above and beyond any mere pecuniary reward. When, in violation of his clear legal rights, his mouth is muzzled and he is deprived of his power to advocate his principles and convictions in the exercise of his vocation, we are bound to hold that he suffers an injury not susceptible of being measured by a mere money standard, and, therefore, in the sense of the law, irreparable.

The relator is, therefore, undoubtedly entitled to the suspensive appeal for which he seasonably applied.

It is, therefore, ordered and decreed that the provisional writ of mandamus herein issued be hereby made peremptory.

Poché, J., absent.

CASES
 ARGUED AND DETERMINED IN THE
 SUPREME COURT OF LOUISIANA,
 AT SHREVEPORT.
 IN
 OCTOBER. 1887.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice.*

HON. FÉLIX P. POCHÉ,

HON. ROBERT B. TODD,

HON. CHARLES E. FENNER,

HON. LYNN B. WATKINS,

} *Associate Justices.*

No. 195.

THE STATE OF LOUISIANA VS. BERNARD J. ESTOUP.

A motion of appeal in a criminal case must be made in *open court* (act 1873, No. 30, p. 56), within ten days after sentence was passed. Where the court adjourns on that day, and the motion is made on the day of its reopening, the motion is in time.

A transcript of appeal in such a case need not be filed before the opening of the appellate court, whatever the return day be. It is in time if filed for such opening.

A witness on the stand cannot be permitted, over the seasonable objections of the accused, to testify to what another person has *told* him touching the circumstances of the arrest of the latter, although such person so stated in presence of the accused, who was then in *actual custody*, and the latter did not contradict him and remained silent. The prisoner had a right to remain dumb.

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State vs. Estoup.

The subsequent declaration of the trial judge in his charge to the jury that they were not to infer guilt from such silence, could not cure the illegal reception of the testimony.

The trial judge was as unable, as the appellate court is, to know what effect the unauthorized evidence produced on the mind of the jury.

A PPEAL from the Criminal District Court, Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

W. L. Evans, for Defendant and Appellant:

The prisoner was on a railroad train, *under arrest, handcuffed and shackled*, at a time when a conversation between *two other men* occurred in his presence; *he remained silent*. Bill of exceptions, R. pp. 24 to 27.

Mere *silence*, while a party is *under arrest and in irons*, affords no inference whatever of acquiescence in the *statements of others* made in his presence. Under such circumstances he is not called upon to contradict such statements. *Such statements should not have gone to the jury over the timely objections of the prisoner*. State vs. Diskin, 34 Ann. 921, 922; State vs. Munston, 35 Ann. 889; Com. vs. McDermott, 123 Mass. 440; Com. vs. Kinney, 12 Met. 235; Com. vs. Walker, 13 Allen 570; Bob vs. State, 32 Ala. 560.

The invariable rule in this State and in England is, that where inadmissible evidence has been allowed to go to the jury in a criminal case, over the prisoner's objection, he is entitled to relief. Reg. vs. Gibson, 16 Cox C. C. (copied in full in the brief); State vs. Perry, 16 Ann. 444; State vs. Monie et al., 26 Ann. 513; State vs. Gruso, 28 Ann. 952; State vs. Gregory, 33 Ann. 743; State vs. Mullen, 33 Ann. 159; State vs. Von Sachs, 30 Ann. 943.

(It is contended that in *every* criminal case reported in the Louisiana Annals—covering a period of more than *forty years*—a new trial was granted where it was made to appear that inadmissible evidence was *admitted over objection*.)

The opinion of the trial judge upon *facts* which *belong exclusively to the jury*, cannot be considered by the Supreme Court. State vs. Crawford, 32 Ann. 527; State vs. Tompkins, 32 Ann. 623.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The Attorney General contends that this court cannot consider the merits of this case for the double reason, that the motion of appeal was offered and allowed and the transcript filed *too late*.

The defendant was sentenced on May 31, 1887. The court then adjourned, and reopened only on September 1, following. On that day, the accused, through counsel, moved for an appeal, which was granted, returnable to this court at this place (Shreveport) within ten days, and the transcript of appeal was filed here on October 1. The case was tried in the parish of Orleans (First Judicial District).

The act of 1878—No. 30, p. 56—relative to appeals in criminal cases provides, section 1, that "the party desiring to appeal, shall file his motion, either verbally or in writing, *in open court* * * * in the

State vs. Estoup.

courts of the First Judicial District, within *ten* days after the sentence shall have been passed." (Sec. 1.)

It is therefore clear that, as between the day on which the sentence was passed and that on which the appeal was asked and granted, the court did not sit *at all*, it was physically impossible for the accused to have filed his motion of appeal *in open court*.

Had ten judicial days elapsed in the interval, quite a different case would have been presented, as the law prohibits, in negative terms, that appeals be granted after the time specified shall have elapsed. (Sec. 3.)

It is true that the law directs that appeals in such cases shall be made returnable within ten days after the granting of the order of appeal; but the statute clearly contemplates that this must be so, where this court may be in session on the return day. (Sec. 4.)

Now, this court could not be in session at this place at all in *September*, as, under the law, the term opens here in *October*.

The law does not require vain things. Of what good would it have been, either to the State or to the accused, that the transcript be filed here within the ten days following September 1.

The ruling in *State vs. Madlar*, 38 Ann. 390, has not the remotest application to the present one, for the obvious reason that there ten judicial days had expired before the motion of appeal had been made, and likewise after the return day, and here none at all had previously elapsed.

The motion to dismiss is denied.

ON THE MERITS.

This case was once already before this court, and was remanded to be tried *de novo*, because of the illegal admission of a declaration, as part of the *res gestæ*, which was not considered to be such. 39 Ann. 219.

On the new trial, the accused was convicted of manslaughter, and sentenced to fifteen years at hard labor.

On the present appeal he complains that incompetent testimony was received, which ought to have been rejected.

It appears from the bill of exception taken to the reception of the evidence, that a witness on the stand was allowed, over defendant's timely objections, to state what an officer who had the accused in charge on his way from Shreveport to New Orleans, had *told him* touching the place and circumstances of the arrest, in presence of the prisoner, who was then *under arrest*, handcuffed and shackled, and

who remained silent, although no one had told him so to be, and, he could have spoken had he chosen to do so, no one preventing him from speaking.

The district judge says, in the bill, that the evidence was admitted because no one prevented the prisoner speaking, and that the jury was instructed that the prisoner remaining silent was not to be construed as an admission of guilt.

We feel constrained, in justice to the sacred rights of the accused, to say that the testimony was inadmissible, not only because it was hearsay, and because the facts sought to be established could have been elicited directly from the officer in charge of the prisoner, and who was not heard; but also because the mere silence of the accused, which he was authorized to keep, could not have been proved, so as to have prejudiced him, under the circumstances. The subsequent declaration of the trial judge, in his charge to the jury, that the testimony objected to and received, would not be considered by them as an admission of guilt, could not cure and legalize the anterior illegal reception of the evidence. This statement, at best, was an implied instruction that this testimony might be good evidence for some other purpose; but this was not correct.

The district judge further states, that the admission of the evidence could in no manner or form affect the rights of the defense, and was certainly no additional burden upon it, and that it was immaterial where the arrest had been effected, as it had already been proved that the prisoner had run away from New Orleans, after committing the crime for which he was tried, and was actually on the train, in charge of the Shreveport officer, who was conveying him.

We feel again constrained to differ from our learned brother.

It was as impossible for him, as it was for us, to say what effect was produced on the jury by this testimony, which he seems to admit after all, was immaterial.

The law excludes hearsay testimony.

The object which the District Attorney had in view was probably to show that the accused was a fugitive from justice, and from that fact induce the jury to infer a presumption of guilt against him.

The fact of the arrest at a place other than that at which the offense was committed, and the statement of the place and circumstances under which it was effected in presence of the accused, who remained silent, possibly could have been established, with the information to the jury that, under the circumstances, no presumption of guilt was inferrable, leaving them, however, otherwise to appreciate the evi-

State vs. Jackson.

dence; but this should have been done at the time of reception, and only by direct and proper testimony, and in no way by hearsay evidence.

The statements of the witness on the stand touching what the officer in charge had told him relative to the place and circumstances of the arrest of the accused, in the latter's presence while in actual custody, ought not to have been received over his seasonable objections, as they were either hearsay, or irrelevant, or both.

Even then, as the prisoner had the indisputable right to abstain from contradicting the witness, and to remain absolutely dumb, and as he could not be prejudiced by deducible impression from his silence, the admission of the testimony ought to have been coupled with the formal warning that guilt could not be inferred.

Under the circumstances, the accused is entitled to a new trial. 2 Ann. 245; 31 Ann. 861; 34 Ann. 921; 35 Ann. 889; 16 Ann. 444; 26 Ann. 513; 28 Ann. 952; 30 Ann. 943; 32 Ann. 571; 33 Ann. 159 and 743; 38 Ann. 788, and 39 Ann. 219.

It is, therefore, ordered and decreed, that the verdict be set aside, and the judgment and sentence upon it reversed, and that this case be remanded for further proceedings according to law.

No. 204.

THE STATE OF LOUISIANA VS. ANDREW JACKSON.

In a criminal prosecution it is not competent for the District Attorney to question a State witness as to the cause of his unfriendly feelings against the accused, which he has admitted on his cross-examination by the defence, without objection. The inquiry cannot be pressed further than the existence of the unfriendly feelings. The decision in *State vs. Gregory*, 33 Ann. 779, affirmed.

A PPEAL from the Second District Court, Parish of Bossier.
Drew, J.

J. A. W. Lowry, District Attorney, and *M. C. Elstner* for the State, Appellee.

Joannes Smith for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Convicted of arson, the defendant complains of an erroneous ruling of the trial judge, which is contained in a bill of exceptions. On cross-examination, a State witness, who is a brother of the prosecutor, was questioned by the defence as to the state of his feelings toward the accused. His answer was that they were unfriendly.

On re-examination by the district attorney, the witness was asked to explain the cause of his unfriendly feelings to the accused, and the question was allowed over the objection of defendant's counsel. The witness explained that his unfriendly feelings grew out of his belief that the accused was guilty of the charge for which he was on trial.

The point thus presented falls entirely under the ruling of this court in the case of the State vs. Gregory, 33 Ann. 737. In that case the court, dealing with a precisely similar question, said: "The sole object of it was to prove the fact or existence of the unfriendly feeling, and beyond this, neither the question nor the answer could legitimately have any bearing whatever on the question presented. If the witness did entertain such feeling, his credibility, under the law, was affected thereby, and it was a matter to be duly considered by the jury in weighing his testimony. If he entertained no such feeling, his credibility was unimpaired; and the inquiry should have ceased and the matter closed here, the end and object of the inquiry being fully accomplished."

And we must note that the ruling thus made is not without precedent. It has been held that "where the defence was permitted, without objection, to ask a witness if he was not prejudiced against the prisoner, and he has answered that he was, it was error for the court, against the objection of the defence, to draw from the witness a statement of the reasons why he was so prejudiced." * * Waterman's U. S. Criminal Digest, p. 169, § 404.

In the case at bar the question allowed was not only illegal and unwarranted, but it was manifestly intended to draw from the witness an answer inevitably injurious to the accused under the state of facts which had been elicited from the witness in his cross-examination. That a statement of a witness for the prosecution containing his opinion that the defendant was guilty as charged was at the same time damaging as well as injurious to the latter, is a proposition too plain and self-evident to need any support or argument. In a criminal trial the jury alone are empowered, under the law, to draw inferences or to form opinions from facts to the statement of whether witnesses, not experts, must be restricted in their testimony.

We are constrained to conclude and to hold that the accused in this case has not had a legal trial, and that he is entitled to relief at our hands.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled and reversed, that the verdict of the jury be set aside, and that this cause be remanded to the lower court for further proceedings according to law.

State vs. Evans.

No. 214.

THE STATE OF LOUISIANA VS. COLUMBUS EVANS.

In a prosecution for shooting with intent to murder, though the evidence shows that it would have been murder had death ensued, that, in itself, will not be sufficient ground for the jury to infer the existence of the intention to murder. If the mortal blow is unlawful and malicious and death ensues, the perpetrator is guilty of murder, although he did not intend to murder.

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

M. J. Cunningham, Attorney General, and *J. C. Pugh*, District Attorney, for the State, Appellee:

1. In prosecution for shooting with intent to murder, where the evidence shows that it would have been murder, had death ensued, that, in itself, will be sufficient ground for the jury to infer the existence of the intention of murder. *Waterman's D.*, p. 52, No. 210; *Bishop Crim. L.*, vol. 1, § 736.
2. A conviction under sec. 791 of the Revised Statutes is responsive to a charge under sec. 790. *State vs. Gilkie*, 35 Ann. 53; 39 Ann. 203.
3. A conviction of a less offence than that charged in the indictment, both being of the same generic class, is expressly authorized by our law. *State vs. Gilkie*, 33 Ann. 53; *State vs. Eckert*, 23 Ann. 326; *State vs. Ford*, 30 Ann. 313; 39 Ann. 203.

Egan & Pierson for Defendant and Appellant.

The opinion of the Court was delivered by

Todd, J. The defendant was indicted under section 790, R. S., for shooting with intent to murder while lying in wait.

The State subsequently abandoned that part of the indictment charging the accused with lying in wait, and the trial was had upon the charge of shooting with intent to murder.

The defendant was tried and convicted, and appeals from a sentence of five years' imprisonment at hard labor.

We find in the record two bills of exceptions.

1. The first is to a charge of the trial judge to the jury, as follows: "Where the evidence shows that it would have been murder if death had ensued, that, in itself, will be sufficient ground for the jury to infer the existence of the intention to murder."

This charge was incorrect for the reason that a party may be guilty of murder when there was no intention on his part to commit murder when the fatal blow was given or wound inflicted from which the death ensued. This doctrine was clearly recognized by the present court in the case of the *State vs. Walker*, 37 Ann. 560, in these words (quoting):

"If a mortal blow is unlawful and malicious and death ensues, the

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perpetrator is guilty of murder, whether he intended or not to kill, as he is responsible for the effect of such blow though he did not intend to kill." And among other authorities cited in that case in support of the principle referred to, is the following from Bishop :

"If a mortal blow is unlawful and malicious and death ensues, the perpetrator is guilty of murder ; whether he intended to kill or not, he is responsible for the effects of such wilful and malicious blow, although he did not intend to kill." 2 Bishop Cr. L., § 679-689.

Roscoe, in his work on Criminal Evidence, after quoting an English statute making it a capital offence: "When, in the language of the statute, a party shall, by any means whatever, cause to any person any bodily injury, dangerous to life, with intent to commit murder," thus proceeds to comment :

"Where a party was indicted under the above section for inflicting an injury dangerous to life, with intent to commit murder, Patterson, J., held that the jury ought not to convict unless they were satisfied that the prisoner had in his mind a positive intention to murder, and that it was not sufficient that it would have been a case of murder, if death had ensued." Roscoe, p. 782.

The Attorney General in his able argument admits that "as an abstract legal proposition" this charge, without the qualification taken from the proffered special charge, may not have been a correct enunciation of the law, but that applied to this case he asserts it correct.

2. And this brings us to the consideration of this special charge, which forms the subject of the second bill of exception, above referred to.

This charge asked by the counsel for the accused was as follows :

"It is not sufficient that the offence would have been murder had death ensued to bring it within the statute, the jury must be satisfied that the prisoner had a positive intention to commit murder."

The judge refused the entire charge save the latter part of it, "that the jury must be satisfied that the prisoner had a positive intention to commit murder."

The addition of these words to the original charge given did not, as contended, cure the defect or vice therein. Its force was left untouched. Its meaning was unchanged and unimpaired. Together they would in effect amount to this :

"The jury must be satisfied that the prisoner had a positive intention to commit murder ; but if the evidence shows that it would have

State vs. Pitts.

been murder if death had ensued, that, in itself, will be sufficient ground for the jury to infer the existence of the intention to murder."

And as thus formulated, it is manifest that it could effect no modification of the original charge.

From the explanation given by the trial judge of his ruling in the bill of exceptions, he seemed to believe that his charge was proper in this case for the reason that the weapon used in this instance was a double-barreled shot gun, the use of which alone afforded indubitable proof of the murderous intent, and such is likewise the contention of the Attorney General. To this, reply is made by the counsel for the accused, that the double-barreled shot gun was shown to have been loaded with fine shot, that the wound inflicted was slight, and that the accused discharged only one barrel of the gun; all of which he contends negatives any intention of killing.

From an exhaustive consideration of the law bearing on this point, we are satisfied that the judge's rulings were erroneous and to the prejudice of the defendant.

This conclusion makes it unnecessary to consider the motion in arrest of judgment, which the record, also, contains.

It is therefore ordered, adjudged and decreed that the sentence be annulled and set aside, the verdict be quashed, and the cause remanded to the lower court to be proceeded with according to law.

Poché, J., takes no part, having not heard the argument.

No. 196.

THE STATE OF LOUISIANA VS. JOHN PITTS.

Where the record exhibits no showing whatever of the return and presentation of the indictment by the grand jury into open court, the defect is fatal.

A PPEAL from the Seventh District Court, Parish of Catahoula.
Ellis, J.

Lucius Thompson, District Attorney, for the State, Appellee.

J. N. Luce, for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. An assignment of errors is filed, one ground of which is absolutely fatal, viz: "That the record does not show the finding of the indictment nor the return and presentation of the indictment by the grand jury in open court."

State vs. Pierre.

The first entry on the minutes of the court begins: "In this case, the accused being present in the court, was arraigned, pleaded not guilty, etc."

Mr. Bishop says: "When the grand jury is the body to take the first step in the court against the prisoner, it *presents* to the court a written accusation of crime; and this *presentment*, after being duly returned into court and made a part of its record, is called an *indictment*." 1 Bishop Cr. Proc. § 36.

This illustrates the importance of the presentment into open court as essential to the very existence of an indictment in its consummated force and effect.

We have heretofore held that entire absence from the record of any showing of such return into open court is fatal. State vs. Shields, 33 Ann. 993; see also Brown vs. State, 9 Yerg. 198; Chappell vs. State, 8 Id. 166; Com. vs. Johnson, Thach. Cr. cases, 284; State vs. Cox, 6 Ired. 44; Nomague vs. People, Breese, 106.

This necessitates the remanding of the case.

It is, therefore, ordered and decreed, that the verdict and sentence be reversed and set aside, and that the case be remanded for further proceedings according to law.

No. 206.

THE STATE OF LOUISIANA VS. JOSEPH JEAN PIERRE.

One may be indicted by a name other than his true one, if he is sometimes called by it, answers to it when called, and makes an appearance in court demanding relief under it.

The provisions of act 124 of 1874, making a distinction between grand and petit larceny do not conflict with, or repeal those of section 814 of the Revised Statutes, denouncing the crime of horse-stealing.

An immaterial and impossible date in an indictment may be corrected at any time; particularly when the date is not of the essence of the offense charged.

It is the right and the duty of judges to cause proper corrections to be made in the minutes of their courts, to the end that same may conform to the truth; especially when errors, or omissions are within their personal knowledge.

It is not necessary that the minutes should show that the defendant was present at the time a motion to quash is tried, nor when an indictment is amended in an *immaterial* matter.

A PPEAL from the Twenty-first District Court, Parish of St. Martin.
Mouton, J.

C. H. Mouton, District Attorney, for the State, Appellee.

Edward Simon, for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The defendant having been convicted of horse-steal-

39	915
48	1567
48	1568
39	915
50	1348
50	1349
39	915
116	609
39	915
125	781

State vs. Pierre.

ing, and sentenced to two years' imprisonment at hard labor, prosecutes this appeal; and upon sundry bills of exceptions taken to the rulings of the trial judge, overruling his motion to quash, application for a continuance, and motion in arrest of judgment, etc., he relies for relief.

I.

The motion to quash the indictment assigns:

1st. That his name is Louis Victor, and not Joseph Jean Pierre, as stated therein.

2d. That section 814 of the Revised Statutes, under which he is indicted, has been repealed by act 124 of 1874, which created the crimes of grand and petit larceny, and repeals all laws in conflict therewith.

On the trial of the first ground of the motion the following facts, substantially, were elicited, viz:

That when called upon to be arraigned, the clerk addressed him as Joseph Jean Pierre, and asked him if that was his name, and he replied that it was not, and gave another. The court then asked him if he was not known, and sometimes called Joseph Jean Pierre, and he replied in the affirmative. He was thereupon arraigned, pleaded not guilty, and prayed for a trial by jury.

It also appears that subsequent to the defendant's arrest under the indictment, he was incarcerated in jail, and petitioned the judge to fix the amount of his appearance bond, and it was accordingly done; and on his procuring the necessary security he was released from custody. In that petition, order and bond he is styled Joseph Jean Pierre. The jailor states that when the bond was prepared he called the defendant by that name; that he answered, and, as that person, he signed, in his presence, the appearance bond, and was by him released from confinement.

There is no force in the objection.

Section 814 of the Revised Statutes denounces horse-stealing, and not larceny; and it does not conflict with the provisions of act 124 of 1874, classifying the crime of larceny in two grades, as grand and petit larceny.

II.

Defendant made an affidavit for a continuance in order to obtain the testimony of an absent witness, which was refused; but we cannot examine the matter, as the defendant retained no bill of exceptions to its refusal.

III.

Further objection was raised by the accused to the district attorney making a correction in the indictment of the date at which the crime

State vs. Pierre.

was charged to have been committed—that is to say, by changing 1887 to 1886—and on the day the cause was called for trial, and after the jury had been empaneled, but prior to the commencement of the trial.

The date laid in the indictment for the commission of the offense was the 22d of December, 1887—a date which has not yet arrived, and hence an impossible one.

The record shows that the grand jury only returned the bill into court on the 8th of September, 1887, making the one given in the indictment a manifestly erroneous date. In the crime of horse-stealing the date at which it was committed is not of its essence; and the correction was properly permitted.

IV.

The defendant moved the arrest of the judgment of the court on various grounds, viz:

1st. That the minutes of the court do not show that the indictment was found by the grand jury, or was returned into court while it was in session; and if returned into court it was not returned and signed by the foreman of the grand jury in his official capacity.

2d. That the minutes do not show that the accused was present in court when the motion to quash was tried, and when the amendment to the indictment was offered and made, etc.

3d. That the indorsement of the foreman of the grand jury upon the bill of indictment is in every respect informal, and irregular, and deficient in law; and the finding was not recorded, etc.

From the bill of exceptions it appears, that the minutes did not show that the indictment that was returned into court was indorsed by the foreman of the grand jury; and the judge permitted the district attorney to have them amended by the clerk *instantly* by inserting the name and capacity of the foreman.

The endorsement on the bill is in strict keeping with the amendment; and the trial judge says, on assigning his reasons therefor: "The court holds that it can, at any time, make necessary corrections of its minutes, especially, as in this case, the correction is made for the purpose of supplying a material omission, and correcting one within the *personal* knowledge of" himself; and that same was done for no other purpose than to make the minutes conform to the facts.

We think he had the undoubted right to permit the correction after the motion in arrest of judgment had been filed. To have permitted the defendant to take advantage of a *known* and *palpable* error of this kind would have been wrong indeed. 31 Ann. 387, 406; 32 Ann. 558, 224.

State vs. Bassenger.

It was not necessary that the defendant should have been present in court at the time the motion to quash was tried, or when the indictment was amended. It is only necessary that he should be present at all the important proceedings taken in the course of the trial and when the verdict of the jury is pronounced. *State vs. Clark*, 32 Ann. 558.

As we had occasion to observe previously, the endorsement of the foreman of the grand jury on the indictment was in good form and correct.

We find no error in the judgment and it is therefore affirmed.

Justice Poché not having been present at the trial takes no part in the opinion.

No. 198.

THE STATE OF LOUISIANA VS. W. H. BASSENGER.

A motion for a continuance, based on an *affidavit* which is insufficient, cannot be allowed. A motion to compel the State to elect between two counts, which does not set forth the grounds upon which it rests, cannot be granted. The overruling of it cannot be reviewed on appeal, when the bill taken to the refusal of the court to order the election, does not set forth either those grounds or those on which the action of the trial judge was predicated.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

J. J. Foley for Defendant and Appellant.

The opinion of the court was delivered by

BERMUDEZ, C. J. The defendant was prosecuted on two counts: 1st, stabbing with a dangerous weapon with intent to kill and murder; and 2d, inflicting with a dangerous weapon a wound less than mayhem.

From a conviction on the first count and a sentence of five years at hard labor, he appeals.

The record shows two grounds of complaint to the refusal of the trial judge: 1st, to continue the case; and 2d, to compel the State to elect.

The first bill of exception taken to the overruling of the motion to continue, owing to the absence of a witness, does not rest on solid foundation.

As reasons in support of his refusal the district judge says: *that* the accused knew of the fixing of his case for some time and though represented by counsel he has not had him summoned; *that*, not the least diligence has been used to procure the attendance of the witness; *that*

State vs. Waggoner et al.

neither the materiality of the evidence to be given, nor what the evidence is, appears in the *affidavit*; that, although the affidavit be fatally defective, still, if any statement by counsel made it probable that this witness would be procured and that his testimony was material, he would have granted the continuance.

Further examination of the bill shows that the accused does not swear that, notwithstanding due diligence, he has failed to ascertain and does not know the place of residence of the witness. He might have known it well.

Under the circumstances, there being nothing to impugn the reasons assigned by the district judge which we find sustained by the record, we cannot say that he did not rule correctly.

The second bill is to the refusal of the trial judge to require the State to elect between the two counts.

The bill does not show on what grounds the motion to elect rests, or those on which it was refused.

The bill is informal and does not furnish *data* sufficient to authorize or justify an inquiry into the correctness of the ruling on the motion.

The rule for a new trial is based on four grounds:

It refers to the two refusals just considered, to the illegal admission of certain evidence to which no bill was taken and to the averment that the evidence did not warrant the verdict, a reason with which we are not concerned.

Judgment affirmed.

No. 213.

THE STATE OF LOUISIANA VS. J. A. WAGGONER ET AL.

In all criminal trials the State is entitled to six peremptory challenges for each of the parties who are jointly on trial.

The discretion of the trial judge to discharge jurors on the panel for reasons satisfactory to him will not be reviewed on appeal.

In cases of conflicting statements of facts, in bills of exceptions, between judge and counsel, the Supreme Court will accept the statements of the judge; unless proper means are taken by counsel to vindicate their contention.

Evidence taken in support of a motion for new trial will not be considered on appeal if it is not embodied in, or made part of reference of a bill of exceptions.

An attack by the defense on the veracity or credibility of a State witness, may be legally met in rebuttal by the State by testimony to sustain the assailed witness.

If the attempt is to show that the witness had previously made statements or declarations contradictory to his testimony on the trial, it is competent for the State to show that soon after the occurrences which he relates, he had made to persons other than the impeaching witnesses, declarations in harmony with his testimony on the trial, although the particulars of his statements thus made are not admissible.

39	919
45	1144
39	919
1118	196

State vs. Waggoner et al.

A PPEAL from the Second District Court, Parish of Bossier
Drew, J.

J. A. W. Lowry, District Attorney, and *M. C. Elstner* for the State,
Appellee.

Watkins & Watkins for Defendants and Appellants.

The opinion of the court was delivered by

POCHE, J. This appeal is brought up by J. A. Waggoner from a conviction of murder without capital punishment, under an indictment charging him and four others with the commission of said crime.

His complaints are numerous and are embodied in eight bills of exception.

I.

In his first bill he charges error in the ruling of the judge who refused to restrict the State to six peremptory challenges. Under the law, Act No. 30 of 1878, the State was entitled to thirty peremptory challenges as there were five accused jointly charged and tried together. *State vs. Green*, 33 Ann. 1408.

II.

His second complaint is levelled at the discharge by the judge of one of the jurors of the panel without allowing him a chance to test the qualification of said juror.

We are informed by the judge that he discharged the juror, before the latter was called, for reasons satisfactory to himself. In so doing, he did not trespass beyond the bounds of the discretion vested in him by law, and we have neither the power nor the disposition to interfere with the proper exercise of his discretion. *State vs. Somnier*, 33 Ann. 237; *State vs. Rountree*, 32 Ann. 1144; *State vs. Kane*, 32 Ann. 999.

III.

The defendant also complains that he was illegally denied the right of questioning a State witness who had described the wounds of the deceased, as to the effect of the first wound received by the latter.

But the judge emphatically denies the statement of the facts made by counsel, and asserts that the question was allowed and that it was answered by the witness. With due deference to counsel, we must be guided by the bill which is the recital of the incident under the signature of the trial judge. We have had frequent occasions to announce and to follow this rule, which we feel compelled to adhere to, as long

as proper means are not resorted to or provided for the purpose of adjusting differences of that nature which arise between judge and counsel.

IV.

Counsel urges that his client was injured by the following incident: A State witness, a brother of the deceased, was asked by the district attorney whether he made the affidavit against the accused after the first or second trip which he made to the place where the homicide had been committed; to which he answered that he made the affidavit on the occasion of his second visit, and after seeing the widow and the young son of the deceased. The charge that the attempt through this question was to create the impression on the minds of the jury that the witness had acted on information received from the widow or her child, is not borne out by the facts disclosed in the bill, and we are at a loss to discover wherein the judge erred in his ruling.

V.

The complaint embodied in the fifth bill, and which is to the effect that the district attorney was illegally allowed to put leading questions to a State witness who had stated that she was afraid to testify in the cause, is flatly denied by the judge, who asserts that no bill had been reserved on that matter during the trial.

VI.

Counsel also charges error in the ruling which allowed the district attorney to ask a witness where J. A. Waggoner was after the preliminary examination of his case. The judge says that the door to this inquiry had been opened by the accused himself, who had proved by witnesses that before the preliminary examination he had been allowed many liberties, and that he had not attempted to escape.

The evidence was properly allowed as rebuttal testimony; although the whole matter decidedly appears to be more trivial than important.

In justice to counsel, we must state that he has not dealt with that contention as at all serious.

VII.

The grounds which make up the seventh bill involve the only difficult question in the case.

They grow out of the following incident: The only direct testimony touching the homicide had been given by the son of the deceased, a boy of the age of ten or eleven years, who had testified that he had witnessed the commission of the deed, in broad daylight, and that he recognized J. A. Waggoner as one of the perpetrators of the same.

State vs. Waggoner et al.

As could be naturally expected, the defense resorted to all available means to impeach his credibility, to weaken his testimony, and destroy its effect on the minds of the jury. As one of such means, counsel for the accused asked, on cross-examination of the boy's uncle, whether he had not stated to a certain person that the little boy had told him "that he did not know who shot his father."

It then appears that in rebuttal the State introduced as a witness the widow of the deceased, the mother of the boy, who was asked whether the boy had made any statement to her touching his knowledge of the homicide, to which she answered that a few minutes after the murder, the boy had told her that he knew who had killed his father.

The theory on which the defense resisted that evidence, is that it was hearsay, not part of the *res gestæ*, and that it was not in rebuttal of any of its testimony previously introduced.

The evidence was not offered as part of the *res gestæ*, but was merely intended to sustain the boy, whose credibility had been avowedly assailed by the defense. The contention that the evidence was irrelevant because the defense had not questioned the mother on the subject-matter is not tenable. The party who offers a witness, whose testimony is impeached by the other side, cannot be confined in his warranted effort to sustain his witness, within the narrow bounds of an examination of the witness whose testimony was sought to be used in the attack.

The question raised by the defense in the course of examination which it had followed, was the credibility *vel non* of the boy as a witness in the case, and the door which it had thus opened could not be closed against the State.

As a rule of evidence, the right of a party to uphold and sustain his witness whose veracity has been assailed, rests on sound principles of justice and fairness as well as of law, and it finds ample sanction in jurisprudence.

The object of the defense was to impair the force and effect of the boy's testimony by showing that he had previously denied any knowledge of the homicide, and that his statements on the trial were the result either of corrupt influences or motives, or of malice towards the accused. It was, therefore, competent for the State to repel the attack by showing that his present statement was consistent with his previous declarations made at a time not suspicious. It is to be noted that the mother did not state the details of his declarations to her, but testified to the simple fact of his telling her that he knew who had shot his father.

Wharton in his valuable work on Criminal Evidence thus comments on this subject: - "On the other hand, where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence be rebutted. Thus where on an indictment for perjury a witness for the prosecution swore that B (the defendant in a trial for arson) was not at the place of the burning at the time of the fire, but was confronted at his cross-examination by his testimony to the contrary on the arson trial, it was held that, as he had been discredited, he might be sustained by showing that he had made to C, immediately after the arson, a statement in harmony with that made by him on the perjury trial, though the particulars of the statement were inadmissible." Sec. 492.

In the same line of thought, this Court said in the case of Fahey, 35 Ann. 12: "The veracity of a leading State witness having been assailed by the defense, it was not only legal but incumbent on the part of the prosecution to attempt by testimony to maintain his good character."

The same line of conduct was justified in the case of Robertson, 38 Ann. 618, in which the Court said: "The object of calling this witness was not to furnish original or independent proof to support the charge itself, but the sole purpose and effect of such evidence was to sustain the testimony of the prosecution—the principal witness." See also *State vs. Melton*, 37 Ann. 77; *Phillips on Evidence*, pp. 303, 304.

It is, therefore, safe to conclude that the bill discloses no error to the prejudice of accused.

VIII.

The last bill is levelled at the refusal of a new trial. The main grounds of the motion were the alleged misconduct of the jury, and of one of the counsel for the prosecution in his line of argument to the jury, but as the evidence taken in support of the motion has not been legally embodied in, or legally connected with the bill of exception, it cannot be considered by this Court.

This rule is too deeply imbedded in our jurisprudence to need any further comment at our hands at this late day. We leave the point with a simple reference to our recent utterances on the subject in the case of Deas, 38 Ann. 581.

The charge that the accused was not present, as far as the record shows, during the hearing of a motion for a change of venue, that the jury made a change of foreman during their deliberations, are contained

McWilliams vs. McWilliams.

in the brief of counsel only, were not urged below and are not contained in an assignment of errors; hence they cannot be considered.

A thorough review of the whole case leaves us convinced that the accused has had a just, fair and impartial trial, and that we are powerless to relieve him.

Judgment affirmed.

No. 201.

ALICE B. McWILLIAMS vs. J. G. McWILLIAMS.

In an action to annul a sale on the ground of *lesion* beyond *moitié* of property previously donated by the seller to the vendee, the plaintiff puts himself out of court by alleging that the price mentioned in the act, though one-eleventh of the value of the real estate at the time, was not paid, and by not alleging error, imposition or fraud on the part of the vendee in withholding the amount.

In such cases, the parties must be left in the condition in which they voluntarily placed themselves at the date of the last conveyance.

The transfer was not prohibited by law. The parties had a right to enter into the contract by whatever name they may have designated it.

The act was transalative of real estate, and has served as a vehicle to pass the title from the one to the other.

A PPEAL from the First District Court, Parish of Caddo. *Taylor, J.*

Leonard, Marks & Bruenn, and Land & Land, for Plaintiff and Appellant.

Alexander & Blanchard, for Defendant and Appellee :

"The real cause and consideration of a written contract involving the transfer of immovable property may be shown by parol evidence, although it appear that the real consideration was different from the one expressed in the contract." 32 Ann. 432.

"The true cause of a contract may be shown by any legal evidence, oral or written, and the evidence adduced for that purpose never can be considered as contradicting the act." 3 Ann. 230; 5 Ann. 741; 13 Ann. 25, 340; 15 Ann. 666; 26 Ann. 545; 33 Ann. 1033; 35 Ann. 560; 36 Ann. 549; 38 Ann. 736.

The plaintiff having attacked the authentic act by charging in her petition that one of its recitals, viz: The payment of the money which was acknowledged to have been paid in cash, was untrue, was thereby estopped from objecting to evidence going to show the true nature and consideration of the act. 22 Ann. 286; 39 Ann. 575.

In an action for the rescision of a sale on the ground of *lesion* the evidence is not confined to the intrinsic value of the property, but is extended to the value of the plaintiff's pretensions, the nature of his title, and the circumstances by which he is surrounded at the time of the sale, and all testimony, oral or written, on these points is admissible. 16 L. 380; 1 R. 125; 37 Ann. 22.

"The action of rescision for *lesion* was intended for the protection of those who have been driven by their necessities, or have through weakness or improvidence, suffered a loss of land of more than half its value." 1 R. 125; 16 L. 380.

McWilliams vs. McWilliams.

Lesion, however enormous it may be, has no effect to invalidate the contracts of persons of full age and under no incapacity, except certain designated contracts, of which this is not one. 37 Ann. 554; C. C. 1863, 2230.

The plaintiff did not allege or prove that she was either driven by her necessities to make the sale, or made it through weakness or improvidence. Neither is it alleged or shown that her husband, who joined and authorized her in the act, was in necessitous circumstances, or was weak or improvident. On the contrary, the petition itself conclusively shows that the sale was not made for the purpose of obtaining money, for it specially alleges that no portion of the purported consideration was ever paid.

The court is bound to give effect to the written contract of the parties by ascertaining what was their true intent. A contract is not the less valid though the true cause or consideration be not expressed in the act itself. C. C. 1894, 1900.

The plaintiff's own allegations and the evidence in this record, show, beyond the shadow of a doubt, that the instrument which bears upon its face the form of a sale, was simply a revocation of a donation by consent of both parties, or a reconveyance and return by the donee of property which had previously been donated to her by her father.

"It has been adopted as a general rule of law, that a sale without a price is a donation." 13 L. 382.

"Whether an act which is set up as a sale be good as such or not, yet if it be clothed with all the formalities required by law to give force and effect to donations *inter vivos*, it will be considered and held valid as a donation." 10 L. 85; 12 Ann. 529, 681; 15 Ann. 566.

A debt or obligation contracted or incurred during the existence of the community, for improvements made upon the separate property of the wife, is binding upon her. 29 Ann. 749; 34 Ann. 1163.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to annul a sale of real estate by the plaintiff to the defendant on the ground of lesion beyond *moiety*, and to have herself decreed the owner of the property.

The defense is that the transfer is valid and, if not, that the plaintiff should be condemned to pay for improvements on the land.

From an adverse judgment the plaintiff prosecutes this appeal.

It appears that on the 19th of July, 1883, the defendant, by notarial act, in consideration of natural love and affection, donated the property in question to the plaintiff, his daughter, and that she, on February 16, 1886, by a notarial act, on its face purporting to be a sale, transferred the same to him, apparently, for one thousand dollars.

It is claimed that the property was shown at that last date to be worth eleven times that sum (\$11,000), and the contrary is not pretended.

The record contains as plaintiff's evidence the acts of donation and sale, the value of the property at the date of sale. In it is found also testimony as regards the defendant in support of his claim for improvements.

The fundamental ground of the action is *lesion*, that is injury suffered in not receiving a full equivalent for the property. This remedy

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is founded on its being the effect of implied error or imposition. R. C. C. 1860.

The petition, however, sets forth the formal averment that the consideration of the sale *never was paid*.

It does not allege that the amount, in the *bona fide* intendment of the parties was to have been paid, or state any circumstance from which it can be inferred that the injury said to have been sustained is the result of any error or imposition. It does not even insinuate that on some fraudulent or unfair representation, on his part, the defendant has dishonestly withheld it.

In the face of the allegation of non-payment, and in the absence of any charge impugning the good faith of the defendant, it must be deduced that the price mentioned in the deed, never was contemplated to be paid, and that the form of sale was preferred and adopted, as the best usual mode or channel for the gratuitous transmission in view of the property by the original donee to her donor.

If, then, no price was designed to be paid, and the purpose of the transaction was simply a transfer of the property back to the latter, how can it be consistently pressed that injury was sustained to any extent, in consequence of the non-payment?

It is clear that, but for the allegation of non-payment, the plaintiff should have recovered in the absence of counter legal evidence; but it is apparent that by this judicial admission, the plaintiff has closed her mouth against any complaint of injury sustained, and thus irrevocably put herself out of court.

The maxim: *Restituitur tanquam lesus* fully applies.

The donation and the transfer of the property back must be considered under the light of, and together with, the averment in the petition.

Viewed as a whole, the plaintiff must be held, therefore, as having solemnly declared, in the most conclusive manner that she has, *without any consideration*, and in the form of a notarial act of sale, willfully, knowingly and gratuitously, conveyed to her father, the defendant, the property which he had some time previously donated to her.

She had a perfect right to do this, and having done it, she is concluded by her acts.

It is unnecessary to pass upon the nature and character of this conveyance, and say whether it be a donation, a cancellation or a revocation of the previous donation, or a retrocession, or any other act.

It is manifestly a title *translative* of real estate which has served as a vehicle to accomplish the purpose of the parties, as proved by their

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deed, which was, to pass the property from the plaintiff's name to that of her father. *Stat mole.*

The district judge, in an elaborate and considerate opinion, has reached the conclusion that the plaintiff had no foundation to stand upon, and has left the parties in the condition in which they deliberately placed themselves on February 6, 1886.

We are not authorized to say that he has misconceived the facts and misapplied the law.

Judgment affirmed.

Justices Poche and Todd, not having heard the argument, take no part.

No. 216.

THE STATE OF LOUISIANA VS. H. HILL ET AL.

It is not every error in the rulings of a judge during the progress of the trial that will justify the setting aside of the verdict.

To warrant such action on the part of the court it must be so grave an error as to induce the belief that but for its commission a verdict favorable to the occasion might have been returned.

Where there is a disagreement between the trial judge and the counsel for the accused touching the facts connected with a ruling complained of, and the record does not enable the appellate court to ascertain the exact truth, the statement of the judge appearing in the bill of exceptions or otherwise of record should control the conclusion of the court on the controverted points.

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

D. C. Scarborough District Attorney, for the State, Appellee.

Jack & Dismukes for Defendants and Appellants.

The opinion of the court was delivered by

Todd, J. The defendants, H. Hill and Noah Cloud, charged with arson, the first as principal and the other as an accessory before the fact, were tried, convicted and sentenced to imprisonment at hard labor, the former for seven years and the latter for ten years.

Cloud alone has appealed.

He complains of two rulings of the trial judge on questions of evidence and presents two bills of exception.

1. The first bill was taken to the ruling of the court permitting a witness on the stand to be interrogated touching the relations existing between Hill and Cloud sometime previous to the commission of the

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offense, and the declaration of the former concerning the failure or insolvency of the latter.

It was competent to prove the relations between these parties and the only part of the interrogations that could under any circumstances be held objectionable, is that calling for the declarations of Hill in regard to Cloud's failure.

The answer of the witness to this question, if answered at all, does not appear in the record and so we have no means of judging whether such answer was in any way prejudicial to the accused, or had any connection whatever with the crime charged. From the argument of the defendants' counsel we may readily infer that there was no such connection, for he characterizes the question as wholly irrelevant and asks what possible bearing it could have had on the commission of the crime.

It is not enough that a question to a witness is objectionable, but to justify the disturbance of a verdict against a person for a grave offense—such as arson—it must clearly appear that the question was intended to call out facts that were wholly inadmissible and that the answer to it would manifestly work to the defendants' injury and prejudice. There is no such showing here, but on the contrary, so far as we can judge from the reasons of the judge given in the bill and the argument of counsel, the question was an idle one, wholly irrelevant and in no way calculated to affect the accused.

We repeat that it is not every error committed by the trial judge during the progress of a prosecution that would authorize a setting aside of the verdict, but it must be an error of such grave import as to reasonably justify the belief that but for its commission a verdict favorable to the accused might have been returned. *State vs. Brett*, 6 Ann. 658; *State vs. Garic*, 35 Ann. 974.

2. The second bill was taken to the admission of certain declarations of Hill, the principal in the crime charged, evidently of a damaging character against the defendant Cloud.

From a reading of the bill it would seemingly appear that an objection was made to the admission of such declarations upon the ground that these declarations were made by Hill, co-conspirator with Cloud, after the commission of the offense and after the purpose of the conspiracy had been consummated and the conspiracy itself at an end.

This objection, if made, was a good one and required the rejection of the testimony offered; but we note in the bill of exceptions that the judge in explaining his ruling states positively and unequivocally

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that no such objection was made to the testimony and that if it had been made he would have sustained it.

It further appears that this disagreement between the judge and the counsel was caused by the fact that the bill of exception was not prepared and signed during the progress of the trial, and when objections were made to the evidence offered, but after the trial had ended and not then in open court, but in chambers, a very irregular and objectionable practice, which is well calculated to lead to such differences between the judge and counsel.

Following established precedents, we are bound in such cases of disagreement to be governed by the statements of the judge where the record affords no conclusive proof on the subject, as in the instant case.

This disposes of the matters embraced in this appeal; and under the views expressed it is plain that there is no reason to disturb the verdict and sentence complained of.

Judgment affirmed.

No. 202.

H. L. FOX & CO. VS. JOHN R. JONES.

Plaintiffs, having sold a locomotive to defendant at a price of \$3000, subject to latter's right to reject it after trial, defendant did reject it. Agreement then made that defendant should further use the locomotive for twelve days, at end of which he was either to deliver it or pay the price. He afterwards refused to do either and held and used the locomotive. Plaintiffs claim damages for tortious conversion in the value of the locomotive fixed at a higher amount than the price originally agreed. Case was tried by jury on this issue, plaintiffs asserting value to be greater and defendant asserting it to be less than the price. Jury found for greater sum. Held: that defendant having abandoned the sale and sought to reduce his liability below the price, cannot now set up the price as the measure of his debt. Had the jury found a less amount, the plea would not have been heard.

Plaintiffs are not entitled to special damages for attorney's fees in this suit and amendment to that effect refused.

The verdict of the jury, being based on their estimate of conflicting evidence and being expressly approved by the judge, will not be disturbed.

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

Land & Land for Plaintiffs and Appellees.

Wise & Herndon for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. There is no dispute as to the following facts, viz:

Plaintiffs sold to defendant a second-hand locomotive engine at the price of \$2000, subject, however, to trial and rejection if not found sat-

39	929
51	457
39	929
52	601

39	929
118	368

39	929
1124	871

Fox & Co. vs. Jones.

isfactory. The engine was shipped to and received by defendant, who, after trial, rejected it, but, at the same time, requested the use of it for twelve days longer as a compensation for delay, etc., binding himself to turn it over to plaintiffs at end of that term or to pay for it, which proposition was accepted. At the expiration of the term defendant refused either to surrender the locomotive or to pay for it.

After putting him in default, plaintiffs brought his action by an original petition asking judgment for the return of the locomotive with damages, or for the price. Subsequently and before answer they amended their petition, alleging the tortious conversion of the property and claiming damages in \$2600 as the value of the engine and \$250 as special damages for attorney's fees in this suit.

Defendant, at first, filed an answer of general denial, which he subsequently amended by an offer to return the locomotive and to pay a full price for its use.

No exception or objection was made to the amended petition of plaintiffs, and the case was tried on the issue of tortious conversion and the measure of damages in the value of the property. On defendant's prayer, the trial was before a jury. Evidence was taken *pro* and *con* as to the value of the locomotive, plaintiffs' witnesses estimating it as high as \$2500, while defendant's placed it as low as from \$1000 to \$1500. The jury found a verdict for \$2,361.61, for which judgment was rendered.

Defendant assails the judgment on two grounds:

1st. He claims that he is bound only for the stipulated price of the engine, viz: \$2000. We think it is too late for him to take this position. He voluntarily abandoned his conditional contract of sale, accepted the issue of conversion, and the value of the engine as the measure of damages. Had the jury followed the estimates of his witnesses and found a value less than the stipulated price, we should not have heard this plea from him, and we cannot listen to it now.

He attacks the verdict as excessive. Ordinarily the price at which plaintiffs had sold the property might be taken as a binding valuation thereof by themselves. But reasons are given why the price stipulated turned out to be less than the value at the time of sale and why the value had subsequently advanced.

The evidence as to the value was conflicting; the finding of the jury is fully supported by plaintiffs' evidence to which the jury evidently gave credence. It is supported by the approval of the judge expressed in his reasons for refusing the new trial. We find no grounds

 State vs. Carriés.

justifying us in disturbing it, and considering the illegal and high-handed course of defendant, we have no inclination to do so.

The judge did not err in charging the jury that the claim for attorney's fees as special damages was untenable and the amendment in that respect asked by plaintiffs is denied. *Chapuis vs. Waterman*, 34 Ann. 58; *Roos vs. Goldman*, 36 Ann. 132; *Chamberlain vs. Worrell*, 38 Ann. 348.

Judgment affirmed.

 No. 211.

THE STATE OF LOUISIANA VS. ABRAM CARRIÉS.

Notwithstanding the defendant's challenges have been exhausted, at a time when one made by the counsel for the State is sustained, no ground of complaint is afforded the former. The right is that of selection, and not that of rejection by the State.

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

D. O. Scarborough District Attorney, for the State, Appellee.

W. G. McDonald for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The accused prosecutes this appeal from a conviction of murder, without capital punishment, and a sentence of lifetime imprisonment.

His sole complaint is that the trial judge incorrectly sustained a challenge for cause, made by the State's counsel to the juror, G. D. Tessier, and excused him from service, notwithstanding his (defendant's) challenges had, at the time, been exhausted and those of the State had not.

In *State vs. Wyatt Cruch*, 38 Ann. 481, we said: "It is no longer an open question in criminal jurisprudence that the rejecting of a juror by the trial judge, even if erroneous, affords of itself no legal ground of complaint to the accused."

In *State vs. Shields*, 33 Ann. 1410, the same question was passed upon and the same doctrine was announced.

While it is true that the challenges of the defendant had been exhausted at the time, he was not compelled to accept an obnoxious juror, on account of the judge's ruling. The juror was excused from service.

39	931
44	334
39	931
50	1139
39	931
104	586
39	931
116	834

Hamilton et al. vs. Bank.

His right is confined to the *selection* of jurors. He has none to complain of the rejection of them by the State. *State vs. Cruch*, just cited; *State vs. Durr*, unreported. The ruling of the trial judge was correct.

Judgment affirmed.

No. 205.

W. E. HAMILTON ET AL. VS. STATE NATIONAL BANK.

- A judicial mortgage attaches to real property of the debtor and affects third persons on registry of the judgment.
- A voluntary transfer subsequently made by the debtor to one who was then a creditor for the unpaid price of sale of such property to such debtor, in consideration of the return of the note, and who had not acquired, from the original vendor, the right to demand the nullity of the sale, in case of non-payment of the price, does not discharge the judicial mortgage.
- The property thus transferred passed *cum onere* and is liable to be subjected to the payment of the judgment.

A PPEAL from the Second District Court, Parish of Bossier.
Drew, J.

Snider & Smith for Plaintiffs and Appellants:

- Mortgages and privileges are extinguished and confused when the creditor acquires the ownership of the thing subject to the mortgage and privilege. *R. C. C. 3277, 3411*; 15 Ann. 407; 25 Ann. 559, 560; 34 Ann. 1032, 1035; 33 Ann. 454, 463.
- A conventional sale or exchange, although made in satisfaction of a prior mortgage, does not discharge or extinguish existing mortgages. The sale must be judicial to have that effect. *Ayraud vs. Babin*, 7 N. S. 471.
- A consent sale in consideration of a prior mortgage does not defeat subsequent mortgages. The property passes *cum onere* and the younger mortgage may be enforced against the immovable in the hands of the third possessor.
- The right to have the sale dissolved for non-payment of its purchase price does not pass with the transfer of the note of the purchaser. *Swan vs. Gayle*, 24 Ann. 501 to 504; 9 Ann. 84; *Heirs of Castle vs. Floyd*, 38 Ann. 583 and authorities there cited.
- The general denial only puts at issue the facts necessary to plaintiff's recovery. *Heirs of Wood, vs. Nicholls*, 33 Ann. 749, and authorities there cited.
- Extinguishment of mortgages by effect of the dissolving condition is analogous to that of payment, release, etc.; it is a plea that must be specially pleaded. 33 Ann. 479 and authorities.
- The general denial reduces the controversy between the parties to the question of the truth or falsity of plaintiff's allegations. The petition alleged that defendant is the owner and third possessor of the land in controversy and that said lands are subject to plaintiff's mortgage, and that the defendant admitted on the trial that plaintiff's mortgage is valid and an existing judgment against C. C. Nowell and that the same was recorded as a mortgage against him. Nowell, while he was the owner of the land; the answer shows that said Nowell is the author of defendant's title. Defendant has admitted the mortgage versus the land and has not shown that it was lifted.

Hamilton et al. vs. Bank.

Litigants must be held closely to their pleadings, and courts will decide the issues as made by the pleadings and nothing more.

A sale or exchange from the debtor to the creditor in consideration of a prior mortgage will not erase nor affect subsequent mortgages unless the purchaser be the wife of the vendor.

J. H. Keyser for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to enforce a judicial mortgage against property belonging to the defendant bank.

The material facts as ascertained from the admission of the parties, are the following:

On March 20, 1878, Connell sold the property to Nowell for \$4070, for which he issued his note due November 1st, 1879. The act was recorded.

On September 21st, 1878, following, plaintiffs obtained a judgment against Nowell for \$2102.67 with interest and subject to a small credit, which was recorded three days afterwards.

On December 10th, 1881, Nowell transferred the property to Payne, who had acquired the note, the consideration of the conveyance being the return of the note of the latter to the former.

On July 31, 1883, Payne transferred the property to Payne, Kennedy & Co., who, on February 11, 1887, conveyed it to the bank defendant herein.

The plaintiffs pray merely that their judicial mortgage be recognized and enforced by the sale of the property, in default of abandonment of it by the bank. Their averments are denied and title is claimed by the defendant. The appeal is taken from a judgment adverse to plaintiffs.

The question presented is simply, whether the mortgage resulting from the registry of plaintiffs' judgment against Nowell has continued to attach to the land, notwithstanding the transfer of it by Nowell to Payne.

It is clear that, as the property stood in the name of Nowell at the date of the recording of the judgment, the judicial mortgage did affect it. R. C. C. 3328.

It is also clear that, had not Connell transferred the note and had he not been paid the same, he could have brought a suit to annul the sale and that the property would have returned to him free from the judicial mortgage in favor of plaintiffs. 19 L. 30; 3 Ann. 217; 6 Ann. 2; 12 Ann. 699; R. C. C. 2045, 2046, 2047, 2561; 8 L. 83.

Hamilton et al. vs. Bank.

But the fact is, that Connell did transfer the note to Payne but did not at the same time, confer on him the right to demand the nullity of the sale in case of non-payment of the price.

The transfer of the property by Nowell to Payne must not therefore be viewed as though made to Connell. 38 Ann. 583.

It consequently follows that the property has not passed *free* from the judicial mortgage, but that it was conveyed *cum onere*.

It has been held and properly too, that, even where a sale is annulled by agreement between the original parties, whatever its validity may be as to them, the retroversion does not necessarily affect third persons. Ricks vs. Goodrich, 3 Ann 217.

In a subsequent case, Mr. Justice Roat delivered an interesting and learned opinion in which it is distinctly reannounced that, where the retrocession is the voluntary act of the parties, the rights of third persons are not always affected thereby. Chretien vs. Richardson 6 Ann. 2.

In a more recent suit, decided by the present Court, the following language was used :

"If the parties desire to substitute the voluntary for the judicial rescission and to give to the former the extraordinary effect of revoking the contract *ab initio* and of obliterating all claims and privileges of third persons against the property, which may have been acquired during the possession of the purchaser, we are satisfied they were bound to comply, in their voluntary act, with all the requirements which the law would have imposed in the judicial proceeding. The purchasers had no authority to abandon or even to compromise the rights secured to them by law to the prejudice of a creditor who, by seizure or orthewise had acquired a privilege on the property."

This exposition of the law rests on conservative principles, followed by all civilized nations. *Sic utere tuo, etc.* R. C. C. 11, 1989.

Had the sale, under judicial process, taken place and the property not realized more than enough to satisfy the vendor's claim, necessarily the judicial mortgage would have ceased to affect the property which would then have passed unincumbered to the adjudicatee.

Under the circumstances of this case, it is manifest that a *fortiori* the voluntary transfer does not affect such third persons, as it was made, not to the original vendor, but to one who was only a creditor for the unpaid price of sale and who had not been subrogated to the right of the vendor, to demand the nullity of the sale on account of non-payment of the price and the less so, as in this instance, suit had been brought to enforce payment, pending which the debtor transferred the property in consideration of the return of the note.

State vs. Jones.

In *Castle vs. Floyd*, 38 Ann. 583, this Court held that the right to have the sale rescinded owing to the non-payment of notes representing the purchase price, did not pass with the note without a special agreement to that effect.

It is perhaps proper to state that the suit brought to enforce payment had been instituted by Payne, Kennedy & Co., a firm of which Payne was a member and for which he had acted, and that, when the property was conveyed to him during the proceedings, it was in reality for account of the firm.

We therefore conclude that the judicial mortgage claimed by the plaintiffs ought to have been recognized and that, in default of a surrender of the property, or satisfaction of the debt, the judgment must be enforced by sale.

We do not pass upon any mortgage or other rights, if any, which may be asserted adversely to plaintiffs, as no issue on that subject was presented by the pleadings.

It is therefore ordered and decreed that the judgment appealed from be reversed, and that there be now judgment in favor of the plaintiffs recognizing the judicial mortgage claimed by them on the land described, and that, in default of payment of that judgment or surrender of the property, the same be seized and sold, after compliance with all legal requirements, to satisfy the judgment in capital, interest and costs in both courts.

Fenner, J. takes no part.

No. 199.

THE STATE OF LOUISIANA VS. ALONZO JONES.

The conclusive presumption of the English common law that a male infant under the age of fourteen years is physically incapable of committing the crime of rape, was based entirely on the physiological fact that, under the climate and other conditions prevailing in England, puberty is very rarely attained under that age.

The contrary being unquestionably the fact in Louisiana, the rule has no application; following 2 Pick, 30; 2 Parker, 174; 14 Ohio, 222; 17 id. 515, 521.

PPEAL from the First District Court, Parish of Caddo.

Hicks, J.

John R. Land, District Attorney, *pro tem.*, for the State, Appellee:

The court may instruct the jury to try the case according to the law, the evidence and their experience. Bishop's Criminal Procedure, vol. 1, sec. 932.

The presumption of the common law, that an infant under the age of fourteen years is absolutely incapable of committing the crime of rape, does not prevail in America. Modified to our own circumstances and conditions, the law is: An infant under the age of four-

State vs. Jones.

teen years is presumed to be incapable of committing the crime of rape, or an attempt to commit it; but that presumption may be rebutted by proof that he has arrived at the age of puberty. *Deady's American Criminal Law*, sec. 22 b; *Williams vs. The State*, 14 Ohio Rep. 223; *O'Meara vs. The State*, 17 Ohio Stat. 521; *Penn. vs. Sullivan*, Add. Rep. 141; *Com. vs. Thomas*, 1 Virg. Cas. 307; *Com. vs. Green*, 2 Pick Rep. 381; *State vs. Handy*, 4 Harrington 566; *Moore vs. State*, 17 Ohio St. 521, etc.

Burglary is an attempt, and its special reprehensible quality is derived from the particular intent, and not from the act, which may be either evil or indifferent, hence the question of physical capacity to commit rape (the act) is foreign to the issue, the sole question being the intent. *Bish. Crim. Law*, vol. 1, sec. 738.

T. F. Bell for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The defendant was indicted under section 854 of the Revised Statutes for entering the dwelling-house of one Gilliland in the night-time, without breaking, with intent to commit a rape.

The record presents two bills of exceptions, viz :

1st. To the judge's refusal to give the following charge: "If the jury find from the evidence that the defendant, at the time of the offense charged, was under fourteen years of age, he is in law *conclusively* presumed to have been physically incapable of committing the crime charged in the indictment, and is therefore entitled to an acquittal."

2d. To the following charge given by the judge, viz: "That if the evidence shows that the defendant was, at the time of the offense charged, over seven and under fourteen years of age, the law raises the presumption that he was mentally incapable of distinguishing right from wrong, but the presumption may be rebutted by evidence of guilty knowledge of wrongdoing; and as to his physical capacity to commit the crime charged against him, the law raises no presumption whatever founded on age, but leaves said physical capacity as a fact to be determined by the jury from the evidence in the case and view of the accused and the experience of the jury in such matters."

I.

In his refusal to give the charges asked by defendant, the judge is sustained by the authority of the courts of Massachusetts, New York and Ohio. *Com. vs. Green*, 2 Pick. 380; *People vs. Randolph*, 2 Park. 174; *Williams vs. State*, 14 Ohio 222; *O'Meara vs. State*, 17 id. 515; *Moore vs. State*, ib. 521.

It is admitted that the charge asked embodied the rule adopted by the common law of England; but the American decisions above referred to, held that the rule was based upon the physiological fact that

in the climate and amongst the population of England and the other northern countries of Europe, puberty was so rarely attained under the age of fourteen in males as to justify the presumption that prior to that age a boy is incapable and hence cannot be convicted of rape. But recognizing that the period of puberty is affected by circumstances of race, climate, habits and conditions of life, and discovering, as a fact, that in this country puberty is frequently attained at an earlier age than fourteen, they refused to apply the English rule, holding that the rule, being founded wholly upon the facts prevailing in England, had no application to the different facts existing in this country.

The reasoning applies with much greater force to the climatic and racial conditions of Louisiana. These authorities fully sustain the refusal of the judge to apply the English rule and we have no hesitation in following them.

II.

It is claimed, however, that the charge actually given by the judge went further than the authorities above quoted, because the latter, while rejecting the *conclusiveness* of the presumption, still maintained the presumption itself as applicable until rebutted by proof; while the judge *a quo* charged that the law raised no presumption whatever founded on age, but left the physical capacity as an independent fact to be determined by the jury.

We think the judge's conclusion is the logical sequence of the rejection of the English rule; for if the common law of England does not establish a presumption applicable here, what other law establishes any presumption whatever? We have certainly no statute to that effect other than the act of 1805 (Rev. Stat § 976) which adopts the common law of England as to crimes, rules of evidence and criminal proceedings, "changing what should be changed," except so far as modified by statute. This statute placed us in the same relation to the common law of England on these subjects which was occupied by the States of Massachusetts, New York and Ohio, and holding, with the courts of those States, that it did not import this presumption because founded solely on facts and conditions which do not prevail in this country, we doubt the judicial authority to substitute it by a different presumption.

If, however, we were to follow the example of those courts in modifying the common law rule only so far as necessary to make it conform to the conditions existing here, we should still reach the same conclusion announced by the judge *a quo*.

State vs. Cole.

The Ohio court said: "In our State we know that many infants under fourteen are capable of being guilty, but that a majority are not capable under that age. Hence we are compelled to suit the rule of law to the facts, as the rule itself has no authority but in fact. Modified, then, to our circumstances and condition, the rule is, an infant under the age of fourteen is presumed to be incapable of committing rape, but that presumption may be rebutted by proof. *Williams vs. State*, 14 Ohio 222."

Obviously the modification was based on the fact stated that, in Ohio, "the majority are not capable under that age," which supported the presumption of incapacity, but subject to rebuttal.

Now, in Louisiana, we believe we hazard nothing in saying that a large majority of youths attain puberty before the age of fourteen years. Therefore there is no foundation for any presumption of incapacity.

It might be wise for the legislature to establish some limit of age within which an irrebuttable presumption of incapacity might result; but it has not done so. It would not, and could not, with any reason, fix so high a limit as fourteen years.

The State of Louisiana has no broader subjection to the common law of England on the subject of crimes and offenses than the other States of this Union, and it is settled that only so much thereof is adopted as is applicable to our situation and circumstances. 2 Bishop Cr. L., sec. 284; 1 Kent's Com. 472, 473 and note.—

Various provisions of the English common and statutory law, such as those with regard to counterfeiting and treason, are rejected as inapplicable. 1 Bishop Cr. L., secs. 177, 456, 611, 612.

We feel fully justified in following the example of our sister States in rejecting a presumption founded exclusively on facts and conditions, the opposite of those which prevail in Louisiana.

Judgment affirmed.

Poché and Todd, JJ. having been absent from argument, take no part.

39 938
47 364

No. 207.

THE STATE OF LOUISIANA VS. W. N. COLE.

A decree setting aside a judgment of forfeiture of an appearance bond is theoretically and practically one granting a *new trial* and is not appealable.

 Trounstine & Co. vs. Ware and Munn.

A PPEAL from the Third District Court, Parish of Claiborne.
Young, J.

E. H. McClendon, District Attorney, for Plaintiff and Appellant.

John A. Richardson and Chas. W. Seals for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The appearance bond furnished by the defendant, was declared forfeited and judgment rendered, on his failure to appear when summoned.

The surety thereupon took a rule to have the forfeiture set aside and the bond annulled, alleging various grounds in support.

The district judge, after hearing, merely rescinded the judgment.

From this decree, the State appeals. The appellee moves to dismiss on the ground that an appeal does not lie therefrom.

It is evident that the district judge did not pass upon the validity of the bond assailed by the security.

His action in annulling the forfeiture leaves matters in the condition in which they stood previous to the motion of the district attorney for the forfeiture of the bond.

The right of the State to further proceedings is admitted by the security and remains unaffected.

Theoretically and practically the district judge, after reversing and setting aside his judgment, has simply granted a new trial.

It has been repeatedly held that an appeal does not lie from an order granting a new trial.

The motion to dismiss must prevail.

Appeal dismissed.

 No. 178.

A. J. TROUNSTINE & CO. vs. R. A. WARE AND G. M. MUNN,

Consolidated with

CARTER BROS. & CO. vs. R. A. WARE AND G. M. MUNN.

An order of appeal granted at a term of court subsequent to the one at which the judgment appealed from was rendered in open court—is not a legal substitute for citation. In such case, citation of appeal is indispensable to the perfection of the appeal.

In case two different and distinct appeals are granted on one order, one may be sustained and the other dismissed.

When a suit has for its object the revocation of a pretended sale as a fraudulent simulation, the party whose title is attacked is a necessary party. This issue cannot be tried with

39	939
48	355
39	939
50	1158

Trounstone & Co. vs. Ware and Munn.

the debtor alone, after the suit has been dismissed as regards the alleged simulated owner of the property.

An appeal having been, by plaintiff, prosecuted to the Circuit Court of Appeals from the judgment of dismissal, and same having been by that court reversed and the cause remanded; and, thereafter the plaintiff prosecute an appeal from the *same* judgment to this Court, he is conclusively presumed to have abandoned the judgment of said Circuit Court of Appeals in his favor.

The principal and necessary defendant, having been eliminated from the suit, the only decree this court can render, is one affirming the judgment appealed from.

A PPEAL from the Second District Court, Parish of Bienville.
Drew, J.

D. H. Patterson and J. A. Dorpan for Plaintiffs and Appellants:

Amendments should always be allowed, when justice is subserved thereby if they do not change the substance of the issue, and cause no injury to the opposite party, nor prejudice to his rights. 27 Ann. 316; 36 Ann. 786 and 39 Ann. 395.

Amendments do not change the substance of the issue when they can be cumulated with the original pleadings. 10 Ann. 599 and 8 N. S. 226.

Substance of demand is not changed when the prayer is the same in original and amendment. 8 N. S. 226.

Courts will more readily allow an amendment than refuse it, because injustice is less liable to be done thereby. 5 Ann. 566; 32 Ann. 829.

Insolvency is proved when plaintiff shows debts and defendant fails to show sufficient property to pay them. C. C. 1985.

Simulation can only be proved by indirect and circumstantial evidence. 29 Ann 8; 33 Ann. 1065.

When fraud or simulation is at issue any act of one of the parties to it bearing on the issue, is relevant. 29 Ann. 4.

The court is not bound to believe the witness, but may disregard his entire evidence when he is one of the interested parties. 33 Ann. 1063.

When the evidence shows the party has not the means to purchase it, it is presumed to belong to the party alleged. If not, the burden is on the defendant to show that it is his 33 Ann. 1063; 11 Ann. 228.

Watkins & Watkins for Defendants and Appellees:

The opinion of the Court was delivered by

WATKINS, J. By consent of parties these causes we consolidated and tried together in the lower court.

Appellee, G. W. Munn, filed in this Court a motion to dismiss the appeal on the following grounds, viz:

1st. Because he has not been cited to answer the appeal; and that an order of appeal, made at a term subsequent to the one at which the judgment appealed from was rendered, is not a legal substitute for a citation.

2d. Because "no bond was ever filed within the time required by law; and none is embraced in the clerk's certificate to the transcript."

Trounstine & Co. vs. Ware and Munn.

It appears from the record that there was a judgment rendered and signed on the 24th of December, 1885, in the suit of Trounstine & Co. vs. Ware and Munn, sustaining the exception of Munn, dissolving plaintiff's attachment in so far as it effects the property of Munn, and dismissing the suit as to Munn.

In the suit of Carter Bros. & Co. vs. Ware and Munn, a precisely similar judgment was rendered in respect to Munn, on the day preceding. In the *former* case the plaintiffs petitioned *in open court* for appeals suspensive and devolutive, "from the judgment rendered against him on the — day of December, 1885, sustaining the defendant Munn's exception of no cause of action, and dismissing plaintiff's suit, as to G. W. Munn; and *also* from the judgment rendered herein on the 19th of July, 1886." The order is of the same tenor, as the petition, and it was granted "*in open court*," on the 23d of July, 1886.

In the *latter* case a similar petition was filed—the only difference being a prayer for citation, in the latter—and a similar order was granted on the same date.

Neither record contains any citation, or service, or any substitute therefor. The bond for appeal in each case was only filed on the 2d of October, 1886—long subsequent to the expiration of the ten days allowed by law for suspensive appeals.

The objection urged to the want of citation, affects fatally plaintiff's appeal from the judgment, in each case, that was rendered in December, 1885. The appeal that was granted on motion "*in open court*" at a subsequent term, in July, 1886, was unavailing, in so far as they are concerned, and they must be dismissed. But the same principle does not apply to the judgment that was rendered on the 19th of July, 1886. The appeal that was granted therefrom, was perfected by the filing of the appeal bonds on October 2, 1886—within a year from its date. In so far as that appeal is concerned, the motion must be overruled.

ON THE MERITS.

In each suit plaintiffs sue Ware as their debtor, for sundry amounts as due them on open account; and upon proper allegations prayed for and obtained attachments, and thereunder caused to be seized and attached, as the property of Ware, several improved lots in the town of New Acadia, and a stock of goods and merchandise—all of which were in the ostensible possession of Munn, who is made a party to the respective suits, on the averment that his title was simulated and fraudulent; and that he had been acting as a person interposed for Ware.

Trounstine & Co. vs. Ware and Munn.

The stock of goods *alone* is estimated in the Sheriff's return to be worth \$3115.95. *In limine* Munn tendered the following exceptions, viz:

1st. That plaintiff's petition shows no cause of action in that it is not alleged that Munn is insolvent, or unable to pay his debts.

2d. That no act or intent is alleged against him as a cause for attachment.

3d. That he is in possession of the property attached, under duly recorded notarial titles, and same cannot be attacked by attachment or otherwise.

4th. That plaintiffs' debts were out of, and prescribed by three years, etc.

The effect of the judgment of December, 1885, dissolving plaintiffs' attachment and dismissing their suit as to Munn, was to discharge him and his property from the suit, and to eliminate therefrom the question of simulation *vel non*, as this issue could not be tried with Ware alone. Munn was a necessary party to the suit in this respect.

An inspection of the record discloses that plaintiffs prosecuted to the Circuit Court of Appeals for that district an appeal from that judgment, and it was by that court reversed and the cause remanded for further proceedings.

When the cause was returned to the district court, the defendant, Munn, promptly tendered the pleas of *res judicata* and estoppel—in the alternative—predicated on the judgment of that court that had been thus appealed from, and the plaintiffs tendered and filed—on defendant Munn's objection and exception—an amended petition, supplying the hitherto wanting allegations of insolvency and injury.

These pleas would have presented difficult and delicate questions for our consideration, had not plaintiffs placed an interpretation upon the two judgments of December, 1885, by obtaining, in July, 1886, orders of appeal from them. Thereby they are *conclusively* estopped from denying their existence, and abandoned the judgment of the Circuit Court reversing them in February, 1886. For this reason we cannot consider the case presented under the reformed pleadings, with Munn as a newly made party to them. Plaintiffs' double appeals have placed this impediment in the way. Had they *solely* relied on the decree of the Court of Appeals, that reversed the judgment of December, 1885, and resisted the defendant's pleas of *res judicata* and estoppel, and appealed from that judgment of the 19th of July, 1886, *alone*, they would have been in line and could have secured a hearing on the whole case. As presented they cannot.

State vs. Scott.

Aside from these considerations, there are other serious difficulties in the plaintiffs' way, which we need not detail.

Inasmuch as Munn is no longer a party to the suit, and the judgments are not questioned here, as regards the debtor, Ware, we shall not pass upon them. Under the views herein expressed the judgment of the court *a qua* must remain undisturbed, and it is therefore affirmed with cost of appeal taxed against the appellants.

Justices Poché and Todd take no part, not having heard the argument.

No. 212.

THE STATE OF LOUISIANA VS. BOYD SCOTT.

Although a *pocket knife* be not *eo nomine* a dangerous weapon within sec. 932 of R. S., it may, *by its use*, be considered such, under sec. 794 R. S., which provides punishment for the infliction, with a dangerous weapon, of a wound less than mayhem.

A count, charging that the accused "with a certain dangerous weapon, commonly called a *pocket knife*, did feloniously inflict a severe wound less than mayhem on the body of," when proved, justifies a verdict of guilty.

The ruling in 38 Ann. 942 has no bearing here.

39	943
51	934
89	942
104	445

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

D. C. Scarborough, District Attorney, for the State, Appellee.

Jack & Dismukes for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The indictment contains two counts: On the first the accused was acquitted, but on the second he was convicted.

The prosecution is based on section 794 of the Revised Statutes.

The second count is that the defendant, with a certain dangerous weapon commonly called a *pocket knife*, did feloniously inflict a severe wound less than mayhem on the body of —, etc.

The motion in arrest made by the accused, charges that the indictment is fatally defective, because a pocket knife is *not* a dangerous weapon and because it does not charge "*with intent to kill*."

The Statute provides (sec. 794 R. S.) that, "whoever shall, with a dangerous weapon, or with intent to kill, inflict a wound less than mayhem upon another person, shall, upon conviction," etc.

It may well be that the accused could not, under sec. 932 R. S. have been convicted for carrying a dangerous weapon concealed on or about

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his person, because a pocket knife is not *eo nomine* a dangerous weapon; but it does not follow that when, under sec. 794 R. S., the charge is that the accused did, with such a knife, feloniously inflict a severe wound less than mayhem, such weapon may not be considered by the court and jury as a dangerous weapon, by the use made of it, within the meaning of that section, particularly as the description of the weapon is not necessarily required by the statute, which merely mentions a *dangerous weapon*, i. e., any dangerous weapon which may be so by its use, or in itself.

Under the count as made, evidence could well have been received and if deemed sufficient the jury could have convicted the accused for having with a *dangerous weapon* inflicted a wound less than mayhem, on the body of another person.

It is true that the count does not charge that the accused did, *with intent to kill*, inflict a wound less than mayhem, though it does, that he did inflict the wound *feloniously*, but this is of no moment in this case.

The charge was made in accord with the requirements of the statute and, if the evidence adduced justified the findings, the jury could legally return the verdict rendered.

The ruling in *State vs. Nelson*, 38 Ann. 942, affords defendant no relief.

Judgment affirmed.

No. 203.

M. M. S. MacKENZIE vs. J. W. WOOLEY, TAX COLLECTOR, ET AL.

When a district judge recuses himself and calls the judge of an adjoining district to come into his court to try the case, the latter may try and determine the cause *after nine months have elapsed*. The law accords to either party in interest the right to have the cause transferred to an adjoining district, if it has not been disposed of within nine months from the date of the recusation; but same is directory only, and does not confer such a right as will become prescribed, if not exercised within time indicated.

A party resisting the enforcement of a special tax as illegal, cannot avail himself of the time that has elapsed during the pendency of his suit to prescribe against it.

Notwithstanding a private corporation is organized for the double purpose of building a railway and erecting a cotton compress, the former a *public improvement* and the latter a *private enterprise*, a special tax voted in its behalf, in aid of the construction of the former alone, is valid.

In the contemplation of Article 242 of the Constitution, and Act 84 of 1880, the property tax payers who are entitled to vote on the levy of a special tax for the purposes therein mentioned, are only those who are entitled to vote at a general election under the election laws of the State.

An ordinance of a municipal corporation that has been actually passed by the council, in the exercise of its authority, and in accordance with all legal requirements, and has

39	944
46	99
49	425
49	432
39	944
106	530

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been duly promulgated and passed into execution, is not invalid because it is not signed by the mayor or president of the council.

An ordinance ordering a vote of the taxpayers on the question of a special tax, though supplemented by an amendment after it is advertised, will not be vitiated thereby; provided, the amendment does not materially affect its essential parts.

If the rate of taxation be specified in the petition and ordinance, explicitly enough to fully advise the taxpayers of the object aimed at, it is sufficient.

A PPEAL from the Second District Court, Parish of Webster.
Drew, J.

Snider & Smith for Plaintiff and Appellant.

Towns are corporations of limited powers and cannot tax except for the very purposes allowed by the law, and in the manner and under the conditions prescribed by law. Cooley on Taxation, 253 and note 1.

Municipalities must confine themselves closely within the powers conferred. Cooley on Taxation, 96, 257 and note; Burroughs on Taxation, 372-3-4, sec. 128; Municipality No. 1, vs. Millaudon, 12 Ann. 769; Rabassa vs. Mayor, etc., 3 Martin (o. s.) 218; Municipality No. 3 vs. Johnson, 6 Ann. 20.

The construction of a compress is not a public improvement in purview of Art. 242 of Constitution of Louisiana, and Act 84 of 1880. Cooley on Taxation, 78 and note 1; Ib. 79 and 80 and notes 1 and 2; Ib. 83 and note; Ib. 87 and note; Ib. 90 and note; Burroughs on Taxation, secs. 23, 24, and 25; 58 Maine 590; 4th Cold. (Tenn.) 419, 425; The People ex rel. vs. Salem, 20 Mich. 452; 4 Am. Reports, 400.

Act 80 of 1884, must be strictly construed, is mandatory, and a rigid compliance with its provisions is a condition precedent to levy of taxes in pursuance with its provisions. Cooley on Taxation, 254 and notes 1 and 2; Ib. 255 and notes 1, 2, 3, and 4.

Watkins & Watkins for Defendants and Appellees:

Unless the purpose for which the tax is levied is unconstitutional or illegal, the Supreme Court is without jurisdiction, unless the amount involved is large enough to give jurisdiction. 36 Ann. 801, Cobb vs. McGuire.

A railroad and a compress are public improvements, under certain circumstances. Burroughs on Taxation, 19 and 20; 2 Robinson 209.

The judge called to try a cause, vice the judge recused, is without jurisdiction after the lapse of nine months to try the cause or to make orders in the original parish. Acts of 1890, No. 40, p. 39, sec. 5; 37 Ann. 392, State ex rel. Fontelieu vs. DeBaillon, Judge et al. When new parties become interested in a suit they should be cited. When the original defendants become *functus officio* and their successors are neither cited nor appear, the suit on exception, should be dismissed for want of parties litigant.

It is not essential that the mayor sign the town ordinances; but should he, and they become lost or destroyed, parol can be substituted. 2 Ann. 939; Town vs. Andrus, 37 Ann. 699; Acts of 1853, No. 59, pp. 37, 39; Acts 1850 p. 70; Dillon pp. 340, 341, 342, 444, section 450 and notes, and section 331 and notes; 35 Ann. 960, section 3, Duperier vs. Viator.

Property taxpayers entitled to vote are males, over twenty-one, who pay their taxes. Those alone are counted who are entitled to vote. 35 Ann. 961, Duperier vs. Viator, section 4; Constitution of 1879, arts. 184 and 185.

An election is valid when the choice of the majority is fairly expressed. 29 Ann. 614, 625; 32 Ann. 987 to 991; Cooley's Constitutional Limitations, pp. 619 to 621.

MacKenzie vs. Tax Collector et al.

The opinion of the Court was delivered by

WATKINS, J. This is an injunction suit in which resistance is made by the plaintiff to an advertised sale of certain personal property of his, for the payment of certain municipal special taxes assessed by the corporation of Minden, and which he complains of as illegal, on the following grounds, viz :

1st. That same were levied for purpose contrary to the Constitution and laws, in that they were in aid of the construction of the Minden Railroad and Compress Company ; and that "to procure, construct, own and operate machinery and works for compressing cotton" is not a "public improvement."

2d. That one-third of the property taxpayers of said town, did not petition for the levy of said tax, as required by sec. 1 of Act 84 of 1880.

3d. That the publication of said petition and the ordinance of the said corporation, directing an election to be held, was not signed officially by the mayor or other proper official thereof.

4th. That said election was held prior to the lapse of thirty days from the *first* publication thereof.

5th. That the proposition submitted to the property taxpayers at said election did not specify the *rate* of taxation, as provided and required by the provisions of Act 84 of 1880.

He avers that said illegal tax is declared to be fixed at five mills, and for a period of ten years, upon all taxable values within that corporation, and although the sum demanded is less than \$100, it will, in the future, aggregate a large sum ; and he prays that same be adjudged and decreed illegal.

The town authorities were cited and joined the tax collector in his answer, pleading the general issue, and alleging that "all things were done, and upon due, full and legal notice, and that the election was duly and legally ordered and the levy of the tax sanctioned by a *unanimous* vote of the taxpayers.

I.

Defendant's objection that this Court is without jurisdiction *ratione materiæ* is not good. 37 Ann. 507, 898 ; 38 Ann. 99, 230.

The judge of the district wherein the suit was filed, recused himself on account of *personal* interest as a stockholder in railway and compress company, and called the judge of the adjoining district to try the case. The defendant excepted to the capacity of the judge thus called to try the case, and plead the prescription of nine months as a bar to any proceedings in said cause *in the parish of Webster*.

The call was made on the judge who tried the case in the mode in-

dictated in section 3 of Act 40 of 1880, on the 25th of June, 1885, and judgment was rendered on the 29th of June, 1887, more than nine months having elapsed in the *interim*. Section 6 of the act cited directs "that whenever any recused cause, for the trial of which a district judge has been appointed, as provided in sections 2 and 3 of this act, it shall be the *duty* of the district judge to order the *transfer of such cause to the district court of the nearest parish of an adjoining district*, the judge of which is compelled to try the cause," etc.

This exception appears not to have been passed upon by the judge *a quo*, and the trial was proceeded with and judgment rendered. It being unfavorable to the plaintiff he filed a motion for a new trial on the sole ground that it was contrary to law. This exception was manifestly abandoned.

II.

The plaintiff pleads the prescription of one, two and three years against the taxes sought to be collected. They appear to have been assessed in 1883, and became due on the 31st of December of that year. The suit was brought and service accepted on September 18, 1884, and has been since that time pending and untried.

The plea of prescription was filed on the 27th of June, 1887. Three years had not then, and have not at this time, elapsed. But conceding for the argument, that the prescriptible period had elapsed, it could not avail the plaintiff whose injunction against the enforcement of the tax, has prevented its collection in the meanwhile.

III.

The tax complained of as illegal, was assessed in the alleged pursuance of an ordinance passed and an election held under and in conformity with the provisions of Act 84 of 1880, putting in force the 242d article of the Constitution. The latter provides that "the General Assembly shall have power to enact general laws authorizing the parochial or municipal authorities of the State, under certain circumstances, by a vote of the majority of the property taxpayers in numbers and in value, to levy special taxes in aid of *public improvements*, or railway enterprises; *provided*, that such tax shall not exceed the rate of five mills per annum, nor extend for a longer period than ten years."

Section 1 of the act cited declares that whenever one-third of the property taxpayers of a municipal corporation shall petition it "to levy a special tax in aid of any work of *public improvement* or railway enterprise," it may order a special election for that purpose. .

Section 2 provides "that a special tax may be levied by any parish,

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city or incorporated town in this State to aid the construction and erection of public buildings, bridges and other works of *public improvement*," etc., and when a "majority of the property taxpayers * * * shall vote therefor."

The name of the private corporation is the "Minden Railroad and Compress Company," and it was organized for the double purpose of erecting and constructing a tap or short line railway connecting with the Vicksburg, Shreveport and Pacific Railroad, and of constructing, operating and maintaining a cotton compress.

The petition of the taxpayers, which is the foundation of all the subsequent proceedings, requests that there be levied "a special tax in aid of a *railway* enterprise to aid in constructing a railroad from Minden to a point of junction with the railroad near J. G. Lanes. To aid the *railroad* called 'Minden Railroad and Compress Company, etc.'"

Preceded by a preamble setting forth the substance of the petition, is an ordinance of the town council directing the question to be submitted to the vote of the property taxpayers.

It bears date May 8, 1883, and the date fixed for the election was the 16th of June following. On the 16th of May, 1883, there was a supplementary ordinance passed amending and re-enacting *section three* of the original ordinance, so as to direct the *manner* of holding the election.

It left the original in full force in all other respects. Without considering other evidence in the record, it appears to have been the manifest and clearly expressed intention of the petitioning taxpayers and council to *limit* and *restrict* the tax to the construction of the *railway*, which is a "public improvement."

This purpose is strengthened by the fact that the contemplated compress has not been constructed and no steps have been taken towards it, notwithstanding all other taxpayers than the plaintiff have paid their taxes.

IV.

To the petition of the taxpayers there are seventy-nine signatures.

On the list of qualified voters in the corporation of Minden as appears upon the assessment roll of 1883, there are one hundred and eighteen names.

To overcome this certificate of the tax assessor, the plaintiff introduced proof to the effect that there were some young men who owned assessable values that had not been assessed; and that there were some married women and minors who owned property which had not

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been assessed; upon the theory that they were property taxpayers in the sense of the Constitution and law.

Articles 242 and 209 being in *pari materia*, must be construed together; and the latter provides that the levying of a special tax shall be "submitted to a vote of the property taxpayers of such parish or municipality *entitled to vote under the election laws of the State.*"

In 35 Ann. 957, *Duperier vs. Viator*, this Court held, that the property taxpayers entitled to vote are only those who are entitled to vote at a general election.

We are satisfied that more than one-third of the property taxpayers entitled to vote signed the petition.

V.

The original ordinance does not seem to have been signed by the mayor of the town; but the amendment which recites its substance was, and both were advertised and offered in evidence.

In *The Town of Opelousas ex rel. C. M. Thompson, President, vs. Andrus*, we held that where an ordinance of a municipal corporation had been actually passed by the council in the exercise of its authority and in accordance with all legal requirements, and had been duly promulgated by publication, and had passed into execution, the mere failure of the president to sign it would not invalidate it, unless the legislative intent to the contrary was clear. The proceeding under consideration fulfills all of those requirements and is valid. 1 Dillon, on Mun. Corp. 331 and note.

We can see no force in the plaintiff's contention that "the publication of the petition and ordinance were not signed officially by the mayor." It could certainly be no more important that it should be signed than the ordinance itself.

VI.

From the evidence it appears that the first ordinance and petition were advertised on the 10th of May, 1883, only two days subsequent to the passage of the former. On the 16th of May following, and prior to the second issue of the weekly newspaper, the amendment was enacted; and thereafter the original and amendment were advertised in each consecutive issue thereof until the 14th of June, 1883.

The law is that the election shall be held "not sooner than thirty days after the official publication of the petition and *ordinance ordering the election.*" The original ordinance ordered the election and the amendment altered the *method* of it only.

We think the computation was fairly made from the date of the first insertion of the 10th of May, 1883, and the election occurred on the 14th

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of June, 1883, the day fixed in the original ordinance—more than thirty days had elapsed.

VII.

The petition of the property taxpayers submitted the proposition to levy a special tax of five mills *per annum* for ten years, and same was repeated in the ordinance in full compliance with the law.

The plaintiff's objections to the tax are untenable, and for the reasons assigned herein and those assigned in the concurring opinion of Associate Justice Fenner, the judgment appealed from is affirmed with all costs against him.

CONCURRING OPINION.

FENNER, J. On the point of the power of the judge to try the case, I think the section 6 of the Act of 1880 raises no question of jurisdiction.

The object of the section was simply to hasten the trial of recused cases, and, with that view, it made it the duty of the judge to whom a case is referred, who has neglected to try it within nine months, to transfer it as directed. But this duty is imposed entirely in the interest of the parties and to enable them to secure a speedy trial.

If, notwithstanding the lapse of the nine months, they conclude that their interest and desire for a speedy trial will be promoted by submitting their cause to the judge, without invoking the exercise of his duty to transfer, they have the right to do so, and the judge's jurisdiction is, in no manner, affected.

Otherwise, parties ready and anxious to try their cause and with a judge ready to try it, would be deprived of the right and subjected to the delays of a second transfer, and thus the law would defeat its own sole purpose.

If, after the lapse of the nine months, either party had required the transfer, and the judge had refused, he would have violated his duty, of which we would have compelled the performance by mandamus if applied to.

But, in this case, no such motion has been made, and though an anomalous plea of nine months' prescription was filed some time before the trial, defendant never provoked any action upon it, but went to trial without objection and without any disposition of his plea, which, so far as record shows, has never been acted on. Even in his motion for new trial no complaint is made on this ground.

I consider this an abandonment of it and a voluntary submission to the jurisdiction, which was never divested; and, after thus taking the

chances of the trial, he cannot now be heard to raise or renew this objection.

I concur in the opinion and decree.

DISSENTING OPINION.

POCHÉ, J. I respectfully dissent from that part of the opinion of the majority which recognizes the authority of Judge Young, to try and determine this case, after nine months had elapsed since the date of the recusation of Judge Drew.

According to the plain and unambiguous language of sec. 5 of Act No. 40 of 1880, the judge to whom a recused case has been referred, is stripped of all power in the premises except to order the transfer of the case to the nearest parish of an adjoining district the judge of whom is competent to try the cause.

The language is peremptory, and was intended to be mandatory; the act reads that if the cause referred to him has not been tried within nine months, "*it shall be the duty* of the district judge to order the transfer of the such cause," etc., (italics are mine.)

Nothing in the section or in the whole act justifies the argument that an application from either of the parties to the cause is necessary to put the power or duty of the judge to order the transfer in motion. As soon as the nine months have elapsed the judge becomes *functus officio* for all purposes for the trial and disposition of the cause, in which he can render no valid judgment.

But in this case a formal objection was made to the judge's authority to try the cause, and all acts of his in the premises after such protest should be treated as absolutely null and void, save and except the order of transfer which he should have made.

Such is the clear inference to be drawn from the decision of this Court in the case of Fontelien, 37 Ann. 392.

When plaintiff's protest was presented it became the duty of the judge to order the transfer of the cause to the nearest parish of an adjoining district, the judge of which was competent to try the cause, and we must take judicial cognizance of the fact that the parish of Webster is surrounded by three such districts.

It is no answer to the positive mandate of the law to argue that, as plaintiffs went to trial without insisting on a trial of their protest or exception, they had abandoned or waived it. Consent cannot invest an incompetent judge with legal authority or capacity.

Under these views, I take no part in the decree.

Mr. Justice Todd concurs in this opinion.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT NEW ORLEANS.

IN

NOVEMBER. 1887.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice.*

HON. FÉLIX P. POCHÉ,

HON. ROBERT B. TODD,

HON. CHARLES E. FENNER,

HON. LYNN B. WATKINS,

} *Associate Justices.*

No. 9933.

SUCCESSION OF MRS. CHARLES A. LARENDON.—ON OPPOSITION TO
ACCOUNT.

The rights and obligations arising under acts passed in one State to be executed in another, respecting the transfer of *real estate* in the latter, are regulated in point of *form, substance and validity* by the laws of the State in which such acts are to have effect.

An act of donation drawn up in Louisiana, in the form in which such acts are required to be put in Georgia, to convey real estate in that State, is valid, although not passed before a notary and two witnesses, as the laws of this State prescribe, under pain of nullity.

Under the law of Georgia, a donation is presumed to be accepted unless the contrary is shown.

Although, in general, a case will not be remanded for the reception of evidence which could have been and was not offered, parties, in exceptional instances, may be allowed a re-

39 953
47 594

39 952
1125 975

Succession of Larendon.

manding where the rulings of the trial judge during the proceeding are at variance with his finding on the merits. and the party asking the remanding abstained from offering evidence which the judge would have ruled out as superfluous.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

A. Briegne, R. T. Beauregard and P. A. Ducros for the Under Tutor, Opponent and Appellee :

Both the form and effect of an ante nuptial gift of real estate, situated in Georgia, are governed by the law of that State. Georgia Code, § 8, 1782, 1950, 2741, 2692, 2657, 2658, 2659, 2660, 58, 59, 2706; Story, § 438, 444, 444a, 475; Fœlix, No. 60, 72, 73, 85; 27 Texas, 38; 1 Zachariae, § 31.

This gift, when clothed with the form prescribed by that law, is valid, by the comity of nations, in the State of Louisiana, no positive rule whereof denies or restrains the operation of said foreign law. Story, §§ 29, 30, 31, 35, 38; Fœlix, Nos. 11, 12, 13, 14, 15, 59, 61; Wheaton, Int. Law, ed. 1863, p. 162; Rorer, Interstate Law, pp. 167, 169, 170; D. 1, 3, 25; Georgia Code, § 9; C. C. 10; 1 Marcadé, Nos. 79, 245; 1 Zachariae, pp. 56, 78; 18 Merlin, Rep. *verbo loi*, § VI, No. VII; 3 Larombière, p. 37; 5 N. S. 141; 5 Ann. 517; 2 Ann. 508; 9 Ann. 166; Inst. B, 1, 2, par. 1 and 2.

Parol evidence is inadmissible in Georgia and in Louisiana, even when unobjected to on trial, to show the conventional revocation or avoidance of such a gift. Georgia Code, § 2706 (a); Story, § 365; C. C. 2275, 2276; 9 R. 416; 13 Ann. 56; 3 M. 253; 23 Ann. 747; 24 Ann. 401; 5 Larombière, p. 81; 5 Marcadé, pp. 148-9; 9 Toullier, Nos. 36, 37, 38; Dantin, ch. 1, Nos. 9, 35; 24 Merlin, *verbo Preuve*, §§ 2 and 3, art. 1, Nos. 28, 29, 30; 5 Zachariae, p. 695.

Evidence of the admissions or declarations of a dead person, testified to by her surviving husband, in his own interest, and unsupported by any proof *aliunde*, is entitled to little or no weight. 10 L. 355; 14 Ann. 275, 763; 24 Ann. 604; 7 R. 112; 10 Ann. 279; 6 Ann. 114.

Personal estate is subject, as regards the rights thereto of the dead owner's heirs, to the law of the former's place of domicile. Story, § 481 *et seq.*; Fœlix, No. 37.

White & Saunders and A. J. & Omer Villeré for the Tutor, Appellant:

Under Art. 10, R. C. C., where a contract is made in Louisiana to be executed in Georgia, the validity of the form of the contract is determined by the law of Louisiana.

The State of Louisiana has its peculiar policy in regard to donations, and refuses to recognize their existence unless they are both made and accepted in a prescribed manner. Accordingly, a Louisiana court will not disregard this policy and enforce a donation, made here and to a citizen of this State and not in the prescribed form.

The evidence shows, that even considered as a Georgia contract, the donation was incomplete from express refusal to accept.

The lower court having ruled at the trial that the donation was a Louisiana contract, and so led the appellant to omit to introduce evidence bearing on its validity viewed as a Georgia contract, and having then held in its judgment that it was a Georgia contract; under these circumstances, this Court, if not satisfied that the donation was invalid even as a Georgia contract, is bound, in fairness to the appellant, to remand the case to admit further evidence as to the validity of the contract under the law of Georgia.

The lower court erred in excluding the testimony of the husband for or against his wife after her death.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The main question presented in this case is

Succession of Larendon.

whether an act of donation drawn up in Louisiana, according to the law of Georgia, designed to convey real estate in that State, is a nullity, because not passed before a notary and two witnesses and not accepted in terms, as the law of Louisiana requires.

The next question is, whether if such act be valid, the donation presumed to have been accepted by the law of Georgia, until the contrary be established, has been shown not to have been accepted and, if not so shown, whether the case ought to be remanded to allow proof on that subject.

The facts are as follows:

On January 1st, 1878, Chas. A. Larendon, declaring himself to be of the city of Atlanta, Ga., voluntary gave, granted and delivered unto Miss Laure Beauregard, in consideration of the love and affection he bore to her and of their contemplated marriage on January 14th following, certain real estate situated in said city and State.

The deed was signed by him and two witnesses and authenticated by a Georgia commissioner in this city. It was accompanied with a photographic view of the property donated to Miss Beauregard, who received both.

Subsequent to the marriage and during the same, Larendon sold the property for some \$15,000, as though he had never ceased to own it.

Mrs. Larendon, having afterwards departed this life, and Larendon administering her estate as tutor of the minor children born of their union, rendered an account in which he did not set forth among the property inherited by the minors from their mother, the proceeds of sale. The under tutor opposed the account, asking that they be placed thereon and the district court sustained the opposition.

From the judgment thus rendered, Larendon appeals.

He contends that the deed in question, not having been executed before a notary and two witnesses, as is required by the Louisiana law, and the gift not having been formally accepted, in writing, by the donee, the act is an absolute nullity.

He further contends that, if the act be valid, the donation, far from having been accepted, was expressly refused.

He besides insists that, if the record does not satisfactorily establish that the donation was declined, the case ought to be remanded to enable him to adduce legal evidence to show the refusal.

He says that he abstained from *furnishing* further proof, for the reason that the district judge, during the trial, treated the contract as a Louisiana contract, which dispensed from such proof; but that the judge, after submission of the case, changed his views and dealt with the contract as a Georgia contract.

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He therefore concludes that, under such circumstances, equity requires a remanding.

On the other hand, the under tutor of the minors urges that the act is perfectly valid, that it was drawn up in the form in which the law of Georgia requires donations *inter vivos* to be put in; that it was intended to convey real estate in Georgia; that by the law of Georgia, the donation is presumed to have been accepted; that it is not proved that it was not so; that the property passed from Larendon to Miss Beauregard and next from her to her children and that Larendon is responsible for the price of sale received by him and which represents the property.

I.

It is evident that the act in question is not in the form in which the law of Louisiana requires that donations *inter vivos* be framed; but it is apparent that it is drawn according to the requirements of the law of Georgia.

It is probable that, had it been prepared according to our law and authenticated for recognition in Georgia, the present controversy would not have arisen; but is it true that because not so drawn up, but drafted in the shape in which a similar act would have been passed in Georgia, such an act is a nullity?

After reviewing what the most distinguished authors, ancient and modern, have written, as well as the doctrine expounded by the adjudications of courts, on the subject of *foreign contracts*, relative to personal and real property and stating the distinction to be made between the former and the latter, STORY in his commentaries on the conflict of laws, emphatically lays down the rule as being, "that the laws of the place where such (real) property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer and the solemnities which should accompany them. The title therefore to real property can be acquired, passed and lost only according to the *lex rei sitæ*." P. 708, No. 424.

Kent in his commentaries says:

"If a contract be made under one government and it is to be performed under another, and the parties had in view the laws of such other country in reference to the execution of the contract, the general rule is that the contract, in respect to its construction and force, is to be governed by the law of the country or State in which it is to be executed, and the foreign law is, in such cases, adopted and effect given to it." Vol. II, lect. 39, p. 595, No. 459.

Wharton, on private international law, says that "jurists of all

Succession of Larendon.

schools and courts of all nations are agreed in holding that land is governed by the law of the place where it is situated." No. 273. And he adds that "if the *lex rei sitæ* be abandoned, there is no other law that can be invoked."

It is uniformly held, says Rorer, on interstate law, that if the instrument be made in one State for the conveyance of *realty* situated in another, then under all circumstances it must in substance and in its execution and also in the evidences thereof, conform to the law of the place where the land to be affected thereby is situated; for, it is a well settled principle of the law that the jurisdiction over *real* property is local and appertains to the State wherein the property lies and that title thereto passes *only* by conformity with the laws of such State. Many authorities in the notes; pp. 208-9.

It would be cumbersome and useless to refer to the authorities which underlie this conservative and sound doctrine.

Our own code, art. 10, has, in broad and general terms, recognized the principles announced and applied, where it says:

"The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.

"But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country in which such acts are to have effect."

It is unnecessary to refer to the exception which the article contains in favor of *wills*, for, no will is involved in the present case.

It is clear that, when the Legislature adopted the Code reported by the compilers, and which included the article in question, it was not intended as legislation for any territory beyond that of this State; nay, it may be said that what was designed was simply the announcement of a universally recognized principle, without the remotest idea of placing any restriction upon it, but with the purpose of leaving to courts of justice, as cases would present themselves, to apply or not, that principle, according to the circumstances of each case.

The article contemplates the form, substance and effects of acts, public and private.

As it cannot purport to legislate for other States, it must be considered as peremptory only where the form, substance and effect of such acts relate to property within this State, and therefore that the validity of these must be governed by our own laws and usages.

There is no doubt that this is the case with every sovereignty. Hence it is that the United States Supreme Court has well said, touch-

Succession of Larendon.

ing this class of property, that "the power of the State to regulate the tenure of real estate within her limits and the modes of its acquisition and transfer, and the rules of its descent and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted."

But the law-giver has foreseen the contingency of an act passed in one place and intended to be carried out or executed in another, and has wisely provided therefor.

Read in the proper light, the second paragraph of the article, touching that contingency, simply means:

But the rights and obligations arising under acts passed or drawn up in one country, to be exercised or complied with in another country, are regulated by the laws of the place where such acts are to be executed.

The provision, although at first sight at variance with that contained in the previous paragraph, is not such at all. It relates to a state of things not till then considered, and simply announces the policy which this State would follow when the contingency arises.

In the case of *Beirne vs Patton*, the old court distinctly held that: "Where a contract is expressly or tacitly to be performed in another place than that where it is made, its validity is to be governed by the law of the place of performance." 17 L. 590.

When the court used the word *validity* it necessarily meant its *legality*, both in form and substance.

In the present case, the act was drawn up according to the law of Georgia, with the avowed design of conveying real estate in that State, by one stating himself to be a citizen thereof.

The contract was not a Louisiana, but a Georgia contract, and its validity must be determined accordingly.

Had this controversy, instead of arising in Louisiana, taken place in Georgia, in what light would a Georgia court have looked upon and treated the contract?

Would it have undertaken to say that the act is a nullity, because not passed in the form in which the law of Louisiana, where it was drawn, requires donations *inter viros* to be drafted? Undoubtedly not. It would have said: Here is an act for the conveyance of real estate in Georgia. It is drawn up in another State in the shape in which, if passed in Georgia, it would have been put in.

The court cannot require that it be clothed beyond the State in a form which is not that in which it would have been bound to be put in if passed in Georgia. The court would undoubtedly have recognized its validity in point of form.

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This is precisely what it has done in a kindred case, in which it held that, where a contract is made in one State, and intended to have effect in another, it must conform to the laws of the latter State. *Stricker vs. Tinkham*, 35 Georgia, 176. See also *Herschfeld vs. Drexel*, 12 Ga., 582.

To make the proposition plainer reverse the facts.

Suppose a party domiciled in Louisiana had donated, by an act before a notary and two witnesses in Georgia, real estate in Louisiana, would a Louisiana court refuse to recognize the validity of the act because it was not drawn up there in the form in which, by the law of Georgia, donations *inter vivos* have to be passed? Assuredly not.

The laws of Georgia, on the subject, are as follows :

“To make any agreement, made upon consideration of a marriage, which a valuable consideration, binding on the promisor, the promisee must be in writing and signed by him. § 1782, 1950, 2741.

“A deed to lands must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser.” § 2890.

“No prescribed form is essential to the validity of a deed to lands. If sufficient in itself to make known the transaction between the parties, no want of form will invalidate it.” § 2692.

“To constitute a valid gift there must be the intention to give by the donor, acceptance by the donee and delivery of the article, or some act, accepted by the law, in lieu thereof. § 2657.

“If the donation be of substantial benefit, the law presumes the acceptance, unless the contrary be shown. § 2658.

“When a law requires a conveyance in writing to the validity of a gift, or the conveyance is made for a good consideration, such conveyance, executed and delivered, will dispense with the necessity of the delivery of the article given. § 2659.

“Actual manual delivery is not essential to the validity of a gift. Any act which indicates the renunciation of dominion, by the donor, and the transfer of dominion to the donee, is a constructive delivery. § 2660.

The conclusion which this court reaches is therefore, that, as the act in question was passed in Louisiana, in the form in which the law of Georgia requires that such acts be drawn, for the conveyance of *real estate situate* in that State, its validity must be recognized.

II.

The next question relates to the acceptance of the donation.

Under the very terms of the Georgia law the donation is presumed to be accepted, unless the contrary is shown.

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The donor, therefore, retains the right to show that the donation was not accepted; in other words, to rebut the presumption of acceptance created by the law.

It is unnecessary to express any opinion touching the legality and sufficiency of the evidence adduced, for the reason that the appellant claims that, owing to the rulings of the district judge during the trial, which showed that he considered the contract as a Louisiana contract, while after submission of the case he dealt with it as a Georgia contract; he did not offer the evidence which he otherwise would have tendered.

However strongly inclined we might be in general to refuse a remanding for the purpose of admitting evidence which could have been, and was not offered, we consider that, under the exceptional circumstances of this litigation, the ends of justice will be better subserved by sending back the case; but this is done for the sole purpose of enabling the appellant to offer legal evidence to rebut the legal presumption of the acceptance of the donation.

This view of the case dispenses us from considering the prayer of the appellee for an amendment of the judgment, so as to specify the amounts for which the appellant is claimed to be liable.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed so far as it recognizes the validity of the act of donation in question, and that, in other respects, it be reversed; and,

It is now ordered and decreed, that the case be remanded to the lower court for the sole purpose of allowing the appellant to adduce legal evidence to rebut the presumption of acceptance of the donation, created by law, reserving to the heirs the right to offer counter proof; the case otherwise to be further proceeded with according to the views herein expressed and according to law, the costs to abide the final determination of the controversy.

No. 10,049.

THE STATE OF LOUISIANA VS. A. J. McDONALD.

An indictment containing the charge of an "assault with an intent to commit murder," and a charge of "inflicting a wound less than mayhem" is not vicious for duplicity—as the two offenses can grow out of the same act, are kindred offenses and were incorporated in separate counts.

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

39	959
51	1090
39	959
52	212

State vs. McDonald.

M. J. Cunningham, Attorney General, and *D. C. Scarborough*, District Attorney, for the State, Appellee.

W. G. McDonald for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Under an indictment charging the defendant with an assault with intent to commit murder, and also with inflicting a wound less than mayhem, he was convicted of the latter offense, and his appeal presents two questions embodied in a motion in arrest of judgment.

1st. His first point is that the indictment is bad for duplicity, as the the two offenses charged therein are not kindred.

It is quite apparent to our minds that the two offenses could grow out of the same act, hence they are kindred, and therefore they could be charged in the same indictment; provided, they be incorporated in separate counts.

The identical point was made and considered in the case of *Robert Green*, 37 Ann. 382. We can but repeat here what we said in that case.

"The indictment contained two counts, and presented the following charges:

1. With stabbing with a dangerous weapon with intent to murder.
2. With inflicting a wound less than mayhem with a dangerous weapon with intent to kill * * * It is too clear for argument that both offenses could grow out of the same act. Hence it follows that these are kindred offenses, and belong to the same generic class, and jurisprudence has crystalized the rule that such offenses may be charged in the same indictment; provided, they be incorporated in separate counts. No amount of reasoning on our part could settle the rule on more solid grounds than we find it announced in numerous decisions of this Court. *State vs. Malley*, 30 Ann. 61; *State vs. Depass*, 31 Ann. 487; *State vs. Johey*, 32 Ann. 812; *State vs. Gilkie*, 35 Ann. 53." See also *State vs. Pierce*, 58 Ann. 92.

2d. The second point made by the counsel for the accused is that the charge incorporated in the second count of the indictment is not accurately, fully and sufficiently set forth.

His contention is that: "The count states that he, defendant, did in and upon the body of *Manheim* assault with a dangerous weapon, commonly called brass-knucks, and did wound less than mayhem," etc. And it is therein argued that the count does not specify on whom the wound was inflicted.

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A reference to the indictment has led us to the conclusion that defendant's counsel, usually painstaking and correct in his pleadings and assertions, must have quoted the passage hereinabove transcribed, from the wrong indictment. The second count in the indictment under consideration reads as follows:

"And the grand jurors aforesaid do further present that A. J. McDonald, at and in the parish, district and State aforesaid, on the day and date aforesaid, in and upon the body of H. Manheim, wilfully, maliciously and feloniously did inflict a severe wound less than mayhem with a dangerous weapon called a brass-knuck."

We fail to perceive any ground for the slightest doubt as to the person on whom the wound is charged to have been inflicted.

There is no force in either of the contentions suggested by the record and the indictment was properly sustained by the district court.

Judgment affirmed.

No. 9889.

J. C. DIRMAYER VS. WM. P. O'HERN.

39	961
118	452
118	454

When the defendant in a suit for damages on account of an alleged tort, dies pending the litigation, after citation and before issue joined, the suit may be prosecuted against the heirs of the deceased who have accepted his succession. C. P. art. 25.

But, if besides lawful heirs, the deceased has left a surviving wife, the widow cannot be sued as an heir, but only as widow in community, as she thus becomes liable for one-half of the damages which may be recovered, and the heirs are then liable for the other half, each for his virile portion.

If the widow is cited as an heir she is not properly brought into court in her legal capacity, and in such an event the succession being only in part represented, no valid judgment can be rendered in the case.

A trial held under such pleadings is illegal, null and void, and the judgment rendered therein must be set aside, and the cause remanded to the lower court for further proceedings.

A PPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

E. W. Huntington & Fred. D. King, for Plaintiff and Appellee.

B. R. Forman, for Defendant and Appellant:

The opinion of the court was delivered by

TODD, J. This is an action for damages caused by the alleged violent acts and conduct of the defendant, connected with and attending the execution of a writ of provisional seizure, which he (O'Hern) caused to issue against the plaintiff.

Dirmeyer vs. O'Hern.

After the institution of the suit the defendant died, and his heirs, who had accepted his succession unconditionally, were made parties. They appeared, and pleaded the general issue.

The case was tried by a jury, who rendered a verdict in favor of the plaintiff for five hundred dollars, and from the judgment thereon the defendants have appealed.

The facts are these :

The plaintiff leased from O'Hern a dwelling-house at the rate of \$12 per month. The lease commenced on the 6th February, 1886. The rent for that month, March and April, was punctually paid.

On the 2d of June the plaintiff called on the defendant, and informed him that he had lost his situation, and would be compelled to leave his house, as he could no longer pay the rent. He offered him \$8 for the rent of the previous month, and promised to pay the balance in a few days, which offer was refused.

On the next day the plaintiff moved with his family to another residence. On the same day the defendant procured a writ of provisional seizure.

He handed the writ to a constable, who refused to execute it, because O'Hern insisted on accompanying him to the plaintiff's house, and because, as the officer stated, he knew O'Hern's mode and manner of collecting his rents, which he (the officer) characterized as "rough and bulldozing."

O'Hern procured the services of another officer, and went with him to the premises. He stalked into the house in advance of the officer without knocking, throwing open doors, and going from room to room. When remonstrated with by the occupant of the house (Dirmeyer, his tenant), he told him to go to hell, and raised his stick, quite a bludgeon, as if to strike him, when Mrs. Dirmeyer rushed between them, and then he addressed her in profane and obscene language. He was told to leave by the officer; he did so, but soon returned, and entered the house in the same unceremonious manner. He procured a cart and carried the furniture away.

The jury by their verdict fixed the damages, caused by this outrageous conduct of O'Hern, at \$500. It cannot well be seen how they could have found for a less sum consistently with the facts stated.

The counsel for the defendant seeks to palliate the conduct of O'Hern by suggesting that it was proper for him to have accompanied the officer, in order to show him the place. It could have been found very easily by the officer without O'Hern's assistance, as the house was numbered and on a well known street.

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He also urges that O'Hern was provoked to the violence shown by him, by Dirmeyer breaking a shelf or some small article of furniture, saying as he did so, that he had made it with his own hands. This was utterly insufficient to justify his rude and unfeeling conduct.

Again the counsel urges that there was no proof offered that the defendants were the heirs of O'Hern, and that therefore the judgment was wholly unauthorized. The motion filed after O'Hern's death to make parties allege that the defendants (naming them) were the heirs of the deceased, and had been put in possession of his estate, and asked that they be cited.

They appeared and answered by a general denial, without putting at issue by an exception the capacity in which they were sued and which was necessary if they desired to contest it.

The general issue admitted their capacity, and the question could never be subsequently raised.

It is also urged that the damages given by the verdict and judgment were exemplary or punitive in their character, awarded on account of an offense or quasi offense of O'Hern, and that the defendant, or his heirs, could not be responsible for the same; that they were personal to O'Hern, and the action to recover them abated at his death.

There is no force in this contention. The damages were actual in their character, although of that kind that the estimate of them is left largely, under our law, to the discretion of a jury or the court. C. C. 1934.

We may well conceive that the injury, the suffering inflicted on Dirmeyer and his family by the brutal conduct of O'Hern, was as intense and painful, or perhaps, more so, than if physical violence had been used, and he had actually belabored the man and his wife with his bludgeon.

There has been great confusion of ideas which, even to some extent, is shown in our own reports, respecting actual and exemplary or punitive damages.

The former is often confounded with a pecuniary loss, and limited to such loss; and all beyond that, such as injuries physical or mental, are classed with the latter. This is a mistake. Indeed, were the question an open one, we would hesitate before recognizing this element of exemplary punitive or vindictive damages, as existing in the civil law. The theory of this kind of damages, is that, after a full indemnity has been found by a jury or a court for the injury suffered, a sum in addition thereto may be arbitrarily imposed to punish the wrong-doer, and by such punishment set an example to deter others from the

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commission of a like offense. And these additional damages, thus found, are likewise called vindictive damages, which a judge or jury may inflict under a just sense of indignation for the wrong done, and are sometimes characterized by the homely phrase of "smart money."

It is a principle that has been borrowed from the common law, and though tacitly, and sometimes expressly, recognized in our decisions, it is really an exotic in our system.

However this may be, the present court, in repeated decisions, has recognized this kind of damages as actual damages, and these decisions are supported by eminent elementary writers on the subject. *Byrne vs. Gardner*, 34 Ann. 6; *Deslondes vs. O'Hern*, 37 Ann. 881.

The damages inflicted by O'Hern on the plaintiff being then actual damages, his liability for the same accrued then and there, and was transmitted to his heirs, although, both as to him and them, the measure of such damages was in *futuro* to be fixed by verdict and judgment.

There is, however, an error in the judgment as relates to John D. Crawford, the husband of one of the heirs, who was condemned therein. He came under no liability whatever on account of this relation to one of the heirs, and besides it does not appear that he was ever cited, or that he appeared at all in the proceeding, by answer or otherwise.

The judgment is erroneous, also, as to Mrs. Crawford. She was not cited conjointly with her husband, nor does it appear that she was authorized by him or the court to defend the suit. It was, therefore, nullity in this respect.

There is a further error in the judgment in condemning the defendant *in solido*.

Heirs are only bound jointly for their ancestors debts.

There are four heirs made parties as legal representatives of the original defendant. The entire judgment is \$500, and each defendant is only bound for his virile share thereof, \$125.

These several errors in the judgment must be corrected.

It is, therefore, ordered adjudged, and decreed, that the judgment of the lower court be amended as follows :

That the judgment as against John D. Crawford and his wife, Catherine O'Hern, be annulled, and the demand as to the former be rejected, and as to the latter it be dismissed as of non-suit. That the judgment as to the others, to-wit: Annie O'Hern, Wm. M. O'Hern, Matilda Breard, be reduced to the virile share of each of the total amount of said judgment, *i. e.*, to one hundred and twenty-five dollars, with legal interest thereon from the 23d of December, 1886, the date

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of the rendition of the judgment in the lower court, and as thus amended it be affirmed, costs of appeal and of the lower court as to Mr. and Mrs. Crawford to be paid by the appellees.

ON REHEARING.

POCHÉ, J. The considerations which induced the court to reopen this case were the serious doubts suggested by a second examination of the record touching the correctness of the mode adopted by plaintiff to make proper parties, after the death of the defendant O'Hern, and as to the extent to which the heirs of the wrong-doer can be held legally responsible for the injuries which he may have inflicted through the acts complained of.

The pith of the charge made against the defendant was brutal and unmanly conduct, the use of abusive language and threats of personal violence towards plaintiff in the presence of his wife, at their own house, whither the defendant had gone in company with a constable who was seeking to execute a writ of provisional seizure, sued out against Dirmeyer, by the defendant O'Hern.

After the death of O'Hern, and before issue joined, plaintiff filed the following motion, and obtained the order subjoined thereto with a view to make new parties to his suit.

"On motion of E. W. Huntington and Fred. D. King, of counsel for J. C. Dirmeyer, plaintiff, and on suggesting to the court that since the service of citation and a copy of the petition on the defendant, the said William P. O'Hern has departed this life, and the heirs have been put in possession of his estate, and plaintiff is desirous of making them parties to this suit.

"It is ordered that the heirs of William P. O'Hern, to-wit: Annie O'Hern, widow of William P. O'Hern, Catherine O'Hern, wife of John D. Crawford, William M. O'Hern, and Matilda Breard, be made parties defendant to this suit, and be served with a copy of this order."

The most striking feature of the motion and order is, that while Annie O'Hern is therein alleged to be the surviving widow of the defendant, Wm. P. O'Hern, she is brought into court simply as an heir. And at the same time it is alleged that William P. O'Hern has left heirs at law, from which condition of things it follows clearly that Widow W. P. O'Hern could not be an heir of her husband's succession.

Article 924 of the Civil Code provides for the only circumstances under which the wife may, according to law, be the heir of her husband. It reads:

"If a married man has left no lawful descendants nor ascendants, nor any collateral relations, but a surviving wife not separated from

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bed and board from him, the wife shall inherit from him, to the exclusion of any natural child or children, duly acknowledged."

Now, the motion does not set forth the quality of heirship which it alleges in the case of Catherine, and William M. O'Hern, and Matilda Breard—and whether either or any of them are descendants of the deceased, or whether they are all collateral relations, and in what proportion between themselves they are each to inherit the property of the deceased, nor does it state whether the widow is a partner in community or not. As Matilda Breard does not bear the name of the deceased it is certainly not a violent presumption to conclude that she is not a child of the deceased, but nothing in the record suggests any more information touching her legal liability for which she is sought to be made a party to the suit.

But under the law by virtue of which heirs can "be sued for civil reparation of the injury caused by the crimes or misdemeanors of the deceased, whose succession they have accepted," as expounded in our jurisprudence, such heirs are only liable jointly, each for his virile share in the succession, and the widow in community for one-half. Code of Practice, art. 25; *Edwards vs. Peck*, 30 Ann. 926.

Now, as the record contains no suggestion, either by pleadings or evidence, of the proportions of the property of the deceased accruing to each or any of the parties made defendants as heirs of O'Hern, how can the court determine the respective responsibility of the heirs under the verdict of the jury.

It is no answer to these views to argue that by filing a general denial these defendants have acknowledged their alleged capacity as heirs. That such a general rule has been sanctioned and enforced in our jurisprudence cannot be gainsaid. But that the rule does not apply to the peculiar circumstances of this case is equally true. What capacity will Mrs. Widow O'Hern be held to have admitted by her answers? None but that of the surviving wife of the deceased, who has left heirs, for the allegation of her widowhood coupled with the allegation of the existence of lawful heirs, excludes absolutely the possibility in law of her being an heir. But she is not sued otherwise than as an heir, hence it follows that she is not brought into court in her real and only capacity, as surviving wife, and that no judgment could be rendered against her at all.

As an heir, she is not liable, as surviving wife, she is not sued.

As to the other defendants, the contention that their general denial admits their capacity as heirs could be successfully opposed to them if their object was to dismiss the suit, but the argument is harmless

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when levelled at their only complaint, which is that there has been no legal trial of the cause for the reason that one-half of the succession was entirely unrepresented, and also that they are erroneously condemned *in solido*, under the verdict of the jury allowing to plaintiff damages in the sum of five hundred dollars.

The legal attitude of the case is precisely where it stood previous to the unsuccessful effort of plaintiff to make new parties after the death of the original defendant.

Whatever is done in contravention of law is null and void, and such is the condition of the trial which has taken place below.

The foregoing views had not been pressed upon us at the first hearing of the cause, and hence our attention had been exclusively directed to the facts of the case, and not to the legal status of the suit under the pleadings.

As the necessary parties are not before the court in their true, legal and proper capacity, and as the conclusion is that there has been no legal trial of the case, it becomes unnecessary to pass, at this time, on other matters which are discussed by counsel in their briefs.

It is, therefore, ordered that our previous decree herein be annulled and set aside; and it is now ordered, adjudged and decreed, that the judgment appealed from and the verdict of the jury in this case be reversed and set aside at the costs of plaintiff in this court, and in the lower court from and after service of petition and citation on the deceased, Wm. P. O'Hern; other costs to abide the final determination of the case, and it is finally ordered that the cause be remanded to the lower court for further proceedings according to law and to the views herein expressed.

Mr. Justice Todd dissents.

No. 9911.

J. C. EGAN vs. S. RUSS.—B. C. LEE ET AL., INTERVENORS.

Parties may, by their contracts, waive rights which they would be entitled to enforce under the general law.

Plaintiff, being about to erect a dam across a watercourse, which defendant opposed, and was about to enjoin, entered into an agreement with the latter, that if he would not enjoin the work, but permit its completion, defendant might remove the dam if, in the high-water season, it should prove injuriously to subject defendant's land to overflow, on giving plaintiff notice in time to close a ditch leading from the watercourse through his plantation. Defendant having cut the ditch, held that plaintiff was not entitled to damages on defendant's showing that it did subject his land to overflow, and that the ditch was actually closed.

Plaintiff's demand, however, for an injunction restraining defendant from further interfering with the reconstruction of the dam and from tearing it down when rebuilt, is sustained.

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The contract being fully executed, and the *status quo* restored, defendant cannot take the law into his own hands, but must resort to legal remedies for further vindication of his rights. The dam being authorized by the police jury for the purpose of carrying a public road across the watercourse, the police jury should be a party to any proceedings to test the legality of its proceedings, and we decline to pass upon those questions in its absence.

A PPEAL from the Eleventh District Court, Parish of Red River.
Hall, J.

J. F. Pierson, for Plaintiff and Appellant.

Pierson & Hall, for Defendant and for Intervenors Appellees :

1. A jury consisting of not less than six free holders must be appointed to trace and lay out a new road proposed to be established, and they must take the oath prescribed by law. Sec. 3369 R. S. A road cannot be transferred to another place without the consent of the owners through or contiguous to whose land it runs. Ib. 34 Ann. 940.
- A failure to comply with an important requirement of the law in establishing a road nullifies the whole proceedings. 27 Ann. 204. Mere user does not make a road public. 37 Ann. 497.
2. The police jury made no provision for filling up Cross Bayou in accordance with law. The resolution as officially published appropriated money to build a bridge over the bayou. The subsequent contract privately made with plaintiff for filling up the bayou was illegal and a violation of defendant's and intervenors' rights. 29 Ann. 516. Sec. 2743, No. 13 R. S.
3. The proprietor of an estate has no right to change the flow of water in such a way as to cause them to run in another direction beyond the boundaries of his estate. C. C. Arts. 660-661.
4. It is not essential that estates should be contiguous in order that one may derive benefit from the servitude on the other. C. C. Art. 651.
5. Plaintiff has no right to close a bayou at its head in order that he may facilitate the drainage from his fields, and more particularly to reclaim and redeem large areas of lakes and ponds. 12 La. 503; 15 Ann. 300; 13 Ann. 587; 15 Ann. 497; Ib. 681; 10 Ann. 689; 12 Ann. 554.
6. A proprietor cannot erect any work which changes or obstructs the servitude of drainage and running water to the injury of neighboring proprietors. Same authorities. 4 Ann. 165; 33 Ann. 796; 34 Ann. 935-568; R. S. Sec. 3026.
7. There is no such thing as servitude of reclamation.
8. Plaintiff, by reason of his consent that defendant should destroy the dam when he thought it was injuring him, is estopped from claiming damages for its destruction as well as asking for an injunction to aid him in rebuilding it.

MOTION TO DISMISS.

The opinion of the Court was delivered by

FENNER, J. The motion is based on the ground that the amount in dispute does not exceed two thousand dollars.

Plaintiff claims \$1065 damages, occasioned to him by the cutting by defendant of a dirt bridge or dam, built across a bayou known as Cross Bayou, and also asks for an injunction restraining defendant from interfering with him in rebuilding said bridge or dam or from disturbing said dam when thus rebuilt.

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Defendant not only disputes plaintiff's claim for damages, but denies the right of plaintiff to build or maintain the dam, and avers that the maintenance thereof would subject his property to overflow and damage him more than five thousand dollars.

The interests involved are two-fold: First, the pecuniary damages claimed by plaintiff; second, the value to the parties of the right to close the Cross Bayou or to keep it open. *State ex rel. Levet vs. Lapeyrollerie*, 38 Ann. 913.

Plaintiff, against whom judgment was rendered, appealed to the Circuit Court. Defendant there moved, successfully, to dismiss the appeal on the ground that the amount in dispute exceeded \$2000.

Plaintiff then appealed to this court, and the same defendant moves to dismiss his appeal here, on the ground that the amount in dispute does not exceed \$2000.

We cannot recognize such contradictory proceedings, and considering that, from the face of defendant's pleadings, as well as from plaintiff's affidavit filed here, the value of the rights involved exceeds \$2000, we must maintain the appeal. Motion to dismiss denied.

MERITS.

It appears that, on June 23, 1884, the police jury of the parish passed an ordinance changing the road No. 17 from Coushatta ferry to Greening's ferry, in such manner as to run it across Cross Bayou.

On July 23d another ordinance was passed, which, as appears from the minutes, appropriated "the sum of forty dollars, or so much as may be necessary * * to build a *dirt* bridge across Cross Bayou."

But this ordinance, as published in the official journal, omitted the word *dirt*, and made it appear that the intention was only to build an ordinary bridge. Of course, this publication gave no notice of the purpose to build a dam closing the bayou.

Plaintiff, who was interested in having such dam built as a protection levee to his lands and plantation, made a contract to build it at the joint expense of himself and the parish.

Defendant was not advised of this project until the construction of the work was begun, when he and others interested called on the president of the police jury to protest against it. That officer informed him that he was not aware of any objections to the work, and referred him to plaintiff, by whom, he said, he had been informed that there were no objections.

Defendant and party then called on plaintiff and announced their intention to enjoin the work, by legal proceedings. Plaintiff dissuaded them from that course, insisting that their apprehensions of injury

Egan vs. Russ.

were without foundation, as would appear if the dam were built and submitted to the test of high water, assuring them that he had no wish to injure his neighbors, and that, if they would let the work go on, he would be perfectly willing, if, when high water came, the dam should prove injurious to defendant's lands, that they should remove it.

The conversation culminated in an agreement, about the exact terms of which there is some conflict, but the substance of which was undoubtedly that, so far as plaintiff was concerned, he would consent that they might cut the levee, if, in the high water season, they found that its effect was to increase the overflow of their lands, first giving him notice so that he might close his ditch running into the bayou. Under the inducement of this agreement, defendant abstained from legal proceedings, and permitted the work to go on.

In the high water of May, 1885, defendant, with others, cut and removed the dam, claiming that, in so doing, he acted under the terms of the foregoing agreement.

It is to be observed that we have no concern here with any questions of public law, so far, at least, as plaintiff's action for damages is concerned. The police jury has not appeared in this suit, and, so far as the record advises us, neither that body, nor any other public authority, makes any complaint of defendant's conduct.

The controversy is simply and purely between plaintiff and defendant, and their rights and obligations are to be governed by the law which they have made for themselves, i. e., by their contract.

Conceding that defendant's act in interfering with a public highway established under authority of the police jury was, in itself, illegal, and that any member of the general public might claim reparation for damages occasioned him by such act, yet plaintiff, as an individual member of the public, had the right, by contract, to waive his particular claim on that account, and to conclude it as fully as if he had been present consenting to, or participating in, the act. Under these views, we hold that plaintiff's right to damages depends on the solution of two questions, viz :

1st. Did the dam across Cross Bayou operate to injure the lands of defendant, by increasing the overflow thereon ?

2d. Did defendant notify the plaintiff of the cutting in time to enable him to close his ditch, or did any injury result from want of such notice ?

The evidence in the case fully confirms the conclusion of the district judge that the dam unquestionably increased the rapidity and extent of the overflow on the lands of defendant.

It is equally clear, and is, indeed, substantially admitted in the petition that, before the effectual cutting, plaintiff's ditch was actually closed, and no injury resulted from non-closing.

Hence, we consider that the judgment rejecting plaintiff's demand for damages was correct.

I.

On the question of the injunction, however, we are compelled to take a different view from that of the judge *a quo*.

The contract between plaintiff and defendant is completely executed and at an end. The dam has been removed.

The *status quo* before the contract is completely restored. The courts are open to defendant for the prosecution of all his legal remedies.

Plaintiff averring his intention to rebuild said levee, and that "he has good reasons to fear, and does verily fear and believe, that said S. Russ will attempt to hinder and interfere with him in rebuilding the same, and that said Russ will pull down or destroy the same after it is repaired and rebuilt," asks for an injunction simply restraining defendant from such action.

To this relief plaintiff is clearly entitled.

As has been said by this court in another case: "Amongst the powers delegated to the police juries in this State, one of the most important is that to cause any water-course which is not navigable to be filled up for the purpose of carrying the public highways over the same, provided no injury be thereby occasioned to the neighboring inhabitants. Rev. Stat., sec. 2743, No. 13." *Lalanne vs. Savoy*, 29 Ann. 516.

The police jury, in this case, has assumed to establish a public road and to authorize the filling of Cross Bayou in order to carry the road across it. Plaintiff claims the right, under his contract with the police jury, and by its authority, to build this dam. Whatever may be the rights of defendant, it is clear that he cannot take the law in his own hands, and physically oppose plaintiff's construction or tear it down when built.

If he denies the regularity of the proceedings of the police jury or its right to fill up this water-course to his injury as a neighboring inhabitant, he must assert his pretensions contradictorily with the police jury as well as with plaintiff, who acts under its authority.

We must decline to settle these questions in this action, where they are not essential to the determination of any right allowed by us to

 Benedict vs. Bonnot et al.

plaintiff, and where defendant has not even formally propounded a re-conventional demand.

Nothing prevents defendant or intervenors from resorting to proper legal proceedings against the proper parties in order to determine these rights and, in the meantime, to preserve the *status quo* by injunction.

We do not, by this decision, affirm the right of plaintiff or of the police jury to close this water-course. We simply deny the right of defendant, by extra judicial proceedings, to obstruct or destroy the work by physical force.

We note that since this suit was filed, defendant did bring an injunction suit against plaintiff, which was dismissed on the exception of *lis pendens*, because he had asserted a like right in this suit. But that obstacle will be no longer in his way.

There is no inconsistency between these views and our reference to the right to build this dam as an element of the cause of action on the motion to dismiss. The *right* was asserted in this suit, and litigated between the parties. We simply decline to decide it in this proceeding.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be affirmed in so far as it rejects plaintiff's demand for damages; that, in all other respects it be annulled, avoided and reversed; that the injunction issued in favor of plaintiff be now reinstated and perpetuated; that intervenors' demands be rejected, appellees, defendant and intervenors to pay the costs of their respective proceedings in the lower court and the costs of this appeal.

Watkins, J. recuses himself, having been of counsel.

 No. 9899.

WILLIAM S. BENEDICT VS. JOHN BONNOT ET AL.

Though an heir accept a succession that has fallen to him, with the benefit of inventory, yet, if he treats the property as his own, and offer it for sale, or make sale thereof, he makes himself an unconditional heir, and binds himself for the payment of the debts of the deceased.

An heir, having only a residuary interest in the succession of an ancestor, has no just cause of objection to a probate sale made to pay debts, if the same is insolvent. He should have paid the debts before making complaint.

If heirs and creditors remain silent and inactive, and permit the property to pass by a public sale into the hands of strangers, purchasers and third persons accepting title from them are fully protected.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

39 972
51 1551

39 972
152 855
52 365

A. J. Murphy, for Plaintiff and Appellee.

Sambola & Ducros, Braughn, Buck Dinkelspiel & Hart and P. E. Theard & Sons, for Defendants and Appellants :

1. By taking possession of the estate of his wife, and continuing the same business for two years after her death, without causing an inventory to be made, James Darcy became personally responsible for all the debts of the community. The share of his minor children was not liable for these debts. R. C. C. 988, 1010.
2. There being no administrator appointed, and James Darcy acting simply as tutor, he could only administer the succession as "an effect, a thing belonging to his wards," and was governed by the rules appertaining to the administration of tutors. The holding of a family meeting to fix the terms of the sale of the minors' share was indispensable. 16 Ann. 420; 34 Ann. 38.
3. An acknowledged creditor, whose claim is allowed on the tableau of distribution, but who has not been paid has his remedy against the tutor ex-officio administrator personally; but he cannot ask that the sale of the succession property be annulled. C. P. 993; R. C. C. 1063 et seq.
4. No such thing as a "putting in possession under the benefit of inventory" is known to our jurisprudence. The heir may accept unconditionally, in which case he is put in possession; or he may accept under benefit of inventory, in which case the administrator must proceed to liquidate the estate and pay the *residuum*, if any, to the heir. R. C. C. 1032, 1051, 1054, 1058, 1062, 1073; 27 Ann. 351; 21 Ann. 365; 19 Ann. 293.
5. Charles A. Benedict having acquired nothing from the succession of Susan Darcy, could convey nothing to William S. Benedict, who inherited from him; hence plaintiff's title is not good, and the defendants have justly refused to take the property adjudicated to them.

The opinion of the Court was delivered by

WATKINS, J. At a public auction sale, made on the 21st of June, 1884, by Nicholas J. Hoey, auctioneer of the city of New Orleans, John Bonnot, the sole appellant, became the adjudicatee of a certain lot of ground and improvements, situated in the Third District, for the price of \$3100, one-fourth cash and the remainder upon terms of one, two and three years' credit, with the security of mortgage and vendor's lien retained, the purchaser to assume the payment of all taxes o 1884. Thereupon a title in due form was tendered him, and compliance demanded, which he refused, and this proceeding was instituted to compel him to accept same in pursuance of the adjudication.

The grounds of the appellant's refusal are the following, viz :

1st. That the plaintiff is not the absolute owner of the property adjudicated, but that same is succession property, and under administration in the probate court for the benefit of the creditors of the late Charles A. Benedict.

2d. That the sheriff's sale of this property, as that of the community theretofore existing between James and Susan Darcy, should have been preceded by the convocation of a family meeting, and their recommen-

Benedict vs. Bonnot et al.

dation of the terms of sale, in the interest of the minors of the deceased mother.

3d. That the sale by James Darcy, tutor, with due formality, and without opposition, could not be subsequently set aside, at the suit of a single creditor, and without notice to the major heir.

4th. That there are recorded against the property various liens, privileges and mortgages, to an amount in excess of the price of adjudication.

Therefore he prays that same be annulled and avoided.

I. ●

The plaintiff claims to have derived title from the succession of his deceased brother, Charles A. Benedict, to which he was an heir, his (plaintiff's) brothers and sisters having renounced, and he having accepted same with the benefit of inventory.

The record discloses this state of facts, and that the plaintiff was placed in possession of the property of the estate of the deceased by the judgment of a competent court, upon due proof of the renunciation of all other heirs.

Since that time he has acted and treated the property as his own; has paid the debts of his brother's estate; and, finally, caused the same to be sold to defendant, as his.

Premitting any expression of opinion with regard to plaintiff's right to accept the succession *with the benefit of inventory*, and terminate his own administration, his taking the property into possession and treating it as his own, and making a sale thereof, constitutes him an unconditional heir, and subjects him to the payment of the debts of the deceased.

This obligation plaintiff acknowledges and assumes. Under this state of facts the title he offers defendant is as good as that of the deceased.

II.

The property originally belonged to James and Susan Darcy in community. At the death of the latter, in 1874, James Darcy survived; and there also survived one major and three minor children. The succession of Susan remained without administration until 1877, when the surviving husband qualified as tutor, and caused an inventory to be made. The community assets aggregated \$12,440, and its indebtedness \$16,722 11.

The succession of the deceased was insolvent.

The tutor obtained an order of court for the sale of the property, and procured an adjudication of it to himself at the *nominal* price of \$9550—though nothing was paid. Prior to this adjudication, though subsequent to the order of sale, James Darcy, in his personal capacity executed and caused to be recorded two special mortgages against the property, then advertised for sale, in favor of two of the creditors of the late community, and, of course, his purchase was subject to them. Subsequently, another community creditor brought suit against James Darcy alone, without making the mortgagees parties, and upon appropriate allegations and proof of fraud, obtained a judgment by default, revoking and annulling his title, and decreeing that the succession of Susan Darcy had not been divested thereby, and that it was subject to the debts thereof. This property was again ordered sold to pay debts of her succession, and the same was adjudicated to Charles A. Benedict.

The defendant's objections to the validity of the proceedings and judgment setting aside the sale to James Darcy are of no force.

The major heir of Susan Darcy was in no way affected by them. When his father assumed to purchase the share of his deceased mother he retained in his hands the share of said heir; and when the sale was revoked the property was left in his hands. In the absence of any complaint by other creditors, defendants cannot be heard. The succession and community were insolvent. On the trial the plaintiff testified that he had paid all the known debts of both, and that if any others there were, same would be paid on presentation.

He claims to have paid all the attorneys' fees and court costs, and has discharged all the mortgages against the property.

There is in the record no countervailing evidence. The heirs of Susan Darcy had only a residuary interest in her succession, which was defeated by the probate sale to pay debts, there being no *residuum* after the same were satisfied.

The objections urged by the defendant to the title offered him are unfounded, but we think the reservation made by the district judge, requiring the plaintiff to cause the inscriptions of all mortgages, liens and privileges that were of record against said property at date of sale, to be canceled and erased, with the exception of the taxes of 1884, was correct.

Judgment affirmed.

 Heirs of Hoggatt vs. Administrator et al.

No. 10,069.

 HEIRS OF PHILIP HOGGATT VS. A. W. CRANDALL, ADMINISTRATOR,
 ET AL.

The principle that, in an action of nullity, the judgment attacked as null cannot be pleaded as *res adjudicata*, does not apply where the grounds of nullity asserted had been considered and validly determined by that judgment itself.

In this case, not only were the grounds of nullity now charged considered and determined in the original judgment, but the same grounds were afterwards presented on an exception of nullity on which issue was joined, and which was again determined adversely to the exception. This operates *res adjudicata* against the present action, which is brought by the same parties (in law), against the same judgment, and on the same grounds.

A PPEAL from the Eighth District Court, Parish of Madison.
 Delony, J.

C. J. Boatner, for Plaintiffs and Appellants.

Stone & Murphy and W. R. Young, for Defendants and Appellees:

The opinion of the court was delivered by

FENNER, J. In the suit of Thos. J. Martin vs. Thos. W. Watts and Philip Hoggatt, No. 8556 on the docket of this court, a final decree was rendered in 1882, condemning the succession of Hoggatt to pay to plaintiff a certain amount of money. Watts vs. Martin et al. N. R., Op. B. 56, fo. 321.

After the return of this mandate to the lower court, plaintiff sought to enforce the same by a proceeding in the succession of Hoggatt for a sale of property to pay it. The administratrix of Hoggatt's succession appeared and opposed the application by an answer setting up that the judgment of this court was, "as to said succession, an absolute nullity."

On this distinct issue of nullity *vel non*, the case was tried and the district judge sustained the plea of nullity, and rendered judgment rejecting plaintiff's demand for the execution of his judgment.

An appeal was taken to this court and, after hearing, we rendered our decree reversing the judgment and remanding the case "for further proceedings according to law and to the views herein expressed." Suc. Martin vs. Suc. Hoggatt, 37 Ann. 340.

On return of this mandate to the lower court, there being no other defense to the proceeding for satisfaction of the first judgment, a judgment was entered to that effect.

Thereafter the legal representatives of the succession of Hoggatt brought the present action, the object of which is to enjoin perpetually the execution of the last-named judgment and to annul both the above-named mandate of this court.

Heirs of Hoggatt vs. Administrator et al.

Amongst other defenses, the defendant interposed the plea of *res judicata*.

From a judgment in favor of defendant, rejecting plaintiffs' demand and dissolving the injunction, the present appeal is taken.

If there is the slightest force in the time-honored maxims, "*res adjudicata pro veritate accipitur*," and "*nemo debet bis vexari pro una et eadem causa*," surely defendant is entitled to their protection in this case.

The grounds of nullity urged against our original judgment between these parties (Op. Book 56, fo. 321), are substantially: 1st. That the succession of Hoggatt was not a party to the proceedings resulting in the judgment appealed from. 2d. That it was not a party to the appeal. 3d. That no judgment having been rendered for or against the succession in the lower court, the judgment of this court was an exercise of original jurisdiction prohibited by the Constitution.

Reference to our first opinion will show that we fully considered these objections to our decree; that we recited correctly every fact upon which they were based, and that we overruled them, holding substantially, in terms or by necessary legal inference: 1st. That the new trial granted by consent of parties vacated the entire former judgment of the court. 2d. That the default subsequently taken against the succession of Hoggatt created a new issue. 3d. That the trial had involved the issue raised by the default against the succession as well as that raised by the answer of Martin. 4th. That the judgment rendered, in failing to confirm the default against the succession, was error, remediable by appeal; and, finally, that the succession being a party to the proceedings and the issue tried, was a party to the appeal by reason of the latter having been taken by motion in open court at the same term at which the judgment was rendered.

Such was the plain theory of our opinion, and it should have been a bar to any action to annul it upon the grounds thus considered and disposed of.

Nevertheless, in the second suit above referred to, the succession of Hoggatt was permitted to raise the issue of the nullity of our mandate upon the identical grounds above stated and disposed of in our first opinion. This issue was tried in the lower court, appealed to this court, and was decreed adversely to the succession on the ground that the grounds of nullity alleged, having been considered and disposed of in the case in which the judgment was rendered, could not again

Heirs of Hoggatt vs. Administrator et al.

be agitated. We call attention to the fact that the first opinion of the court, in this last case, was reconsidered, and that our decree was made to rest on the reasons given in the opinion rendered on the rehearing.

The present action presents the same demand, founded on the same cause of action, between the same parties. C. C. 2286.

The petition charges that our proceedings violate various provisions of the Federal Constitution, and an attempt was made to remove the cause to the Federal court; but the Supreme Court of the United States remanded the cause, with these remarks: "If the administratrix of the succession of Hoggatt was not a party to the proceedings after the first judgment in her favor, no one can claim that the succession she represents was bound by what was afterwards done in the suit. All depends on whether she continued to be in fact and in law a party; and this is to be determined by the effect of the original judgment in her favor, and the form of the proceedings thereafter. This may involve a consideration of the law and practice in Louisiana, but it is not, so far as anything now appears on the record, at all dependent for its solution on any construction of the Constitution or laws of the United States."

The very thing decided by us was that under "the law and practice in Louisiana;" the original judgment was vacated by the new trial granted, and that the administratrix did "continue to be, in law and fact, a party" to the subsequent proceedings.

Assaults upon the correctness of these judgments, even if they had merit, would be of no avail.

We do not claim that our judgments are infallible; but, when they have become final, they are certainly irreversible by inferior courts and even by ourselves, on mere grounds of error.

In thus deciding we do not forget, nor do we violate, the principle that in an action to annul a judgment, the judgment so assailed cannot be pleaded as *res adjudicata*. That principle only applies to grounds of nullity which were not considered and validly determined in the judgment itself.

But it is sufficient to say that our decree on the former plea of nullity against the original judgment is unquestionably valid, and subject to no charge of nullity on any ground; and it is clearly *res adjudicata* against any further action of nullity by the same parties, against the same judgment, and on the same grounds.

Judgment affirmed.

State ex rel. Fisk vs. Police Jury.

No. 9821.

THE STATE EX REL. JOSIAH FISK VS. POLICE JURY, PARISH OF JEFFERSON.

A mandamus made peremptory against the police jury of a division of a parish, may be enforced after a consolidation of the divisions of the same parish, against the police jury of the parish thus formed.

A PPEAL from the Twenty-sixth District Court, Parish of Jefferson.
Rost, J.

Chas. Louque, for the Relator and Appellee.

James D. Coleman, for the Respondent and Appellant.

The opinion of the Court was delivered by

TODD, J. The police jury of the parish of Jefferson is appellant from a judgment dismissing a rule to quash and set aside a peremptory mandamus issued against it at the instance of the relator.

The relator, a judgment creditor of the parish of Jefferson, (left bank), obtained a writ of mandamus for the enforcement of his claims, which was maintained by a judgment of the Supreme Court of the United States on a writ of error from this court, which judgment directed this court to frame a decree conformable to the judgment and opinion of the court.

Accordingly a motion was made in this court to execute the judgment of the Supreme Court of the United States, and notice of such motion was directed to be served on the police jury of the parish of Jefferson and the district attorney for said parish, which was done, and contradictorily with said parties, a decree was rendered by this court on the 10th of May, 1886, to the end and for the purpose aforesaid.

Shortly thereafter a rule was taken by the police jury of Jefferson to vacate said decree, and have its nullity, as also that of the judgment of the United States Supreme Court declared, on the ground that the said police jury of Jefferson was not a party to the proceeding in which said judgment was rendered, that said proceeding was instituted and conducted against the police jury of the parish of Jefferson (left bank), and that said judgment could not, therefore, embrace or affect the parish of Jefferson, or its present police jury.

It appears that during the pendency of this proceeding in the courts, the divisions of the parish of Jefferson known as right and left bank, by an act of the Legislature of the State, known as act 92 of 1884,

State ex rel. Flak vs. Police Jury.

were united, constituting the one parish of Jefferson, with one police jury, and this act is cited and relied on by the said police jury of Jefferson as the ground of contention and resistance to the said judgment and to the decree of this court providing for its enforcement.

We note that when the mandate of the Supreme Court of the United States under said judgment, was filed in this court, and the decree of this court for its execution asked for, the police jury of Jefferson, after notice given as above stated, filed an answer to the motion, in which several grounds of opposition to the proposed decree were set up, and among others the special contention urged in the rule before us, viz: That the police jury of the parish of Jefferson was not a party to the said proceeding, in which the judgment was rendered, and that, therefore, the said judgment as to the said parish of Jefferson and its police jury, was an absolute nullity; and, again, referring to act 92 of 1884, as the ground of the resistance thus urged. The decree of this court made the mandamus peremptory, and in the language of that decree (quoting); "The defendant police jury" is ordered to levy the tax to pay relator's judgment.

Considering that there was no other defendant before this court opposing the proposed decree, and that the legislative act referred to was specially cited and relied on by this defendant in the pleadings stated, and that by the express terms of that act the police jury of Jefferson was made the successor of the police juries of Jefferson (right and left bank), abolished by the act, there can be no doubt that the decree aforesaid was directed against the present police jury of the parish of Jefferson. Nor can there be any less doubt of the correctness of the decree in this respect, inasmuch as this body is, as stated, the legal successor of the original defendant in the proceeding, and is directed by the act cited to adjust the indebtedness contracted by the police juries of Jefferson (right and left bank). Furthermore, it appears that the judgment appealed from, in exact conformity to said act, whilst directing the police jury of Jefferson to levy the required tax, limited the levy to the property embraced in the former political division of the parish as now constituted, known as Jefferson (left bank). We find no error in the judgment appealed from, and it is therefore affirmed with costs.

POCHÉ, J. I dissent from the opinion and decree of the majority in this case, and will file my reasons later.

 Fire Engine Company vs. City of New Orleans.

No. 9897.

CREOLE STEAM FIRE ENGINE COMPANY NO. 9 VS. THE CITY OF NEW ORLEANS.

The suit being upon certificates of appropriation evidencing claims for current municipal expenses during years from 1874 to 1877 exclusive, the judgment should have been restricted to payment out of the revenues of the several years in which the claims arose. The certificates declared upon carrying on their face an express stipulation they "bear no interest," none can be recovered except from judicial demand. The right to fund under acts 133 of 1880 and 67 of 1884, cannot be determined judicially except contradictorily with the Board of Liquidation.

39	981
46	715
39	981
48	566
39	981
108	121

A PPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

J. Duvalneaud, for Plaintiff and Appellee.

Walter H. Rogers, City Attorney, and *Branch K. Miller*, Assistant City Attorney, for Defendant and Appellee.

The opinion of the court was delivered by

FENNER, J. The suit is brought upon sundry "certificates of appropriation," issued in pursuance of an ordinance of the city, passed April 5th, 1881, No. 6968, Administration series. The certificates represent part of the floating debt of the city, created prior to the year 1879.

The judgment appealed from was in favor of the plaintiff for the amount of the certificates with legal interest on their respective amounts from the date of the several ordinances under which they were issued, and further ordering that, upon the surrender thereof, bonds be issued to plaintiff in exchange, as directed by act No. 67 of 1884.

The city complains of the judgment in two respects only, viz :

1st. That the judgment against the city should not have been absolute, but should have been restricted to the revenues of the years in which the claim arose.

From the face of the certificates it appears that they represent claims for current municipal expenses during the years from 1874 to 1877 inclusive, and, under our repeated precedents, the judgment must be restricted, as claimed by the city, to payment out of the revenues of those years. This may not interfere with their funding under the act No. 67 of 1884, which grants the right to fund all judgments, whether "absolute or rendered against the revenues of any particular year or years, previous to the year 1879."

 Schmitt, Tutrix, vs. Schmitt.

But the right to fund clearly cannot be determined in this controversy, which is one between plaintiff and the city of New Orleans alone. Under the funding acts, No. 133 of 1880, and No. 67 of 1884, it is plain that the right to fund can only be judicially determined contradictorily with the Board of Liquidation of the city debt. Therefore the judgment, in so far as it recognizes such right, is inoperative and erroneous.

2d. The other complaint of the judgment is that it allows interest from a date beyond that of judicial demand.

This was error. The certificates carry on their face the stipulation that they shall "bear no interest." The ordinance under which they were issued, makes the same express provision. The record does not disclose the reasons of the judge *a quo* for his judgment; and the only one assigned by plaintiff's counsel is the provision of law that debts bear interest from the time when they are due. Even if debts payable only out of particular revenues when collected fell under this provision in absence of proof the revenues applicable are in the treasury, and demand for payment out of same has been made, the provision can, in no event, apply to this case, where the evidences of obligation declared upon expressly exclude interest.

The judgment must be amended in the respects indicated.

It is, therefore, adjudged and decreed, that the judgment appealed from be amended by restricting the same to the revenues of the several years in which the respective claims arose; by allowing legal interest only from judicial demand, and by striking out that portion thereof which orders the funding, without prejudice to the rights of relator as against the Board of Liquidation of the city debt, and that, as thus amended, it be now affirmed, plaintiff and appellee to pay costs of appeal.

 No. 9942.

MRS. ELIZABETH SCHMITT, TUTRIX, vs. WIDOW R. B. SCHMITT.

If the person whose duty it is to furnish alimony shall prove that he is unable to pay the sum demanded out of his revenues, the judge may order that such person shall receive in his own house, and their maintain and support the person to whom the alimony is due.

A PPEAL from the Civil District Court, Parish of Orleans.
Tissot, J.

H. C. Cage & W. S. Benedict, for Plaintiff and Appellant.
Chas. F. Claiborne, for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. The plaintiff, in her capacity of tutrix of her minor child, prosecutes this suit against the defendant, its paternal grand-

Schmitt, Tutrix, vs. Schmitt.

mother, for alimony, claiming \$20 per month, "until the child shall have arrived at the age of majority, or at an age that she will be able to maintain herself."

She represents that Peter Schmitt, Jr., the father of the child, died on the 20th of July, 1882, and it was born on the 23d of February following, and is consequently about six years old. That the father was one of six children, issue of the marriage of Peter Schmitt, Sr., and Rosina Bohler, and that the former died on the 23d October, 1880, leaving an estate of about \$12,000 in value, to one-twelfth of which the child became an heir, at the death of its father. That this property being that of the matrimonial community theretofore existing between said spouses, the defendant, as the survivor, retained the share of the heirs, as the legal usufructuary, and still so retains it, including the share of the minor.

Petitioner represents herself as being entirely without means of support, and without property, and that it is the duty of the grandmother, under the state of facts presented, to furnish alimony to said child, in proportion to her means and the child's condition in life, and that she has repeatedly demanded it of her without avail.

It appears from the evidence that, at the date of the demise of Peter Schmitt, Jr., he and his wife and two small children, were living in a house that belonged to the dissolved community, for which he had been paying his mother a small rent, and that, immediately thereafter his widow removed to the house of her brother, where she has since abided with her children, one of whom has since died.

Peter Schmitt, Sr., and the defendant were the owners of, and cultivated several small market gardens, and from the sale of vegetables realized something above a competency, which they had invested in small properties in their neighborhood.

After the death of her husband, the defendant and her sons and daughters continued the business, but not with profit. All the children have become of age, except one daughter of nineteen years, and, in the main, they live together somewhat after the manner of a community.

The proof shows that the property subject to the defendant's usufruct consists of real estate worth \$5500, and \$1625 95 in money. That the plaintiff is thirty-four years of age, and absolutely impecunious. That defendant is sixty-two years of age, and works daily in her garden for a living, the annual rents of her property, when collected, only amounting to about forty dollars.

State ex rel. Police Jury vs. Judge et al.

We do not think that it is defendant's duty to furnish the alimony demanded, as she is evidently unable to pay the same out of her revenues; but we are of the opinion that the defendant should receive in her house and there support and maintain the minor, and furnish her what is necessary for her nourishment, lodging, support and education suited to her condition and station in life; and that she retain her until she attains her majority, or becomes sufficiently able to maintain and support herself. R. C. C. 230, 231, 233, 234.

This the defendant expresses a willingness to do.

Judgment affirmed.

No. 10,033.

THE STATE EX REL. POLICE JURY, PARISH OF PLAQUEMINES VS. A. E. LIVAUDAIS, JUDGE, ET AL.

30 984
108 206

A District Court is incompetent to enforce the execution of a judgment rendered by a Justice of the Peace, the more so where the existence and validity thereof are put at issue.

Objections to the jurisdiction of that court, in such a case, ought not to have been overruled.

A prohibition lies to such court to prevent the execution of the judgment rendered by it to enforce the judgment thus assailed.

APPPLICATION for Prohibition and Certiorari.

James Wilkinson, District Attorney, for the Relator:

Justices of the Peace have a right to grant new trials within three days after service on defendant of a valid notice of judgment, where the judgment was rendered out of his presence. Art. 1152, Code of Practice; "Louisiana Magistrate," p. 53; Knobloch's Civil and Crim. Justice, p. 74; Act 45, 1880, sec. 7; Rule XI, City Courts, New Orleans; State ex rel. Broussard vs. Koenig, 39 Ann. C. P., 1085, 1131.

An attorney-at-law requires a special power to accept service of notice of judgment; 32 Ann. 803, and other authorities there cited.

An agreement to accept service of notice of judgment presupposes a valid notice of judgment shall be served, La. Magistrate, p. 39.

No valid notice was served in this cause.

The motion for a new trial was in time, irrespective of the time when the judgment was signed; 5 N. S. 224; 4 Ann. 561; 6 Ann. 251; 20 Ann. 168; 23 Ann., 110.

Where a court has jurisdiction of the subject matter and the parties are before it, its orders and decrees, though perhaps voidable, are not void; Holdane vs. Sumner, 15 Wallace. 601; Bayhi vs. Bayhi, 35 Ann. 529.

The District Court has no supervisory power over Justice of the Peace Courts; State vs. Judge Nineteenth Judicial District; 30 Ann. and cases there cited; Arts. 617, 618 and 629 of the Code of Practice.

In mandamus proceedings the officer whose duty it is to perform the act must be cited; Dillon on Mun. Corporation "Mandamus; C. P. Art. 834; 29 Ann. 262; C. P. Art. 844.

The President of the Police Jury has no greater power than any other member to provide for the payment of a judgment; 38 Ann. 630.

The facts at bar entitle us to the writs of prohibition and certiorari.

State ex rel. Police Jury vs. Judge et al.

P. Leonard and Sambola and Ducros :

MALITIIS NON EST INDULGENDUM.

1. The writ of *certiorari* is allowable only in case of a relator complaining of the want either of citation or of the jurisdiction of an inferior judge, or of proceedings absolutely void or not cured by the action of the party complaining: C. P. 845, 846, 855, 856, 857, 864, 865.
2. Country district courts have jurisdiction of all cases involving more than \$50 in value or amount, as well as of cases brought by mandamus to enforce the payment of a judgment rendered by a justice's court against a parish or police jury. Const. 1879, Art. 109; C. P. 81, 829, 836, 844; 1 R. 496; 13 Ann. 291; 4 Ann. 84; 30 Ann. 65; 1 Ann. 438; Boone, § 313, 168; 2 Dillon, § 850; High, § 365.
3. In a suit brought against a parish or police jury *eo nomine*, citation issued and served on the president of the police jury legally brings the police jury into court, without citing the individual members thereof; C. P. 112, 119, 198, 206, 929, 844; 35 Ann. 70; High, §§ 337, 442, 443, 444; 2 Dillon, § 700, etc.; Boone, §§ 75, 160; 21 Ann. 439; 23 Ann. 803; 27 Ann. 542.
4. An exception of any kind, other than one founded on the absolute incompetency of the court *ratione materiae*, is legally waived by an answer to the merits, without a previous decision of the exception. C. P. 94, 353, 334, 375, 344; 23 Ann. 255; 26 Ann. 312; 18 Ann. 66; 14 Ann. 798; 4 L. 482; 12 Ann. 198; 10 Ann. 20; 17 L. 499; 4 Ann. 350; 1 N. S. 201, 704; 11 R. 80, 430; 2 L. 226; 18 Ann. 340; 2 L. 226; 30 Ann. 705.
5. On a writ of *certiorari* the court is not permitted by law to pass upon the intrinsic correctness of the judgment or proceeding complained of. 33 Ann. 16; 32 Ann. 1223; 38 Ann. 378, 922; 39 Ann. 631.
6. An attorney of record may legally accept service of a notice of a judgment, or agree on behalf of his client to a certain mode of taking or trying suspensively an appeal, and by so doing he waives none of his client's rights. 1 Ann. 398; 32 Ann. 803; 12 L. 603; C. P. 197, 206, 1090, 1129, 1131, 1133, 1139; 2 Ann. 917; 3 Ann. 543.
7. A country justice of the peace in this State is without jurisdictional power to grant a new trial by reason of an error of fact or of law committed in his former final judgment. Rev. Stat., §§ 2047, 2052; C. P. 124, 557 to 563, 912, 913, 914, 1043, 1074, 1090, 1129, 1131, 1132; 16 Merlin Rep., verbo judgment, § 3, No. 4; 29 Merlin, verbis requête civile, § 3, No. 11; verbis révision de procès, § 1, Nos. 1, 2, 5, 7; Carré, No. 604 and notes; 4 Favard, Rep., verbis révision de procès, Nos. 1, 2; Curia philippica, part 1, § 18, Nos. 17 and 18; part 5, § 4, No. 1; 7 Febreiro, p. 184, appendix, chap. 2, § 1; 1 Solon, §§ 165, 168, 170, 2 L. 139; 2 Ann. 493; 2 R. 512.

The opinion of the Court was delivered by

BERMÚDEZ, C. J. This is an application for a *prohibition and certiorari*. The complaint is: That the district judge has undertaken, over the objection made to his jurisdiction, to issue a *mandamus* to the police jury to compel them to make provision for the payment of a judgment for \$75, rendered by the third justice of the peace in the parish.

The grounds of the complaint are: *That* the district court is incompetent to enforce a judgment of a justice of the peace, and *that*, in the case in which the judgment was rendered, the justice of the peace had granted a new trial, thus leaving matters as though no judgment had been rendered.

State vs. Eames.

The objection to the jurisdiction of the district court in the premises was overruled and the court rendered judgment simultaneously on the merits.

The district judge returns, maintaining his jurisdiction in the premises.

It is unnecessary to inquire whether the judgment alleged to have been rendered by the justice and sought to be enforced before the district court is or not in existence and valid.

It suffices to say, even if it be a valid judgment, that it does not appertain to the district court to see to its execution.

The Code of Practice, Article 629, provides: "It is for the Court, whether appellate or inferior, which has rendered the judgment, to take cognizance of the manner of its execution, when the proper manner of executing it is to be determined."

An anterior article, 617, declares that the execution of judgments belongs to the courts by which the causes have been tried, and the jurisprudence on the subject is that it belongs to the court which has rendered the judgment to regulate the mode of its execution, and that the Supreme Court will not interfere except in clear cases of injustice or oppression. *Compton vs. Aïreal*, 9 Ann. 496; *Donnell vs. Parrott*, 13 Ann. 253; 7 N. S. 658; 8 M. 63.

It appears from the pleadings here that the existence and validity of the judgment sought to be enforced are denied. This is an issue which the district court was incompetent to determine, and which belongs exclusively to the justice's court, by which it is claimed to have been rendered.

It is clear that the objection to the jurisdiction of the district court ought not to have been overruled, and that the district court cannot proceed to execute the judgment rendered, making the *mandamus* peremptory on the police jury.

It is therefore ordered and decreed that the judgment rendered by the district court be declared invalid and that the prohibition asked be made peremptory.

No. 10,048.

THE STATE OF LOUISIANA VS. W. F. EAMES.

An indictment for a statutory crime need not follow the exact words of the statute in setting forth the offense, it is sufficient if the words employed are of equivalent import and clearly convey the true and complete meaning of the language used in the statute. An indictment under sec. 903 for the embezzlement of moneys of the Board of School Directors of the parish of Red River, which said money had been then and there entrusted to him as treasurer of the public school funds of said parish, etc., sufficiently

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State vs. Eames.

embodies all the elements of the offense denounced in the statute, viz: 1st. That the money was public money, being school funds. 2d. That defendant was a public officer, being treasurer of the public school fund, an office created by law. 3d. That the entrusting to him, "as treasurer," was an entrusting for "safe keeping or disbursement," as required by the statute. On the last point, the law creating the function of treasurer of the school funds, defines his duties to be exclusively those of "safe keeping or disbursement," and, moreover, the term treasurer, as denoting a public or private office, has a well-settled signification as "the title of an officer to whom funds are committed to be kept or disbursed."

Attention of prosecuting officers is called to the "practical hints" as to drawing of indictments, contained in Bishop on Statutory Crimes, § 386, an observance of which would obviate the frequent questions as to the validity of indictments.

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

M. J. Cunningham, Attorney General, and *J. C. Pugh*, District Attorney, for the State, Appellant:

1. Indictments for statutory offenses need only describe the offense in the language of the statute, or words of similar import. *State vs. Pratt*, 10 Ann. 191; *State vs. Henry*, 10 Ann. 207; *State vs. Batman*, 15 Ann. 156; *Arch. Crim.*, P. and P., p. 14; *Bishop on Crim. Prac.*, sec. 478; *State vs. Williams*, 37 Ann. 776; 33 Ann. 312; 36 Ann. 923.
2. If the statement of the real facts constitute a substantial violation of the statute, the indictment is sufficient. *State vs. Hood*, 6 Ann. 179.
3. It is a rule of criminal pleadings well settled, that presumption of law need not be stated, nor conclusions of law resulting from the facts of a case. It suffices to state the facts, and leave the court and jury to draw the inferences. 1 *Chitty* 231; 4 *Manly* 105; 2 *Wilson* 147; 5 *Leach* 591; see also dissenting opinion of Judge Preston in *State vs. Stiles*, 5 Ann. 329.
4. The principal object of pleadings in criminal cases is to inform the defendant of the nature, cause and character of the charge preferred against him, to the end that he may shape his proof accordingly.
5. The policy of criminal jurisprudence is to give a liberal construction to indictments and statutes. *State vs. Stiles*, 5 Ann. 329; *State vs. Humphries*, 35 Ann. 969; 38 Ann. 564; *Ib.* 567.
6. In criminal matters technicalities are not to be disregarded; but they must be subjected to reasonable restraints, and cannot be allowed to reduce the law to a mere "rhapsody of words."

J. C. Egan, for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. The State is appellant from a judgment of the district court quashing the indictment in this case.

The indictment charges that the defendant "did feloniously, wrongfully use and convert to his own use, and conceal and embezzle eight hundred dollars, lawful money of the value of eight hundred dollars, of the property of the Board of School Directors of the parish of Red River, which said money had been then and there entrusted to said

State vs. Eames.

W. F. Eames, as treasurer of the public school funds of the said parish of Red River," etc.

The statute under which the prosecution is based provides:

"Any officer of this State, or any other person who shall convert to his own use, in any way whatever, or shall use by way of investment in any kind of property, or merchandise, or shall loan, with or without interest, or use in any other manner than as directed by the law, any portion of public money which he is authorized to collect, or which may be entrusted to his safe keeping or disbursement, or for any other purpose, shall be guilty of an embezzlement of the same." R. S., Sec. 903.

Various defects are charged against the indictment, which may be summarized as follows:

1st. That it does not charge that the funds embezzled were *public* money.

A sufficient answer is, that the "Board of School Directors" in each parish is constituted by law a public corporation, charged with the control, administration and disbursement of the school funds; that such funds are public money, and that the allegation that the funds embezzled were those of said board sufficiently characterizes them as "public money."

2d. That it does not charge that Eames was "treasurer of the school fund," or occupied any fiduciary relation to the Board of School Directors.

The indictment charges that the funds were entrusted to him "as treasurer of the public school funds of the parish." The law establishes the office of "treasurer of the public school funds," makes him the custodian of said funds, to be disbursed exclusively on the warrants of the Board of School Directors, and requires his semi-annual accounting to said board, or "as often as required." Act No. 23 of 1877, §§ 8, 11, 13; act No. 70 of 1882, § 2, No. 12.

Thus, it conclusively appears that the indictment does allege that defendant is treasurer, and the law establishes the fiduciary relation between that officer and the board.

3d. The remaining ground of the motion to quash is that the indictment does not, in its terms, set out the offense denounced by the statute, in that it does not allege that the money converted was entrusted to defendant for "safe keeping or disbursement" or any other fiduciary purpose.

It is undoubtedly true that the statute makes the purpose of the trust an essential element of the crime, and equally true that the indictment, in order to be valid, must set forth such purpose.

But it is not essential that the offense should be described in the language of the statute. It is sufficient if all the elements of the offense are set forth in words of similar import to those employed in the statute—that is, in such words as clearly convey the real meaning of the language used in the statute. *State vs. Williams*, 37 Ann. 776; *State vs. Humphries*, 35 Ann. 966; *State vs. Hood*, 6 Ann. 179.

The question is simply whether the allegation that the funds embezzled had been entrusted to defendant "*as treasurer of the public school funds*," does not necessarily, *ex vi termini*, clearly and unequivocally import an entrusting "to his safe keeping and disbursement," as set forth in the statute.

The office of treasurer of the school funds is one created by a public statute which defines its powers and duties, and these last are solely to receive and safely keep the school funds, to disburse them "only on warrants drawn" by the Board of School Directors, and to account to that body for his "receipts and disbursements as often as required" by it. Act No. 23 of 1877, §§ 8 to 13.

The entrusting of school funds to him "*as treasurer of the school funds*" was necessarily an entrusting for the purpose of "safe keeping or disbursement," because, under the law, they could have been entrusted to him, *as treasurer*, for no other purpose.

Indeed, aside from the clear, express definition of the functions of his office in the law creating it, the very word "*treasurer*," as denoting either a public or private office, has a fixed, general and legal signification of the same character.

Thus Worcester defines it as one having charge of the money, funds or revenues of a society, corporation, State or nation."

And Mr. Abbott, in his Law Dictionary, yet more pointedly defines it as the style or title of an officer to whom funds are committed to be *kept or disbursed*," adding, "the function is much the same in all cases, to take charge of the funds or revenues as they come in, to *keep them safely*, and make payments from them, as required from time to time."

It is not, therefore, a mere inference from the words used in the indictment, but an integral part of their essential meaning, that school funds entrusted to defendant "*as treasurer*," were so entrusted for "*safe-keeping or disbursement*," within the purview of the statute.

State ex rel. Railroad Company vs. Justice of the Peace.

Thus, in *Humphries'* case, an indictment under sec. 790 R. S., which provides :

"If any person lying in wait, etc., shall shoot, etc., any person, with a dangerous weapon, with the intent to commit murder," etc., was held good, though the words "with a dangerous weapon" were omitted, the court saying: "Shooting a person wilfully, while lying in wait, with intent to kill him, cannot be done without a dangerous weapon." 35 Ann. 966.

This precedent more than covers the instant case.

The public service, however, would be much benefited if prosecuting officers, in drawing indictments for statutory offenses, would perform the simple and easy task of embodying the words of the statute, following the "practical hints" of Mr. Bishop on this subject, which should be the *vade mecum* of every district attorney, amongst which are mentioned the following sensible injunctions: "Never draw an indictment except with the statute spread out before you. Always employ the exact statutory words, and do not experiment with other words which you may deem to be sufficient as substitutes." Bishop on Statutory Crimes, sec. 386.

But, being satisfied in this case that words used in the indictment include the full meaning of those of the statute, and advise the defendant perfectly of the nature and cause of the offense with which he is charged, we think our brother of the district court erred in quashing it.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled and set aside, and that the case be remanded for further proceedings according to law.

Poché and Todd, J. J., having been absent at argument, take no part.

No. 10,020.

THE STATE EX REL. NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY VS. C. F. HUFT, JUSTICE OF THE PEACE FOR THE NINTH WARD, PARISH OF ST. TAMMANY.

The provision of Art. 165, No. 9 C. P., making corporations committing trespass or doing damage "liable to be sued in the parish where such damage is done or trespass committed," does not confer jurisdiction of such action upon justices of the peace away from the corporate domicile. The Art. 165 is found under a particular title of the C. P. the first article of which restricts the application of the provisions under said title to district courts, and declares that "special rules are hereafter established for justices of the peace." Such special rules are found in the following Title IV of said code, articles 1069 and 1070, of which expressly forbid them from exercising jurisdiction over defendants domiciled in the State outside of their territorial limits.

State ex rel. Railroad Company vs. Justice of the Peace.

The case is not affected by the fact that the provision of Art. 165, No. 9, is also embodied in section 725 R. S. The same Legislature adopted both the Revised Statutes and the Code of Practice, and in cases of conflict, gave precedence to the latter. By embodying the provision as an amendment to Art. 165 and by leaving Arts. 1069 and 1070 unchanged, the legislative intent was fully indicated to maintain the latter in full force. Moreover, said articles are in direct conflict with Sec. 725 R. S., and under Art. 3990 R. S. the code must be "held and taken as the law governing."

A PPLICATION for Prohibition.

Robert Mott, for the Relator.

The opinion of the Court was delivered by

FENNER, J. Relator, a corporation domiciled in the parish of Orleans, having been sued before the respondent, a justice of the peace of St. Tammany parish, excepted to the latter's jurisdiction on the ground of its domicile.

The exceptions having been overruled, relator seeks relief in the present application for prohibition.

The claim of respondent to jurisdiction rests upon Art. 165, No. 9, of the Code of Practice, which provides that "in all cases where any corporation shall commit trespass or do anything for which an action for damage lies, it shall be liable to be sued in the parish where such damage is done or trespass committed."

But this article is found under Title I of Part II of the Code, the first article of which declares: "The rules of proceedings contained in the present title relate only to the district and parish courts of the State. * * Special rules are hereafter established for courts of probate and justices of the peace."

The special rules referred to respecting justices of the peace are found in the following, Title IV, "of proceedings before justice of the peace," and articles 1069 and 1070 there found, clearly preclude the jurisdiction here claimed over a defendant domiciled in the State and outside of the ward and parish of the respondent justice by the following emphatic provisions: "In civil cases within their competence justices of the peace can only cite before them such persons as are domiciliated or residing within the limits of their jurisdiction, or strangers who may chance to be there. In this case the term strangers applies to such as have no domiciled or fixed place of residence in the State. * * * Justices of the peace shall not hold, exercise or entertain jurisdiction in any civil matter where the defendant does not reside within the limits of his ward."

It is true that the provision of No. 9 of Art. 165 C. P. is also embodied in Sec. 725 of the Revised Statutes, but the act No. 341 of 1855, from

State ex rel. May vs. Recorder.

which it was taken, expressly reserved the above articles of the Code of practice from repeal, and the same Legislature which adopted the Revised Statutes also adopted the existing Code of Practice, and in cases of conflict gave the latter precedence over the former. We consider that by embodying the provision as an amendment or addition to Art. 165, and by leaving articles 1069 and 1070 unchanged, the legislative intent was clearly indicated to maintain the latter in their original force. Moreover, the said articles are in irreconcilable conflict with Sec. 725 R. S., if interpreted to apply to justices of the peace, and under Sec. 3990 R. S., the code must be "held and taken as the law governing,"

The jurisdiction asserted by the respondent justice is denied to him by the law.

It is, therefore, ordered that the provisional writ of prohibition herein issued be now made peremptory.

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No. 10,026.

THE STATE EX REL. N. E. MAY VS. R. C. DAVEY, RECORDER.

If no complaint is made of the *legality* of a city ordinance alleged to have been violated, nor of the *regularity* of a judgment pronounced thereunder, and there is nothing on the face of the papers showing that the charge preferred is *not* an offense against said ordinance, an application for a writ of *certiorari* will be refused.

A PPLICATION for *Certiorari*.

Walter D. Denegre, Farrar & Kruttschnitt and Henry Dufilho, for the Relator.

Thomas J. Semmes and Hornor & Lee, for the Respondent.

The opinion of the Court was delivered by

WATKINS, J. The relator was arrested on the charge of having violated ordinance 92, Council Series, of the city of New Orleans, and brought before the respondent's court for trial; and, upon hearing, was condemned, and sentenced to pay a fine of \$25, or, in default thereof, to thirty days' imprisonment in the parish prison.

His complaint of the proceedings in the respondent's court is that the charge presented did not constitute an offense that is punishable by said ordinance; and that his sentence is, therefore, illegal.

He represents that the sentence complained of is an unappealable judgment, from which he has in vain sought relief by petition to the Civil and Criminal District Courts of the parish of Orleans, for writs of *habeas corpus*, and that *certiorari* is his sole remaining remedy.

State ex rel. May vs. Recorder.

The ordinance alleged to have been violated reads as follows, viz :

"That it shall be unlawful for any person or persons to sell, barter, exchange or otherwise dispose of any lottery tickets, or token, policy, combination, device or certificate, or fractional part thereof, in any lottery drawn, or to be drawn, in or out of the city of New Orleans, unless the same be duly authorized by the laws of the State of Louisiana."

The affidavit simply charges "that on the 29th of June, 1887, at No. 26 Commercial Alley, in this district and city, one N. E. May did then and there violate ordinance 92, C. S."

The following ticket is annexed to the affidavits filed in this court, as a part of the respondent's return :

The purchaser of the within described

LOUISIANA STATE LOTTERY TICKET,

in accepting this receipt agree to appoint the undersigned as trustee, of
the original \$1 ticket of the monthly La. State Lottery.

Pool No. New Orleans, June 25, 1887.

Received of.....the sum of

10c. for One-Twentieth interest in a **40450**

tenth Lottery Ticket numbered

To be drawn on Tuesday, July 12, 1887.

(SIGNED) N. E. MAY, Trustee.

[FACE.]

RECEIPT.

[BACK.]

This share was received from

N. E. MAY,

26 Commercial Place.

—NOTE—

If the ticket described on the reverse side of this receipt should win a prize the holder should call on the person from whom they received this share (see stamp) and assist in appointing a Committee of three, to present the original ticket for collection. The prizes will then be equally divided among the shareholders, as follows :

	SCHEME.	Amount to each shareholder.
1	capital prize \$150,000..	\$750.00
1	grand " 50,000..	250.00
1	grand " 20,000..	100.00
2	large pr., each..10,000..	50.00
4	large " " 5,000..	25.00
20	prizes each.... 1,000..	5.00
50	" " 500..	2.50
100	" " 300..	1.50
200	" " 200..	1.00
500	prizes each.... 100..	.50
1000	" " 50..	.25
100	Approx. pr's each 300..	1.50
100	" " 200..	1.00
100	" " 100..	.50

But there is nothing discoverable on the face of the record to connect it with the charge made against the relator, or to constitute it an

State ex. rel. Nolan et al. vs. Judge et als.

essential and integral part thereof; and the respondent denies in his answer that the relator was charged with the sale of any ticket the sale of which was not authorized by the law of the State.

As there is no complaint made of the *legality* of the ordinance, none of the *regularity* of the judgment pronounced thereunder, and there is nothing to show that the sale of the ticket annexed was the violation of the ordinance complained of, there is nothing on the face of the record to bring this application within the scope of the supervisory power of this court.

It is, therefore, ordered, adjudged and decreed, that the relator's prayer for the issuance of a writ of *certiorari* be refused at his cost.

Bermudez, C. J. and Poché, J. concur in the decree.

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No. 10,030.

THE STATE EX REL. J. T. NOLAN ET AL. VS. THE JUDGE OF THE
TWENTY-SECOND JUDICIAL DISTRICT ET ALS.

A judge who has been recused has no right to take any judicial action in the case in which the recusation has been made

It does not appertain to him to say that the recusation is not well founded.

He must, immediately, where he does not acknowledge, *proprio motu*, that the recusation rests on good reason, call in another judge, or lawyer, as the case may be, to determine the question on that issue.

It is not until *after* the question has been decided adversely to the party raising it, that the judge can resume and exercise jurisdiction over the controversy.

It ought to be well known that, under article 90 of the Constitution, this court has a general supervision and control over inferior courts, *regardless of amount*, in all cases, otherwise proper.

A PPLICATION for Prohibition.

G. A. Goudran & R. N. Sims, for the Relators.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a prohibition, to prevent the district judge from passing upon a suit in which he was recused, and for a *mandamus* to compel him to call on a judge to determine the question of recusation.

It appears that the relators brought suit before the Twenty-second Judicial District Court, setting up certain rights to the ownership and administration of a local newspaper, claiming a sequestration of its apparatus, and praying that certain parties be enjoined from using the same.

State ex rel. Nolan et al. vs. Judge et als.

In their petition the plaintiffs recused the judge of that court on the ground of relationship.

The clerk issued the sequestration and the injunction, which were executed.

The district judge afterwards, on an application to bond, dissolved the writs.

The plaintiff, now the relators, complain that the district judge had no authority to take any action; that he ought to have called in a judge to pass upon the recusation, and that, having failed to do so, a *mandamus* should issue to compel compliance with that duty.

The district judge returns, that this court has no jurisdiction over this cause, the matter in dispute in the suit before him not exceeding \$2000; that the clerk had no right to issue the writs; that the recusation is unjustifiable; that he had the right to dissolve the writs on bond, etc.

It is, indeed, surprising and incredible that, at this late day, article 90 of the constitution, which vests this court with general supervision and control over *all* inferior courts, to be exercised by the usual remedial writs, and that the jurisprudence expounding it, which has settled that this power may be exercised in *all* cases, *regardless* of amount or matter in dispute—remain ignored by any member of the judiciary or bar.

The objection that the matter involved does not exceed \$2000 must be at once dismissed, with the hope that it will not be repeated as long as the article shall not have been revoked.

It may well be that the order of the clerk is illegal, that the recusation is groundless, but it is unquestionable that it did not lie in the mouth of the respondent so to say, under the circumstances.

It was the undeniable duty of the judge to have stood aside and at once called upon a judge *ad hoc* to pass upon the validity of the recusation, and it was not until *after* the recusation had been declared without foundation that he could take any action in the case.

The adjudications of this court are quite numerous, and rest on solid and conservative considerations. State ex rel. Tyrrell vs. Judge, 33 Ann. 1293; Wardens vs. Perche, 36 Ann. 160; State ex rel. Segura vs. Judge, 37 Ann. 253; State ex rel. Trimble vs. Judge, 38 Ann. 247; Amaker vs. Vernado, 19 Ann. 381; Hunter vs. Blackmar, Manning's U. C. 427.

As the district judge had no authority to act in the case as he did, it follows that the order which he made to dissolve the writs on bond was unwarranted, and so is an absolute nullity.

Tissot et al. vs. Telegraph Company.

The rights of the defendants to ask the dissolution on bond, or otherwise, must, however, remain unaffected, provided it be asserted *after* the recusation shall have been finally passed upon.

The case presented is a clear one for the relief asked.

It is, therefore, ordered and decreed, that the respondent judge do *at once* withdraw from the case, and call upon a lawyer, having the qualifications of a judge, to hear and determine the question of recusation, and that said respondent judge be prohibited from exercising any jurisdiction over the cause, until *after* said recusation shall have been finally determined adversely to the plaintiffs in the case.

It is further decreed that the dissolving order, made by the respondent judge, be declared null and set aside, reserving to the defendants in the case to urge a demand for a dissolution, in due course, and before a proper authority, and that relators recover their costs."

No. 9947.

WIDOW J. L. TISSOT ET AL. VS. GREAT SOUTHERN TELEGRAPH AND
TELEPHONE COMPANY.

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39	996
1124	778

There is no authority in any one to treat as a nuisance that which is not so, and whoever assumes to abate, as a nuisance, that which is not so, acts at his risks and perils.

A company which undertakes, under a contract with a municipal corporation, to do a work of public improvement, such as laying a fire alarm telegraph, has no right to invade the premises of an abutting proprietor and cut off limbs of trees overhanging the sidewalk, and which do not obstruct the use of the sidewalk, or when the posts and wires could have been, with less or no inconvenience, located elsewhere.

Even then, it has not the right to cut off branches so as to leave in the foliage an open space ranging in circumference from 25 to 40 feet, for the purpose of passing an almost imperceptible wire.

The city with whom the contract was made did not grant to the company the right of committing the acts complained. While the rights of corporations will be recognized, the obligations under which they are to respect those of others must be enforced.

The damage done can not be said to be irreparable. Time will surely restore the original condition of things.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Henry P. Dart, for Plaintiffs and Appellees:

1. Defendant's employes entered plaintiffs' premises (in their absence and without their knowledge or consent), by climbing the boundary fence, and destroyed the outer limbs of two ornamental magnolia trees. This is a trespass, and plaintiffs have their action for it, though no other damage be proved. *Sutherland Damages*, 3, pp. 364, 385, 869, 469; *Cooley on Torts*, pp. 63-4.
2. The wanton destruction of shade trees may be an irreparable injury. *Delacaux vs. Villere*, XI Ann. 39; *Sutherland Damages*, p. 374. See also *Wire's*, case, 20 Ann. 500.

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- In assessing damages, in such cases, the injury to the feeling: the conduct of the trespassers; its wantonness, etc., are to be regarded. *Byrne vs. Gardner*, 33 Ann. 9; *Cooley*; *Sutherland*; above cited. Wanton trespass implies malice. *Id.*
3. Negligence of the employes of a corporation acting within the scope of their employment, and in the discharge of their ordinary duties, which amounts to trespass, will be imputed as trespass to the corporation. *State ex rel. vs. Judge*, 33 Ann. 956; *Salt Lake City vs. Hollister*, 118 U. S. 256; also, 21 How. 202. "It is too late to discuss the question, once much debated, whether a corporation can commit a trespass." *Reed vs. Bank*, 13 Mass. 443; also, 2 Woods, 494.
4. The rule is, "that the employer or principal shall be responsible in all cases where the injury to the third person might have resulted from the negligence or unskillfulness of the servant whilst in the immediate pursuit of his master's business; although in fact it did not, but was occasioned by the wilfulness or maliciousness of the servant whilst so employed." *American Law Register*, Oct. 1887, p. 609, *et seq.*, and authorities there cited; *Heath vs. Wilson*, 9 C. and P. 607.

Bayne, Denègre & Bayne, for Defendant and Appellant:

The city of New Orleans employed defendant to construct a fire alarm telegraph through its streets, over a designated route, under the supervision of its commissioner of police and public buildings, and in executing this contract, the limbs of two trees which projected over and into the street were cut and the foliage trimmed for the passage of the wires, and for this plaintiffs claim damages. The streets are for public use, and under the administration of the city government. C. C. 454-458; 14 Ann. 842-827; 12 Ann. 747. City Charter, Acts of 1882, Nov. 20, Sec. 7 and 8, p. 20 and 21.

Branches of trees extending into the street may be cut or trimmed, when they prevent or impair a public use, and the fire alarm telegraph is constructed by the city for public use. C. C. 691; *Herbert vs. Benson*, 2 Ann. Rep. 271; 12 Ann. Rep. 343-746; *Young vs. Inhabitants of Varmouth*, 9 Gray 386; *Dillon on Municipal Corporations*, Sec. 688; *Irwin Telephone Company*, 37 Ann. Rep. 67; *Hill vs. Illinois Central R. R. Co.*, 38 Ann. Rep. 606; *Wood on Nuisances*, Secs. 111-256.

The line of the telegraph was constructed under the authority of the city in the exercise of power specially given by its charter and its police power, and in the construction no more of the limbs were cut or trimmed than was necessary, and the presumption of the law is that it was properly done. 28 Ann. Rep. 131; 9 Gray 386; *Franz et als. vs. S. C. & P. R. R. Co.*, and city of Sioux City, 7 Northwestern Rep. 472.

Neither malice nor negligence is in any manner imputable to any of the general officers of the corporation. There is no basis for the claim made for punitive damages, and there is no proof of any actual damage.

The general rule, under the law of Louisiana, is that only actual and compensatory damages are recoverable for an alleged illegal act, and any exception to this rule involves malice. C. C. 2320; *Richoux vs. Mayer Bro.*, *Manning's Unreported Cases*, p. 50; *Boulard vs. Calhoun*, 13 Ann. 447; *Keene vs. Lizardi*, 8 La. Rep. 33; *Woodenware Co. vs. United States*, 106 U. S. 435; *The State vs. Chapman*, 38 Ann. 348.

If there is any malice shown or outrage committed by the employee in which the employer did not participate, and which he did not authorize, the employer is not responsible therefor, and this is especially true as to a corporation. 11 Ann. Rep. 294; 13 Ann. Rep. 447; 6 Ann. Rep. 495; 29 Ann. Rep. 792; 38 Ann. Rep. 606, 348; 34 California, 594; 19 Michigan, 3; 47 New York, 122; 4 Indiana, 260; 52 Illinois, 256; 106 U. S. 435; *Greenleaf Ev.*, sec. 253, vol. 2; 4 Exchequer Rep. 580-586; *McManus vs. Crickett*, 1 East. 106; *Wright vs. Wilcox*, 19 Wendell, 345. The two last are leading cases on this subject.

The public are entitled to the use of the whole traveled street as a public highway, and the location of the poles for the fire alarm eight or nine feet from the bank of the bayou,

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out into the public road, would obstruct and endanger the lives of persons driving or riding upon it. The location was made under the direction of the city officers in accordance with the city ordinance, and there is no legal claim for damages. Wood on Nuisances, sec. 356; Dickey vs. Maine Tel. Co. 46 Maine Rep. 483; 37 Wisconsin, 84; 61 New York, 448.

There is no proof of any actual damage, and neither the law nor the facts proved in this case authorize any judgment for vindictive or punitive damages.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to recover \$2500 damages for trespass on plaintiffs' premises, injury done to valuable trees thereon, etc., by employees of the defendant company, whose action is characterized as wanton, malicious and violative of the rights of petitioners.

After issue joined by a general denial, the case was tried and a judgment rendered for \$750 damages, from which the defendant company appeals.

The facts do not appear to be disputed: with the district judge, we find them to be the following:

The plaintiffs are the owners of the property, which cost \$12,000 years ago, and has been continually since improved.

At a distance of between one and two feet within the front line railing, there were four full-grown magnolia trees, planted more than twenty years ago, which had been carefully nurtured and trimmed, and which presented an imposing appearance. They were planted two on each side of the entrance gate, at a distance of between twelve and fifteen feet apart.

During the summer of 1886, employees of the defendant company entered the premises and climbing the trees to some twenty-five feet from the ground, actually did cut off from two of them a number of limbs projecting on the street, so as to leave an open space in the foliage varying from 25 to 40 feet in circumference.

In justification the company urges that permission for the cutting of the limbs had been previously obtained; that the branches projected over and into the street and were an obstruction operating as a nuisance, which the city of New Orleans had the right to remove; that the cutting complained of was done in execution of a contract between the company and the corporation for the latter's benefit, or public improvement, namely: the construction of a fire alarm telegraph through its streets, over a designated route, under the supervision of the commissioner of police and public buildings; that the trees in question were on that route and the limbs cut off were an impediment to the

execution of the contract; that no more limbs were cut than was necessary, and the legal presumption is that it was done properly.

The company repels the charges of malice and negligence, holding that, in the absence of such, only actual and compensatory damages can be claimed; that there is no proof of real damage, and that punitive damages cannot be allowed.

Hence, error is charged in the judgment below, and its reversal is asked.

The evidence shows that when the acts complained of were consummated, the plaintiffs were away from the State, and that there lived on the premises a female servant who had a daughter some twelve years old. A gardener occasionally would come merely to keep the garden in good condition.

There is nothing to show that any authority was obtained from either of the occupants; but even if there was *proof* to that effect, it could not be considered, for the plain reason that the keepers of the property had been placed upon it for its protection and not for its destruction, to any extent, and that any permission from them to the contrary was bound to be violative of their trust, and so of no value and protection.

Granting the contract for the building of the fire alarm telegraph, with the city, it by no means follows that under that contract, which is absolutely reticent on the subject, the defendant company acquired from the city the right to do that which is charged against it.

There is no doubt that the streets and sidewalks of a city are not subject to any proprietary right or interest on the part of abutting proprietors. 37 Ann. 67; 38 Ann. 606.

They are things which belong in common to the inhabitants of cities and to the use of which all the inhabitants of the place, and even strangers, are in common entitled. R. C. C. 455, 458; 32 Ann. 915.

Neither can the right of the city to regulate the use of streets and sidewalks be disputed, for it has that privilege not only as an inherent power to its corporate existence, but also because its charter specially vests it with the prerogative. 32 Ann. 915, charter 1882, secs. 7 and 8, p. 20 and 21.

It is well settled that, whether the municipal corporation holds the fee of the street or not, the true doctrine is that it can do all acts appropriate or incidental to a beneficial use by the public, only where it acts in a proper and careful manner, for it is then only that the adjoining proprietor cannot complain.

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It is perfectly true that a municipal corporation may, when authorized, expropriate for the purpose of opening streets and making sidewalks, and that it may cut down trees, dig up the earth, and may make culverts, drains and sewers upon or under the surface, grade and level; in fine, do any proper act which may improve the use of the thoroughfare and enhance public convenience; but that cutting of trees, digging up of earth and the other acts must be confined within the limits of the street which extends over the space between the front lines of property-holders, on both sides, sidewalks included. It follows, therefore, the city could not enter the premises of the abutting proprietors, cut down their trees or dig up the earth on their premises. Dillon on Municipal Corp., 3d Ed. § 688 (544), p. 684.

It is true that under its charter, already cited, the city is expressly vested with the power "*to suppress all nuisances*;" but this must be construed so as to apply to cases of *nuisances clearly so*, to the detriment of public health and public convenience; for otherwise the removal or abatement would be unlawful.

Woods, in his treatise on the subject of *nuisances*, substantially uses the following language: (Sec. 740.)

Where the Legislature confers upon the city the power to remove nuisances, this power confers authority, provided the thing be a nuisance and produces such an injury that an individual injured thereby might remove, but not otherwise, and if the authorities abate a nuisance, they are subject to the same perils and liabilities as an individual, if the nuisance is not *in fact* a nuisance. * * * It would indeed be a dangerous power to repose in municipal corporations to permit them to declare, by ordinance or otherwise, anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw, without being responsible for all the consequences; and even if such power is expressly given, it is utterly inoperative and void, *unless* the thing is *in fact* a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it.

The fact that a particular use of property is declared a nuisance by an ordinance of the city does not make that use a nuisance, unless it is *in fact* so and comes within the idea of a nuisance. Hence authority conferred by an ordinance of the city is no protection against liability, unless its unlawful character is clearly established. Therefore (except in cases of great public emergency, when the emergency may be safely regarded as so strong as to justify extraordinary measures upon the ground of paramount necessity, or when the use of property com-

plained of is so clearly a nuisance as to leave no room for doubt on the subject,) it is the better course to secure an adjudication from the courts before proceeding to abate it.

The author next proceeds, enumerating the recognized cases in which municipal corporations may abate nuisances.

In the present instance there is nothing to show that the overhanging of limbs of trees, on the sidewalks from within the property, has ever been declared by law or ordinance, or even considered as a *nuisance*.

In a case in which it was claimed that a verandah extending over a sidewalk was a nuisance, as being an obstruction of light and view, which ought to be abated, a previous court said that, as to verandahs of the kind erected by the defendant, which the evidence shows to have become so common of late years, they are obviously, so far as the public is concerned, a great improvement as compared with the hanging galleries and wooden sheds which extend only to the half or the third of the width of a sidewalk and from which the drip in rainy weather is so great an annoyance to foot passengers. These modern verandahs, on the contrary, afford a perfect shelter from the sun and weather to passers by the front of the houses to which they are attached. In sultry climates, the necessity of shade from the sun, to health and comfort, has universally introduced the custom of balconies, or verandahs, which, in this respect, are equally beneficial to the inmates of the houses and to way-farers. *Durant vs. Riddell*, 12 Ann. 747.

It is to be noted that the property in the instant case is situate in the suburban or rural part of the city, in front of a water-course known as a "*bayou*," and that right next to the trees, on the street side, there exists a small sidewalk of between two or three feet in width.

To those who live in this climate, particularly during the hot summer months, when the thermometer points to about 100, when not more, it would be needless to argue that the overhanging of branches of magnolia trees on such sidewalks is no nuisance, but on the contrary, actually proves of great relief not only against the heat, but also sometimes even against the rain itself.

The court can take judicial notice of the fact that, on many sidewalks in the city and its suburbs or outskirts, there has been planted a number of trees, and it knows that this is done with the formal sanction of the municipal authorities, though subject to its good pleasure only. *Jewell's Dig.* 519.

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The principles announced by Wood were expressly recognized in this State, in *Kennedy vs. Phelps*, 10 Ann. 227, and were enforced in the case of *Pontchartrain R. R. Co. vs. New Orleans*, 27 Ann. 162, in which the city was condemned to pay \$30,000 damages for having pulled down the *depot* of the company, which had been considered a nuisance and which was not in fact such.

The same views were entertained in the case of *City vs. Wire*, 20 Ann. 500, in which a contractor in laying the pavement on a banquette on one of the streets, took up or destroyed common shade trees which had been planted there, was held liable in damages and condemned accordingly, although he claimed not to have acted with malice.

The defendants have called our attention to what was said in the case of the *Earl of Lonsdale*, 2 B. and C. 311, by Mr. Justice Bert, and which is to the effect that the permitting the branches of trees to extend so far beyond the soil of the owner of the trees is an unequivocal act of negligence which the injured party may abate without notice; but the learned justice adds, that the security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property has arisen to remedy it and that, in all other cases, persons should not take the law into their own hands, but follow the advice of Lord Hale and appeal to a court of justice.

It may well be that, under the circumstances from which the litigation arose, the learned justice thought himself authorized to announce what he deemed to be a principle; but, from his own language, this course could be justified only where security to life and property would require a speedy remedy.

In France, whose system derives from the Roman law, from which we have borrowed the great bulk of our legislation, the code provides, with more regard to the rights of ownership, that he, on whose property the branches of the trees of the neighbor overhang, may compel *the latter* to cut those branches. C. N. 672.

It further declares, however, that if it be the roots that have encroached, he has the right to cut them *himself*. Same article, new line.

Our code, art. 691, on the subject, is to the effect that, if the neighbor suffers any damage from the trees he can oblige the owner to have them torn up, or have their branches cut off, which extend over his estate. It makes the same provision as the French code when the roots invade his estate.

Had, by some accident, the limbs of the trees on plaintiffs' property been detached therefrom and fallen across the sidewalk, remaining there, so as to prevent the use of it by wayfarers, there is no doubt that

the city, or any person injured, could have had the right—the obstruction proving a nuisance, the necessary remedy having to be applied at once—to remove it some way or other, without any notice to the proprietor of the trees, even had it been necessary to enter upon the premises, as an indispensable means to accomplish the removal, but doing no more damage than would be essential to effect the object, remaining liable for any wanton and uncalled for injury. The existence of the emergency alone would justify the interference. U. S. Dig. Vol. IX, vs. Nuisance, p. 649, Nos. 62, 63, 67 and 68; Cooley on Torts, 47.

It is upon this principle that, while recognizing the rights of the defendant to put up poles and run wires thereon this court has, in the Irwin case, 37 Ann. 67, relieved the defendant, because the right had been exercised with as little inconvenience as possible to the plaintiff and to the public.

The argument is fallacious and a begging of the question, that in this case, although the limbs were not strictly a nuisance, they were obstacles in the way of a public necessary improvement, which had to be instantly removed, for it is not found that it was actually *impossible* to put up the posts and run the wires at any other place or otherwise than through the space occupied by the branches and the foliage.

It is apparent from an inspection of the map or plat in evidence that it would have been easy to have planted the telegraph posts and run the wires on them, on the other side of the street, on the embankment of the bayou, without interfering with the tow path used for cordelling schooners and other craft up and down the water course.

It is likewise manifest that, even if the posts could not have been erected elsewhere, there existed no reason whatever to cut the limbs of the trees so as to leave in the foliage an open space ranging from 25 to 40 feet in circumference, or 8 to 13 feet in diameter, for the mere purpose of running through that space an almost imperceptible wire.

It remains to be known how long it will take for other limbs and other foliage to grow which will fill up the large opening thus unnecessarily made.

In the meantime the injury done has surely not been fully repaired.

While treating of the right which a party may have of removing, *himself, and without notice*, a nuisance really so, Cooley on his work on Torts, says: The fact that he is taking the law into his own hands imposes upon himself a special obligation to keep clearly within the necessity which justifies it, and if he is guilty of *wanton* or unnecessary violence, he is liable for the excess.

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From the premises, it clearly follows that, as the overhanging of the limbs cut by the employees of the defendant company was not a nuisance, and surely not such as required or authorized an immediate removal by the city, the company or any other person, the entry on the premises and the cutting were wanton acts which constitute a trespass and an infliction of injury to property and feelings which demands the allowance of compensation to the injured party.

That party in default is surely not the city, for it never expressly or impliedly, directly or indirectly, authorized any one of its officials, or even the defendant company, to commit the trespass or inflict the damage. So that the responsibility rests upon the defendant company alone, whose employees represented it and did the acts complained of in the performance of service assigned to them in the ordinary cause of their employment, and which acts the company could have prevented by giving proper instructions or pursuing some different course.

While the rights of corporations will be recognized, the obligations under which they are placed, to respect those of others, must be enforced.

It is hardly necessary to refer to authorities to show that the acts done constitute a trespass and entitle the plaintiffs to an indemnity. Attention, however, is called to Sutherland on Damages, vol. 3, p. 364, 374, 385, 398, 469; Cooley on Torts, p. 63, 64, R. C. C. 1934; Delacroix vs. Villeré, XI Ann. 39; City vs. Wire, 20 Ann. 500; Hardy vs. Stevenson, 29 Ann. 172; Keene vs. Lizardi, 8 L. 26; Brulard vs. Calhoun, 18 Ann. 445; Salt Lake City vs. Hollister, 118 U. S. 256, and authorities therein, all referred to in the elaborate opinion of our learned brother of the district court.

It is evident that the plaintiffs have sustained injury in the wanton invasion of their premises, in the unjustified destruction of their property, in the deprivation of material, physical and moral enjoyment, in the endurance of aggrieved feelings and in the apprehension of a possibly irremediable wrong, for all of which they are entitled to compensatory damages.

The law on the subject of assessment of damages in cases of offenses and *quasi* offenses leaves much discretion to the judge or jury. R. C. C. 1928.

The evidence shows the value of the trees, what it would cost to replace them, how long it would take for the newly-planted trees to acquire the size of those mutilated. It establishes that these were ornaments of the property planted by Mr. Tissot.

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It does not put a value on the disappointment, mortification and other sufferings of the plaintiffs, as such things cannot be said to be measurable and appreciable in dollars, though, where there has been a mental endurance, some adequate pecuniary compensation must be made.

The Code provides that, in cases of unlawful deprivation of some legitimate gratification, although the same are not appreciated in money, yet damages are due. R. C. C. 1934; 4 Ann. 440; 10 Ann. 33.

We deem that, under the circumstances, the damage done is daily being repaired and that, in the course of time, it will hardly be perceptible, so that the original condition of things will be fully restored.

We do not think, however, in the absence of any fixed rule for the allowance of such damages, that the plaintiffs are entitled to recover the amounts allowed below.

It is, therefore, adjudged and decreed, that the judgment of the lower court be amended so as to allow the plaintiffs four hundred dollars (\$400), instead of seven hundred and fifty dollars (\$750), and thus amended, it be affirmed, appellees to costs of appeal.

No. 10,038.

JOHN McDUGALL VS. PASCAL MONLEZUN ET AL.

A tax sale is not necessarily cancelled and annulled by a certificate of redemption issued under the provisions of section 69 of act 42 of 1871, as such certificate is intended merely to redeem immovable property from a previous forfeiture to the State.

Under that section the privilege of redemption is extended to any person interested, and this includes the purchaser at the tax sale.

If the certificate is made in favor of the original owner, it is competent for the purchaser to show that he made the payment out of his own funds with intention to retransfer the property to the former owner, on condition of reimbursement within a given time by the latter.

An action to invalidate a tax sale made under a law of the State is barred by the prescription of three years. Barrow vs. Wilson, 39 Ann. 403, affirmed.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette.
DeBaillon, J.

Breaux & RenouDET, for Plaintiff and Appellant.

Chas. D. Caffery & M. E. Girard, for Defendant and Appellees.

The opinion of the Court was delivered by

POCHÉ, J. This suit involves the title to a tract of land which was sold by the tax collector of the parish of Lafayette, wherein the prop-

39	1005
45	425
39	1005
48	348
39	1005
50	88
39	1005
109	122
39	1005
113	196

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erty is situated, on the 6th of May, 1876, for taxes levied against it for the years 1873 and 1874.

Plaintiff claims under a sale made to him in April, 1833, by Otto Meine, the owner of the land at the time that the tax sale took place.

At that sale the property was adjudicated to William Brandt, who sold the land to L. E. Salles in January, 1877.

The defendant Monlezun purchased the same property from Salles in May, 1877.

Plaintiff charges nullity and fraud in all these transactions, and Monlezun, Salles and Brandt are all thus made parties to the suit.

The first ground of nullity is a certificate of redemption issued by the tax collector and by the Auditor of Public Accounts, under date of May 16, 1876, in which it is recited that the taxes and damages for which the property had been forfeited to the State had been paid into the State Treasury by William Brandt for account of Otto Meine, which certificate of redemption was of record at the date of Salles' purchase from Brandt, and of Monlezun from Salles. Hence, plaintiff charges fraud and nullity as to a certificate issued by the Auditor of Public Accounts under date of December 31, 1876, confirming the adjudication and tax deed made by the tax collector to William Brandt.

Plaintiff also alleges numerous illegalities, irregularities and informalities in the manner of assessing said property for the years 1873 and 1874—and in the proceedings which were the basis of the tax sale of May 6, 1876.

Of the number are, want of legal notices, omission to list the property as belonging to a non-resident (Otto Meine, being then a resident of New Orleans), absence of required affidavits to assessment rolls, omission to sell the lands in fifty acre lots, insufficient and defective description of the property, insufficiency and irregularity of advertisement of the sale, and other informalities of a similar character.

The defense consisted of numerous exceptions, pleas, answers and amended answers, substantially maintaining the legality of the tax sale, and the just title of the defendants, ending with a plea of the prescription of three years in bar of plaintiff's suit to invalidate the tax sale, and the plea of prescription of five years as curing all defects of form and of the proceedings leading to the tax sale.

At a first trial one of the exceptions urged by the defendants was sustained by the district court, whose judgment was, on appeal, reversed by this court, whence the case was remanded to the lower court for trial on the merits of the cause. McDougall vs. Monlezun, 36 Ann. 223.

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After the cause was remanded the defendants severed in their defenses, and each of their cases was tried separately, resulting in judgments against Brandt and Salles, and a judgment in favor of Monlezun, recognizing his title and quieting him in his possession.

Hence, on issues involving the legality of a certain title we have to deal with a singular state of things, exemplified by a judgment which annuls the tax sale, and by another judgment sustaining the title of a purchaser holding under such tax sale.

Plaintiff is appellant as to Monlezun and appellee as to Brandt and Salles.

After a serious study of the case, including a tedious examination of a most cumbersome record, as incomplete as we found it last year, (38 Ann. 230), we conclude that the case turns on the two following questions:

1st. Did the certificate of redemption issued on the 16th of May, 1876, annul the tax sale of the 6th of that month, and restore the ownership of the property to Otto Meine?

2d. Is that part of plaintiff's action which seeks to invalidate the tax sale of May, 1876, on the alleged grounds of nullities for illegality and irregularity of the proceedings, barred by the prescription of three years, and has that prescription accrued?

1st. On the first point the record shows the following salient facts as bearing on the issues which we are called to review:

The property in suit had been forfeited to the State for unpaid taxes of 1873 and 1874, in accordance with the provisions of secs. 67 and 68 of act 42 of 1871, and the certificate of redemption was, under its own terms, issued in compliance with sec. 69 of the same act, which reads: "That if any person *interested* in any lot or lands *forfeited* to the State shall, after the date of the collector's return, pay to the *Treasurer of the State* or to the *tax collector* charged with the collection of the tax for which said property was forfeited, the taxes for which the same were returned, and all taxes subsequently accrued on such land, and 25 per cent damages thereon, and 25 per cent additional for every year or part of year, after one year, the Auditor, upon proof thereof, shall execute and deliver to *such person* a certificate of redemption of the same." * * (Italics are ours).

From a careful analysis of the language of that section, it appears that the redemption therein contemplated is not from an adjudication or tax sale to a third person, but simply from a forfeiture to the State, and that no payment is therein contemplated or suggested from the delinquent to the adjudicatee of his property at a tax sale.

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It will also be noticed that the privilege of redeeming the property is not restricted to the former owner, but it is extended to *any person interested*. Hence, it follows that the purchaser at a tax sale made subsequently to the forfeiture to the State is included in the persons interested, and that the most frequent exercise of the privilege is found at the hands of the purchaser, who thus relieves his purchase from the effect of the previous forfeiture to the State.

The certificate of redemption contemplated in that section is materially different from, and must not be confounded with, the redemption which results from section 62 of the same act, and therein lies the error of plaintiff in claiming that the certificates of redemption which issued on May 16, 1876, had the effect of necessarily and absolutely cancelling the tax sale of May 6, and the adjudication to Brandt.

Sec. 62 of the act provides: "That real estate sold hereafter under the provisions of this act or any former revenue act, shall be redeemable by *the owners thereof*, or their legally authorized agents, within two years from the day of sale, upon the payment to *the party purchasing* at the tax collector's sales of the amount of the purchase-money with 50 per cent additional and all costs," * * * (*Italics are ours*).

It thus appears that the privilege of redeeming the property is restricted to *the owner* thereof, and that the payment is to be made to the *party purchasing*, and not the Treasurer or tax collector. The provisions of this statute assume that the amount of the taxes due to the State has already been paid by the purchaser, and that the forfeiture to the State has thereby been cancelled.

Referring to the certificate, with which we are now dealing, the evidence in the record shows that Brandt, the adjudicatee, had been in the habit of paying the taxes of Otto Meine on the property with money which the latter would send him every year. It is shown that Meine was notified first that the property had been forfeited to the State, and of the payment which he should make without delay to save his land. His answer was that he was out of funds. At the sale, which soon followed, Brandt bid in the property, with the intention of saving it for Meine, obtaining the promise of the tax collector to wait for him for six months without increasing damages, of which he immediately informed Meine by letter.

At the expiration of that time Meine had failed to come to the rescue, and as the tax collector pressed Brandt, who was powerless to relieve Meine, he sold the property to L. E. Salles, the deputy tax collector, who made the payment out of his own funds into the State

treasury, and for whose benefit, as a purchaser, the certificate of redemption operated, in default of Meine's compliance with the promises made for him by his agent.

In a letter to his attorney, under date of September 12, 1877, Otto Meine corroborates this state of facts, and unequivocally admits that he had paid no taxes on the property after the year 1872, thus confirming the conclusion that the certificate of redemption did not, and was not intended absolutely to enure to his benefit. His assignee is bound by his acts and admissions in all these matters.

The proceeding was irregular, but the only party who could have derived any benefit from the irregularity was Meine himself, to whom the tax collector had extended an indulgence of six months.

By the payment, at any time between the 6th of May, 1876, to the 1st of January, 1877, of the precise amount of the adjudication, Meine would have been the beneficiary of the redemption issued to his agent; and it was only on his default that the law took its course, resulting in his expropriation.

We fail to discover any elements or intentions of fraud in the conduct of either Brandt or Salles, or any undue advantage which accrued to either under their management.

A difference of only \$35 appears to exist between the purchase-price at the tax sale, and the price (\$100), paid by plaintiff to Meine for the identical property.

In addition to the facts hereinabove recited the record shows by other circumstances almost conclusive, that the redemption did not enure to the benefit of Meine, from the fact that the sale had already been made, and that under the sale from Brandt to Salles the latter went into possession of the lands, which possession was transferred to Monlezun in May, 1877, from which time he has been in uninterrupted possession of the same. This view is confirmed by the Auditor's ratification of the tax sale in December, 1876, at which time he certified that the lands had not been redeemed *by the owner*.

Hence, it follows, as we hold, that the adjudication and tax sale of the 6th of May, 1876, was not cancelled or annulled by the certificate of redemption issued on the 16th of May, of the same year.

2d. This suit was filed in November, 1883, and the sale attached, and took place, as stated, in May, 1876; hence, more than three years had elapsed between the date of the sale and the institution of the suit.

McDougall vs. Monlezun et al.

The tax deed is translativ of property ; it was executed by a competent officer, under the provisions of a law of this State—act No. 47 of 1873 ; it contains a recital of a compliance with all the formalities prescribed by the act ; the record shows that, holding under it, the defendant, Monlezun, has been in possession of the property sold thereby for more than three years, and has added to it many and valuable improvements, and the case therefore falls under the prescription established by section 5 of act 105 of 1874.

It reads as follows : “ Any action to invalidate the titles of any property purchased at tax sale under and virtue of any law of this State, shall be prescribed by the lapse of three years from the date of such sale.”

In commenting on that provision of law, and measuring its effect and bearing on a plea interposed to an action to invalidate a tax sale, this court recently said :

“ This is distinctly a statute of prescription. It operates not upon the rights of the parties. It does not purport to validate a title which otherwise would be invalid. It simply limits the time within which owner of the original title shall be allowed to assert his rights against the purchaser at a tax sale.” * *

“ It is a mistake to treat this statute as one intended to *cure defects* in tax titles. It is a statute of prescription, barring an action, regardless of the merits or demerits of either title.” *Barrow vs. Wilson*, 39 Ann. 403.

Hence, in the instant case, the statute must be construed, under the plea interposed as, and held to be an impassable barrier, which eliminates the very right of the court to investigate or consider the grounds of alleged nullity in the tax sale.

We, therefore, conclude that the judgment in favor of Monlezun must be affirmed, and the judgments rendered against Brandt and Salles respectively, are manifestly erroneous.

It is, therefore, ordered, adjudged and decreed, that the judgment rendered below, against William Brandt and against L. E. Salles, be each annulled, avoided and reversed, and that there be judgments in favor of each of said parties rejecting plaintiff's demand against them and dismissing his action at his cost in both courts, and it is ordered that the judgment in favor of the defendant, Monlezun, be affirmed with costs.

Tutrix vs. Sellers & Co.

No. 9941.

MRS. JOHN FAREN, WIDOW AND TUTRIX, vs. T. J. SELLERS & CO.

Under a written contract by which the contractor agrees to demolish a building, but containing a clause that "the work of demolition is to be carried out according to the directions of the supervising architect, whose decisions on all points I agree to accept as final," held: that this operated such a reservation of control over the work as prevented the contractor from being independent, and created the relation of master and servant.

Held: That even if the relation of contractor and contractee existed, yet, if the latter personally interferes in the work, or some part of it, he is responsible for any injury to a servant of the contractor occasioned by such interference.

Held: If an injury results to a servant from the combined negligence of the master and fellow-servant, the master is responsible notwithstanding the contributory negligence of the fellow-servant.

The master is responsible for the negligence of a servant who stands as his vice-principal and direct representative, invested with his own authority over inferior servants, and the latter, when injured by such negligence, are not barred by the doctrine of fellow-servant.

A servant is only bound to see patent, not latent, defects; mere knowledge of defects will not bar recovery for resultant injury unless accompanied by knowledge that they are necessarily dangerous, and he has a right to rely on the superior knowledge and judgment of his master, and to act on the assumption that the latter will not expose him to evitable risk, and has taken proper precaution to guard him from danger.

When the master has created the danger, he is bound to guard against it, and if he himself does not know or believe that the danger exists, he cannot require superior knowledge and judgment from the servant.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Harry H. Hall, for Plaintiff and Appellee :

1. Master and Servant. The risk assumed by the servant is the ordinary hazard incident to the employment, and this is synonymous with unavoidable accident. Wood, Master and Servant, p. 738. Unless the act is necessarily and inevitably dangerous, no negligence. Do. 739, 681. It is not contributory negligence, *per se*, to engage in a dangerous occupation. Beach, Contrib. Neg. 370; Wood, p. 763.
2. The servant has a right to rely upon the care and superior knowledge, information, and judgment of the employer. Wood, pp. 749, 751; Thompson. Neg. p. 975.
3. An employee is not bound to inquire as to latent defects. He has a right to presume that this injury has been made by the employer upon whom the duty devolves, and although the servant may know of the defects, this will not defeat his claim, unless he knows that the defects are dangerous. Wharton, Neg. § 215.
4. A proprietor who retains control may direct what shall be done without liability for injury to the contractor's servants, provided he does not retain control of the means and method of its accomplishment. Wood, 599; v. 594; v. 7 Ann. 321; 45 Ills. 455; 15 Wall, 649.
4. The master is liable for subjecting the servant, through negligence, to greater risks than those which fairly belong to the employment. Negligence, for which the master is liable, is:
 1. Negligence in subjecting the servant to the risk of injury from defective buildings or premises;

39	1011
46	186
39	1011
48	981
39	1011
50	728
50	1168
51	184
39	1011
106	412
39	1011
108	866
39	1011
109	408
39	1011
114	1073

Tutrix vs. Sellers & Co.

2. Negligence, where the master, or his vice-principal, personally interferes, and either does, or commands the doing of, the act which caused the injury. Thompson, Neg., 2, 969; Beach, Contrib. Neg. 311, 350; Wood, Mast. and Serv. 676, 837, 699, 843; Wharton, Neg., § 205.

The employer may be guilty of personal neglect, connecting itself with the negligence of the contractor, so as to render both liable. Cooley, Torts, p. 548.

5. Whenever the negligence of the master, united to the negligence of a fellow-servant, contributes to the injury, the servant injured thereby may recover from the common employer. Beach, Con. Neg. 313; Wharton, Neg., § 234, 913; Thomp., Neg., ii, 913.
6. The owner is bound by the same legal obligation to the servants of the contractor, that exist as between him and his own servant, to keep the premises in a safe condition, and is liable to any of the servants of such contractor for injuries resulting to them from defects therein, not under a contract obligation, but by force of the maxim: *Sic uterr tuo ut non alienum laedas*. Wood, 699; Wharton, §§ 232, 234, 199 note; Cooley on Torts, p. 549.
7. The servant need only raise a reasonable presumption of negligence or fault on defendant's part. The jury may fairly infer from the fact that he had performed similar acts in safety that he was not guilty of negligence in attempting to perform the act which caused the injury. Wood, Master and Servant, p. 777.

Chas. S. Rice, for Defendants and Appellants:

Wood on the Law of Master and Servant, p. 593: "When a person lets out work to another to be done by him, such person to furnish the labor, and the contractee reserving no control over the work or workmen, the relation of contractor and contractee exists, and not that of master and servant, and the contractee is not liable for the negligent or improper execution of the work by the contractor."

- P. 598.—"Where a person lets work to be done by another, by contract, or job, which is innocent and lawful in itself, but which may, if carelessly or negligently done, result in injury to another, he is not charged with liability if such work is, in fact, carelessly and negligently performed. He is only liable in such cases when the work to be done necessarily creates a nuisance. When it is lawful in itself and in all its details, he is not liable for the acts of the contractor or his servants, unless he retains control over the work and the instruments of its performance. He may personally, or by an agent, superintend the work, and direct as to what shall be done, provided he does not retain control over the method and means of its accomplishment. Thus, where a person, in erecting a building upon a public street, lets out the stone work to be done by a contractor, under the direction and to the satisfaction of a superintendent employed by him, this reservation is not such a reservation of control over the method and instruments of accomplishing the work, as renders him liable for an injury resulting from the negligent execution of the work by the contractor." See *Park vs. Mayor, etc.*, 4 Selden, N. Y., 929; *Gallagher vs. Southwestern Exposition*, 20 La. 943; see, also, *Wood on Railway Law*, vol. 2, p. 1009 *et seq.*; *Patterson's Railway Accident Law*, p. 119 to 130. *Hunt vs. Penn. R. R. Co.*, 51 Pa. Stat. 475; 80 Pa. Stat. 105-6, *Wray vs. Erass*; *Shearman & Redfield on Negligence*, p. 95; *Camp vs. Warden St. Louis Church*, 7 Ann. 394-6.

Even if there were serious doubts as to the meaning of those parts of the contract, which have been, it is contended, incorrectly interpreted in plaintiff's petition, their interpretation by the conduct of the parties thereto, which would create the law as to third parties, removes that doubt.

Art. C. C. 1955—"When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both, or by one with the express or

Tutrix vs. Sellers & Co.

implied consent of the other, furnishes a rule for its interpretation." See Charge to Jury, Record, p.

"*Optima legum interpretis consuetudo*,"

And if there were doubts, the interpretation would be in favor of these defendants. Art. C. C. 1857.

Beach on Contributory Negligence, p. 369: "The servant is held, by his contract of hiring, to assume the risk of injury from the ordinary dangers of the employment; that is to say, from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part. He has, therefore, no right of action, in general, against his master for an injury befalling him for such a cause. His right to recover will often depend upon his knowledge or ignorance of the danger. If he knew of it, or was under a legal obligation to know it, it was a part of his contract, and he cannot recover."

P. 368—"If the servant runs the risk with his eyes open, he will ordinarily have no remedy, no matter what the knowledge on the part of the master."

P. 370—"It is the rule applicable to this subject, that, if the servant, when the defect or danger is brought to his knowledge—when he discovers that the machinery, buildings, premises, tools or any other instrumentalities of his labor are un safe or unfit, or that a fellow-servant is careless or incompetent—continues in the employment, without protest or complaint, he is deemed to assume the risk of such danger, and to waive any claim upon his master for damages in case of injury."

Cooley on Torts, p. 451—"The terms in which the proposition has been stated will exempt the master from responsibility in all cases where the risks were apparent and voluntarily assumed by a person capable of understanding and appreciating them."

Leary vs. Boston and Albany R. R. Co., 139 Mass. 584: "But the servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and, while, ordinarily, he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent will dispense with the duty of the master to take such precautions."

In Coombs vs. New Bedford Cordage Co., 102 Mass. 508, the Court charged the jury that, "if the plaintiff, being of sufficient age and intelligence to understand the nature of the risk to which he was exposed, and with full notice of the dangerous nature of the service which he undertook, chose to contract to do it, he assumed all such risks as were clearly within the scope of his employment, and no implied contract could arise on the part of the master to indemnify him against the consequences of such risks."

"The instructions," said the Appellate Court, "were carefully framed and well adapted to impress the true distinctions upon the minds of the jury."

Cooley on Torts, p. 155—"It has often been, and very justly, remarked, that a man may decline any exceptionally dangerous employment, but if he voluntarily engages in it, he should not complain because it is dangerous."

In an English case, Thomas vs. Quartermaine (Railway and Corporation Law Journal, April 30, 1887), the High Court of Appeals said: "The workman who goes to work at a particular place, or continues working there with knowledge of the state of things there existing, does so voluntarily, and has himself caused his exposure to the risk."

A very clearly stated case, upon this point, but too extended to quote, is that of Sullivan, Administrator, vs. Louisville Bridge Co., 9 Bush (Ky.) 85.

In Assops vs. Yates, 2 Hurl. & Normans, 767-70, it was contended that there was case for the jury. "We think not," said the Court, "first, after having complained of the hoarding [without promise of remedy], and knowing all the circumstances, he voluntarily continued the work."

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See, also, *Dillon vs. Union Pacific R. R. Co.*, 3 Dillon, 328; *Hough vs. Railway Co.*, 100 U. S. C. 224; *Kelley vs. Silver Spring Co.*, 34 Am. Rep. 615-620; *Thompson on Negligence*, vol. 1, pp. 1008, 905, 996, 936-7, 940 2.

In *Sweeney vs. Bertin & Jones Envelope Co.*, 5 N. E. Rep. 359, a very recent case decided by the Court of Appeals of New York, that Court said: "The servant accepts the service subject to the risks incident to it; and where the machinery and implements of the employer's business are, at the time, of a certain kind and condition, and the servant knows it, he can make no claim upon the master to furnish other or different safe guards."

Cases could be added *ad libitum*.

While the defense goes to claim of plaintiff, it is submitted that, even if liable, the verdict of the jury against them is excessive. *Poirier vs. Carroll* 35 Ann. 708.

The opinion of the Court was delivered by

FENNER, J. The defendant firm became the purchaser of the immense structure known as the Main Building of the World's Exposition, erected in the Public Park of the city of New Orleans. The object of the purchase was to demolish it and to convert its materials into marketable lumber. The building was one of the largest ever constructed, covering a space of about 1300 by 900 feet. It was built for a temporary purpose and with great haste. The height and breadth of its spans were unusually large and many of the timbers were of great size and weight, the whole secured by an elaborate system of rafters, ridge-pieces, purlines, braces, etc. The work of its safe demolition was one of great magnitude and requiring skill and care.

Defendants entered into a written contract with one J. H. Lynch, the pertinent portions of which are as follows: that Lynch was "to take down and lower on to main or ground floor of building the *whole* of the *trusses* of various sizes, namely, the 75 foot spans and fifty foot spans. In effect, the *whole* of the internal framing of the building with the exception of that portion known as the gallery section, etc., etc." * * * "The word *truss*, or section aforementioned is to mean the *whole of the frame work which is in position or place between two uprights or posts, and to include plates, braces, jack-rafters, ridge-pieces, purlines, double posts or uprights supporting plates on which foot of seventy-five and fifty foot spans rests*, and also includes the main uprights or posts, the whole to be lowered and piled in their respective sizes and scantling, etc." Lynch further agreed "to use all necessary and proper braces, struts, etc., so as to secure the safety of the various parts or portions of the above building. The whole of the work of demolition to be carried out according to the directions of the supervising architect, whose decisions on all points in dispute, I (Lynch) agree to accept as final. If, at any time, I do not use due diligence and do not push the work

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or carry it out to his satisfaction, and notice in writing having been given me and I failing to carry out the instructions, I agree to forfeit this contract and give up all claim to any money or moneys that may be due to me. I do further agree to accept all responsibility with regard to any accident that may befall or happen to any of my employees or laborers." Lynch was to receive \$5.00 for each truss lowered, "weekly payments to be made at the rate of fifty *per cent.* on amount of work done on certificate from supervising architect, the remainder to be paid on completion."

We take occasion now to say that the agreement as to Lynch's responsibility for accidents to employees is *brutum fulmen* at to plaintiff, and this is admitted by defendant's counsel.

The supervising architect, referred to in the contract, was one employed by Sellers & Co., who resigned immediately afterwards and no other was employed, the only substitute being a police officer having no pretensions to being an architect, whom Sellers & Co. engaged simply to keep the record of Lynch's work and to give him certificates for payment.

Immediately after the contract, Sellers & Co. proceeded, through other employees, in advance of Lynch's work, to strip the building, not only of the sheathing but of many of the important braces and purlines. The purlines are heavy cross-timbers connecting the immense successive trusses or spans with each other, fitted at each end into a slot in the trusses and secured by nails. They were of prime importance in strengthening and maintaining the structure. There were 18 of them between each pair of trusses. Sellers & Co. removed all except one on the 50 foot spans and three on the 75 foot spans, the last being one running along the crest of the trusses and one on each side. The testimony is conflicting as to the number and location of the braces removed, and the matter is of slight consequence. There is no question that the result of Sellers & Co.'s work was to weaken the structure beyond the point of security, to make it dangerous to the lives of all who entered it and to add enormously to the hazard of Lynch's work. In point of fact, over forty of the trusses fell of their own weight at different times, and without doubt the whole of the structure was weakened, jarred and in many parts thrown out of plumb. The building was thereby converted into a public nuisance dangerous to all who approached it, and it was subsequently condemned as such in an official report of the city surveyor.

The expert witnesses all agree that the method of demolition thus adopted by Sellers & Co. was improper, unsafe and unscientific, and

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that the braces and purlines, or at least a greater number of them, should have been left for removal in connection with the trusses themselves as evidently contemplated by the contract, and as no doubt would have been done had the work proceeded under the direction of a competent architect.

Under this condition of affairs Lynch proceeded with his work and safely removed a large number of the trusses. The method of removal adopted was to bring a derrick up close to the truss and lash the latter securely to the derrick so as firmly to support it and hold it in position; then to fasten a gant line to the purline and to disengage the latter from the truss by tension on the gant line, to tear it from its fastenings and then to lower it.

On the occasion with which we are concerned this work had progressed as usual, the truss had been secured to the derrick, and Faren, Lynch's employee, reached over on the purline for the purpose of fastening the gant line to it, when the purline slipped from its supports, plunging Faren in a fall of seventy-five feet, accompanied by the purline itself which fell on him, occasioning his death.

The widow and minor children bring the present action against defendant for damages, and, on the verdict of a jury, recovered a judgment for \$5000, from which the defendants appeal.

The grounds of defence, as we understand them, are threefold, viz.:

1st. That Lynch was an independent contractor, and therefore that the relation of master and servant did not exist between defendants and Faren, the employee of Lynch.

2nd. That if Lynch was not an independent contractor, then that he was a fellow servant of Faren, and the injury resulting from Lynch's fault, Faren cannot recover.

3rd. That Faren knew the danger and assumed the risks of the work, and therefore cannot recover.

I.

Both parties quote and accept the exposition of the doctrine of independent contractor given by Wm. Wood in his work on Master and Servant, viz.: "When a person lets out work to another to be done by him, such person to furnish the labor and the contractee reserving no control over the work or workmen, the relation of contractor and contractee exists, and not that of master and servant, and the contractee is not liable for the negligent or improper execution of the work by the contractor." Wood on Master and Servant, p. 593.

This is a sound and conservative principle, but the element essential to the discharge of the contractee from responsibility is that he shall

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not reserve control over the work. This does not mean that he may not reserve a certain kind of power of direction as to the thing to be done, provided the method and instruments of doing the thing are left under the exclusive control of the contractor. "The simple test is," says Mr. Wood, "who has the general control over the work? who has the right to direct what shall be done and how to do it? And if the person employed reserves this power to himself, his relation to his employer is independent and he is a contractor; but if it is reserved to the employer or his agents, the relation is that of master and servant." Wood, 614.

In the leading case of *Camp vs. the Church Wardens*, the contract was for the reconstruction of a cathedral according to certain plans, the contractor agreeing to act "under the direction and superintendence of the architect appointed by the wardens." The court found the injury resulted from defects in the *plan* pursued in prosecuting the work as well as from negligence in the contractor, and held both liable *in solido*, on the ground that the plan or method of prosecuting the work was under the control of the architect. *Camp vs. Church Wardens*, 7 Am. 322.

In another case before the Supreme Court of the United States, the contract was for the building of a wharf by the contractor for a railway company, and the contract contained the clause: "It is understood and agreed that the said G. W. Bayley, division engineer of the company, shall supervise and direct the work herein agreed to be done, and that the said work shall be done to his said satisfaction." Considering the nature of the work, the court held that this clause operated a reservation of control over the method of conducting it which rendered the company responsible for injury resulting from defect in such method. *R. R. Co. vs. Hanning*, 15 Wall. 650.

A recent case, perfectly analogous to the instant one, arose before the Supreme Court of Massachusetts, where the contractor entered into a written contract with trustees, by which he agreed "to take down the entire building known as the A. house, or so much thereof as the trustees may request," and which also provided, "All of said work to be done carefully and under the direction and subject to the approval of the trustees." The court held that this reservation of control implied that the contractor "was subject to their orders as to the time and manner and mode of doing the work; that they had the right to step in and say to him, 'you are not doing this as we direct; you do it; we direct you to do thus and so, and we direct you to do this in the other way,'" and that this brought the case within the relation

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of master and servant," and rendered the trustees responsible for injuries resulting from the negligence of their employee. *Linnehan vs. Rollins*, 137 Mass.

In the present case, two things are apparent on the face of the contract, viz.: 1st. That the work referred to in the contract embraced the entire demolition of the internal framing of the building, including removal of braces and purlines. 2d That the entire order, method and plan of this work of demolition was subject to the control of defendants through their agent, the supervising architect, whose directions Lynch was bound to obey under penalty of forfeiting all his rights. The nature of the work was such that nothing else but the *method* of doing it required the supervision of an architect, and we can see no other possible construction of the language employed.

If the architect had directed or permitted Lynch to strip the building as actually done by defendants, before removing the spans, Lynch would have been the servant of defendants *quoad* the adoption of this method, and they would have been responsible for any injury resulting therefrom. *Afortiori* are they responsible when they themselves adopt this method and do this part of the work themselves.

All authorities agree that the immunity of a contractee depends on his entire abstinence from control, and that if he personally interferes in the work and assumes control of it or of some part of it, and through such interference, whether as a direct result or as a consequence thereof, injury results to a servant, he is responsible. 2 Thompson on Neg., p. 913, No. 40; Wood, Mast. and Servant, p. 837; Wharton on Neg. §§ 186, 205; Cooley on Torts, p. 548; *Gilbert vs. Beach*, 16 N. Y. 608; *Hefferman vs. Benkard*, 1 Robt. 432.

It is perfectly clear that the stripping of the building by the removal of the purlines and braces was an essential part of the work covered by the contract; that the time, order and manner of their removal formed important elements of the method to be adopted in effecting the demolition; that the adoption of the particular method here pursued was the direct act of defendants themselves; that it was a vicious, faulty and dangerous method, and if the injury to Faren happened as a direct result or consequence of this fault, defendants cannot shield themselves from responsibility under the doctrine of independent contract.

II.

The evidence leaves no doubt that the accident to Faren was the consequence of the acts of defendants in stripping and weakening the building. No other cause is assigned for the breaking of the fasten-

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ings and the detachment of the purline from its supports, without which it could not have fallen. This detachment resulted from the spreading of the trusses occasioned by the removal of the numerous purlines and braces which held them in position, and by the jarring to which the building had been subjected in this unsafe condition. As to whether this spreading occurred before or after Lynch began work on this particular truss the evidence is conflicting; but it is sufficient to say it could not have occurred at all but for the removal of the other purlines and the strain to which the structure had submitted.

It is claimed, however, that, notwithstanding the fault of defendants, the accident would not have happened but for the fault of Lynch in failing to comply with the stipulation in his contract requiring him "to use all necessary braces, struts, etc., so as to secure the safety of the various parts of the building."

This may or may not be true; but conceding it to be true, this would only serve to impute the accident to the combined faults of defendants and of Lynch, and the effect would be, not to discharge defendants, but merely to make Lynch responsible *in solido* with them. *Camp vs. Church Wardens*, 7 Ann. 322; *Cooley on Torts*, p. 548.

If we treat Lynch as a servant and not as an independent contractor, and Faren, as a fellow servant, this would afford no protection to defendants. The doctrine is well settled that "if the negligence of the master had a share in causing the injuries of plaintiff, the master is liable, notwithstanding the contributory negligence of his fellow-servant." *Graud Trunk vs. Cummings*, 106 U. S. 700; *Beach on Cont. Neg.*, § 96; *Wharton on Neg.*, §§ 234, 913; 2 *Thomp. Neg.*, p. 913.

Moreover, under this view of Lynch's relation as a servant, he would be, as to Faren, a vice-principal or direct representative of the master, to whom Faren would owe the same obedience as to the master himself, and for whose negligence the master would be responsible as for his own. *Chicago, etc., R. R. Co. vs. Ross*, 112 U. S. Sec. 377; *Towns vs. R. R. Co.*, 37 Ann. 632; *Wood on Master and Servant*, p. 865.

III.

The final contention of the defense is that Faren knew the danger, and assumed the risk of the work in which he was engaged.

Without discussing the nice distinctions underlying the application of the principle referred to, it is sufficient to say that the servant is only bound to see patent defects, not latent ones; that mere knowledge of defects will not bar his recovery unless accompanied by knowledge

that the defects are dangerous, and that he has a right to rely upon the care and superior knowledge and judgment of his employer, and to act upon the assumption that the latter would not expose him to unnecessary risk, and has taken all proper precautions to guard him from danger. *Wood, Master and Servant*, pp. 681, 738-9, 763; 2 *Thompson, Neg.*, p. 975; *Wharton, Neg.*, § 215.

Here the defect which occasioned the injury, viz: the disengagement of the purline, was latent and, of course, entirely unknown to Faren, as otherwise he would not have trusted his weight upon it. It was the result of the vicious and faulty method of demolition adopted by defendants, the more faulty because they dispensed with the supervising architect required by their contract, whose better judgment would, doubtless, have prevented such imprudence. At all events, they created the danger, and were under the highest obligation to guard against it. They admit that they did not know or believe that there was danger. How can they require of Faren more knowledge or better judgment than their own? He, on the contrary, had the right to rely on their superior knowledge and judgment. He had been engaged on this work from the beginning. Notwithstanding the stripping, a very large number of the trusses had been lowered without accident. He was not bound to anticipate that this particular purline was disengaged, or held to assume the risk of such a peril.

The principle invoked by defendants has no application to this case, and as the injury happened by their fault, they must respond for the damages.

The verdict of the jury was unanimous as to defendants' liability, one juror stating that he disagreed as to amount of damages allowed, without stating whether he thought they should be greater or less. The jury acted under a charge of the judge, unusually full and clear, and certainly as favorable to defendants as the law would justify. The judge, in overruling the motion for new trial, announced his conclusion that the law and the evidence were in favor of plaintiff.

After a painstaking study of the record, we agree with him.

Judgment affirmed.

Poché, J. takes no part in this opinion and decree, having not heard the argument of the case.

Jermann vs. Tenneas et als.

No. 9938.

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44	621

MRS. JOSEPHINE JERMANN VS. MRS. MARY TENNEAS ET ALS.

When a man contracts a second marriage whilst his first wife is living and undivorced, and dies leaving property acquired during the second marriage, if the second wife married in good faith, the estate will be shared equally by the two wives.

Where after the death of the husband the widow of the second marriage recovers an immovable, which had been acquired during her marriage, but from which the husband had been illegally evicted before his death, the property, together with its fruits and revenues recovered at the same time, will belong to the second community and be subject to be equally divided between the two widows.

The widow of the second marriage is only accountable for the revenues of the property in her possession received by her after the dissolution of the marriage from judicial demand. She is a possessor in good faith.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

J. O. Nixon, Jr., for Plaintiff and Appellee.

Braughn, Buck, Dinkelspiel and Hart, for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. The petition alleges in substance:

That Francis Jermann, alias Germaine, contracted marriage with the plaintiff, Josephine Atlinger, in Germany in 1851, and that there was born of the marriage one child, Josephine Jermann, who joins in the suit.

That shortly after the birth of the child, the said Francis emigrated to the United States, leaving his wife and child in Germany.

That after his arrival in this country he contracted a second marriage in the city of New Orleans with one Mary Tenneas, of which marriage there were eight children born, who are named in the petition, and with their mother are made defendants in the suit.

That Francis Jermann died, in this city, on the 2d June, 1873, leaving an estate, consisting mainly of certain city lots and buildings described in the petition, which were acquired during the existence of the second marriage.

That this property, though inventoried as belonging to the succession of said Jermann, had been sold at sheriff's sale prior to his death, but that in a suit brought after his death by the widow of his second marriage, the sheriff's sale had been annulled and the property restored to the succession, and rents of the same recovered to the amount of \$7311.

This immovable property, the money thus recovered for the rents of the same, and the revenues thereof since it came into the possession of

Jermann vs. Tenneas et als.

the defendant Mary Tenneas, widow of the second marriage, are asked to be community property between the deceased Francis Jermann and the defendant and Mary Tenneas, his second wife, but one-half of it is claimed to belong to the plaintiff, Mrs. Josephine Jermann, the first wife.

There is no money judgment prayed for against the children of the second marriage.

To this petition there was an exception of "no cause of action" filed.

Upon this exception judgment was rendered as follows (quoting):

"It is ordered that the exception * * * in so far as concerns the money demand against the heirs be maintained, and as to the widow, Mrs. Mary Germaine, as far as same concerns rents and revenues up to judicial demand be also maintained, otherwise overruled.

From this judgment the plaintiffs have appealed.

The appellants do not complain of the judgment so far as it relieves the heirs of a demand for a money judgment, or of any liability for money received by their mother from any source.

There is, however, some obscurity in the language of the judgment, but we construe it to mean and hold that the defendant, Mary Tenneas, widow, is not liable for the revenues of the property since she recovered possession of it, after annulling the sheriff's sale, prior to judicial demand. Thus leaving intact the demand for the recovery of one-half of the immovable property and one-half of the money recovered from the rents of the same by the defendant under the judgment against the party holding under the sheriff's sale.

The theory of the plaintiff's suit is that the community growing out of the second marriage of Jermann is composed:

1. Of the immovable described.
2. Of the rents recovered for it whilst it was out of the possession of the defendant.
3. The revenues of the property after possession was recovered by the defendant and before judicial demand.
4. The revenues after judicial demand.

As we construe it, the judgment maintained the suits in all the above items save the third—i. e., as to the revenues of the property received before the institution of the suit.

A reasonable construction of the language of the judgment can admit of no other conclusion.

The second item above embraces only money collected for the second community—on account of revenues it is true—but not of revenues received from the property by the widow whilst in her possession, but for revenues enjoyed by another whilst the possession of the property was illegally withheld from her and she was seeking to recover it.

The property itself was not in the possession of Jermann at the time of his death. It had been sold at sheriff's sale. It was afterward recovered by the widow, and with the property was recovered also its fruits during the time it was held by the purchaser under the illegal sale. Both parties admit that the property itself belongs to the community, notwithstanding it was not in possession of the community when it was dissolved by the death of Jermann, and we cannot perceive why the fruits of that property, when recovered, did not have the same status as to ownership or title as the property itself.

The only question, therefore, really presented for our solution is, whether there was any liability shown by the petition against the defendant widow of the second marriage for the revenues of the property received by her before the institution of this suit whilst in her possession.

It is not charged in the petition that the marriage with Jermann was contracted by her in bad faith; on the contrary, taking the allegation and prayer of the petition as a whole, it is fairly deducible that it is admitted that she entered into marriage in good faith, in entire ignorance of the previous marriage of her husband and of his having another living wife.

Being thus in good faith as to the marriage, she had a right to believe, and did believe, that she was the owner of one-half of the property acquired during her marriage and the usufructuary, as widow in community, of the other half and thus legally entitled to receive its fruits and revenues. In other words, that she was strictly a possessor in good faith, and she so remained until informed by this suit of the prior marriage of her husband and of the existence of his first wife.

The counsel for plaintiff contend that the question of possession in good faith, and the rights incident thereto, has no application under the circumstances of this case, but only applies to petitory or possessory actions, but we cannot concur in this view. It is of wider scope and significance.

It is in truth the broad principle of equity, of universal application, that a person in possession of an immovable under a just title rightfully and legally entitled to believe he is the owner of the premises,

Carpenter vs Camp et als.

cannot justly be condemned to pay its revenues to another before the same are demanded of him, and his right to receive them is questioned.

We are supported in this conclusion by the decision in the case of Hubbel vs. Inkstein (7 Ann. 252), where the question was directly presented. It is true that in that case the party sued had been put into possession of the property by an order of court as widow and usufructuary; but that circumstance does not effect the principle underlying both cases.

With the construction placed on the judgment appealed from as above stated, we find no error in it, and it is therefore affirmed with costs.

No. 9922.

S. D. CARPENTER VS. S. B. CAMP ET ALS.

The books of a commercial partnership are receivable in evidence, and are entitled to great weight and consideration when they bear upon the disputed questions of fact and with reference to which the testimony of witnesses is conflicting.

In case the business of the partnership has been almost exclusively conducted by one member of the firm, and the books have been kept by him, the other is entitled to introduce evidence of the incorrectness of the entries contained therein, and also to show that others, not entered, should be made; but this is subject to overthrow by countervailing testimony.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Talbot, J.

Samuel Matthews and Leonard, Marks & Bruenn, for Plaintiff and Appellee.

A. A. Browne and David N. Barrow, for Defendants and Appellants.

The opinion of the court was delivered by

WATKINS, J. This is a suit for a partition of the property of a saw-mill partnership, by licitation, and the settlement of its affairs between the partners.

The wife of the defendant (Camp) was made a party to the suit, but upon the exception of the curator *ad hoc* appointed to represent her, an absentee, it was dismissed as to her. Upon like exception the attachment was dissolved and the garnishees discharged.

At this juncture, the defendant, Camp, likewise a citizen of Hallville, Texas, appeared by *counsel* and filed an answer, and submitted himself to the jurisdiction of the court. There is no dispute in respect to what property remains for division and partition, and none in regard to the necessity and propriety of sale to effect it.

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It appears that, prior to March, 1882, there was a partnership existing between J. H. Mallory and the plaintiff in the saw-mill business. The domicile was in Caddo parish, this State, and the defendant, Camp, was employed by the company, at a salary of \$4 per day, with an *eventual* interest in the business. It was in contemplation of the parties—a part of their agreement—that, when the net earnings of the mill should pay the amount of the original investment, Camp should become a partner. Before this arrangement was consummated the plaintiff became the owner of Mallory's interest in the plant, and it was transferred to Hallville, Harrison County, Texas, in March, 1882.

Camp, assuming, and obligating himself to pay the deficit on the investment of Carpenter and Mallory of \$1590 24, was admitted into full and equal partnership with the plaintiff.

The style of their firm was S. D. Carpenter & Co.

This contract was a *verbal* one.

The mill was operated at Hallville, Texas, from date of its establishment there until the 19th of June, 1883, when Camp, acting for S. D. Carpenter & Co., sold the entire plant to one J. J. McDearmont, for the price of \$5611 23. He removed same to the parish of Iberville, this State, and therein re-established it, and began the manufacture of lumber. He made various payments on the purchase-price, whereby same was reduced to \$1932 80, as shown by the books of S. D. Carpenter & Co. In the meanwhile Camp purchased from McDearmont an undivided half interest in the plant, and they formed a new partnership, styled McDearmont & Camp.

In so doing Camp assumed and promised to pay to S. D. Carpenter & Co. the balance due them by McDearmont on the purchase-price of the mill. Subsequently McDearmont & Camp became insolvent, and made a cession, and upon their schedule of liabilities placed S. D. Carpenter & Co. as their creditors at the sum above stated.

At a judicial sale made of the effects of the estate of the insolvents Camp became the adjudicatee for *S. D. Carpenter & Co.*, of the saw-mill and appurtenances. The tableau of distribution therein filed shows that only a dividend of 31 per cent was due creditors and entitling S. D. Carpenter & Co. to \$602 28.

Deducting this partial payment, and the balance due by Camp, on his assumption is \$1330 52. In this manner the plant was restored to S. D. Carpenter & Co., and these various mutations of title have produced, in great part, the differences and disputes between the partners.

As the business of this firm was to be under the management and

Carpenter vs. Camp et als.

general superintendence of Camp, the books of the concern were either kept by him, or others, under his direction.

They were retained by Camp until about the 1st of February, 1885, when they were surrendered to the plaintiff. During the time the books were in his keeping he caused to be made therein certain entries, of which Camp complains as fraudulent. As soon as he recovered possession of them, he made certain counter entries, correcting and counteracting those made by Carpenter.

These entries and counter entries present the principal controversies for discussion and determination.

These may be enumerated as follows, viz :

1st. The statement of ledger and journal entries in reference to Camp's purchase of the Mallory interest in the mill, correctly.

2d. The ascertainment of the validity of Camp's claim for a salary and the adjustment of his account, accordingly.

3d. The determination of the amount due S. D. Carpenter & Co. by Camp on account of his assumption of the indebtedness of McDearmont, and the proper correction, if any, of his account.

4th. The proper allowance to be made to the plaintiff for price of mules and wagons sold by Camp.

5th. The adjustment of the item for freight bill paid by Carpenter, Ely & Co. on mill and machinery.

This *résumé* of the salient points in these complicated transactions enables us to determine the issues more easily.

I.

One of the principal troubles in the way of a settlement—one in relation to which a mass of evidence has been taken—arises from the disputed entries, above referred to.

The books of a commercial partnership are receivable in evidence, and are entitled to great weight and consideration, when they bear on disputed questions, and with reference to which the testimony of witnesses is conflicting and unsatisfactory. In the instant case the books seem to have been kept exclusively by the defendant up to the date the alleged fraudulent alterations were made. Up to this point we may safely assume that the books are correct, and at least, binding on the defendant. But we know of no rule whereby the plaintiff can be precluded from making an examination of them, or from introducing evidence to show their incorrectness; but the burden of proof is on the plaintiff, and he must prove the alleged errors by a fair and satisfactory preponderance of testimony.

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The books, when thus considered, show—at a date anterior to the plaintiff's correction—there was, viz :

A balance against Carpenter of.....\$4,077 20
 A balance against Camp of..... 2,730 14
 Both parties concede this.

II.

The transaction in reference to Camp's purchase of an interest in the Carpenter & Mallory mill in 1882, and which is the stepping-stone to the formation of the partnership of S. D. Carpenter & Co., is thus stated on the latter's books, as kept by Camp, viz :

" Mill account.....\$1,590 24

" TO SUNDRIES :

" S. B. Camp..... \$643 36

" S. D. Carpenter..... 946 88

In point of fact Carpenter & Mallory were indebted to Camp \$643 36, and this formed a part of the amount he assumed in purchasing the mill. It should have been treated as a part payment on the amount of purchase price.

It should not have been placed to his credit.

Had Camp paid Carpenter \$946 88 he would have been entitled to one-half interest in the mill. But he did not have the cash, and could not pay it. So Carpenter and Camp agreed that this matter should be settled by making proper entries in the books. The one just quoted is the one made by Camp. The proper entry would have been a charge against Camp and a credit to Carpenter of \$946 88.

So the books should be corrected by charging Camp \$643 36, in order to offset his improper credit of that amount, and he should be charged with the \$946 88 due to Carpenter. The judge *a quo* made the latter correction only. His judgment must be so corrected as to charge Camp with \$643 36 in addition.

III.

An examination of the evidence has satisfied us that the demand of Camp for an allowance of \$4 per day, or \$1200 per annum, as a salary, in addition to one-half of the profits, is unfounded, and we concur in the decree of the district judge rejecting the same. He found that the defendant had only withdrawn, on that account, \$525, and only charged him one-half of that sum—\$262 50. We find, from the books, that he has withdrawn the sum of \$582, and should have been charged with the *entire amount*. The situation is just the same as if he had expended, unduly, that sum for any purpose, disconnected from the partnership. He is chargeable with it.

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IV.

As is fully shown in the statement, Camp purchased of McDearmont an interest in the mill and appurtenances, after the sale to him, and its removal to the parish of Iberville; and, as the price, agreed to assume, and promised to pay S. D. Carpenter & Co., the balance J. J. McDearmont was owing them, on his purchase thereof, as shown by the books of said company.

By this assumption said indebtedness became that of Camp, notwithstanding S. D. Carpenter had not released McDearmont.

As has been shown above, this balance is \$1830 52, and he must be charged therewith, on settlement.

V.

It is difficult to determine the proper allowance to be made in favor of the plaintiff, on the score of mules and wagons belonging to him, that were sold by the defendant Camp.

It does not appear from the petition that the plaintiff makes any definite and special claim on this score. But evidence was adduced on this issue; the parties argue it in their briefs; the judge *a quo* has examined and decided it; and specific claim is made in plaintiff's and appellee's answer to the appeal of defendant, for an increase of judgment on that account.

Under these circumstances we are of the opinion that the interest of both parties would be better subserved by the decision of it than by its remission to a separate suit.

On this score the plaintiff claims \$1812 63, and the entries on the books show that Camp realized that sum for the mules and wagons belonging to Carpenter, but there appears to have been a previous transaction between Carpenter and Forrest and Munden, in which the former became the purchaser of mules for the price of \$600, with which sum Carpenter is charged on the books, and Forrest and Munden are credited. There is a strong probability of this amount having formed a part of the consideration of the subsequent sale by Camp to Forrest and Munden, of Carpenter's stock. If so, then the latter is not entitled to charge Camp with it. We are of that opinion. Inasmuch as the firm of S. D. Carpenter & Co. had no interest in these mules and wagons, and Camp acted as agent, or *negotiorum gestor* for Carpenter, he should be held to account for the surplus of the price of sale, above the \$600 Carpenter had withdrawn from the firm in making the investment, and with which he is credited back. The surplus is \$1212 63.

The defendant's counsel insists that when these mules were sold, and their price credited to D. Carpenter, he was a debtor of the con-

Carpenter vs. Camp et als.

cern for a sum exceeding the credit, whereby same was consumed. He instances the general balance of account against him of \$4077 20 with which we prefaced our opinion. That, of course, is "begging the question." Conceding the respective balances against the partners the question remains: are those balances correct, or should they be increased or reduced?

On this question he concludes his argument in these words:

"There were *returned*, of those teams, one by Munden and one by Forrest, value of \$600, which leaves Dr. Carpenter, a creditor of the *firm*, \$850." Not alone is this admission directly opposed to his previous assumption, but it is itself incorrect in two particulars, viz:

1st. That Carpenter did not thus become a creditor of S. D. Carpenter & Co., but of Camp, who received, and is chargeable with the whole.

2d. That he incorrectly subtracted the \$600 from the \$1450 representing the two transactions with J. B. Munden and O. P. Forrest; he should have subtracted it from the *total* sales of \$1812 63. Had he done so, the amount to which Carpenter is entitled would have been shown to be \$1212 63, as above stated.

VI.

There seems to be no dispute in regard to the freight bill of \$231 85 that Carpenter, Ely & Co. paid for Camp, and which Dr. Carpenter refunded to them. This sum should be credited to Carpenter and charged to Camp.

VII.

The judge *a quo* ascertained and decided that the plaintiff had not accounted for the sum of \$500, which he had withdrawn and used in his settlement with Garrett & Key, of Marshall, Texas, and that this sum should be charged to his account. Of this there is no satisfactory account given by his counsel, and defendant has not requested an increase of the allowance in his favor; hence, this part of the decree of the lower court must be undisturbed.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be, and the same is hereby amended in the following particulars, viz:

1st. By charging the defendant Camp with the sum of \$643 36, on account of his purchase from Carpenter of one-half interest in the mill.

2d. By charging Camp with \$682, money improperly applied to the discharge of his claim for wages.

 Riggs & Bro. vs. Bell et als.

3d. By charging Camp with \$1330 52, the amount he assumed to pay S. D. Carpenter & Co. for J. J. McDearmont.

4th. By charging him with \$1212 63, as the surplus of the price of the sale of mules and wagons of Dr. Carpenter, above the \$600 he had withdrawn from the firm in making the investment in them.

5th. By charging him the sum of \$231 85, the amount of his freight bill on the mill that was paid for him by Carpenter, Ely & Co., and subsequently refunded to them by Carpenter.

It is further ordered, adjudged and decreed, that the judgment and decree appealed from be, and is, hereby affirmed in all other respects; and that, when the partnership property shall have been sold, the proceeds thereof shall be first applied to the payment of the debts of the partnership, which are fixed at the sum of \$134 57—this being the amount admitted by both parties, exclusive of the claim of Mrs. R. E. Camp, which cannot be considered, inasmuch as the suit, on her own motion and exception, was dismissed as to her, and next to the satisfaction of the sums awarded the parties respectively this decree, and the residue shall be divided equally between the partners.

The costs of appeal are taxed against the defendant and appellant, and those of the lower court are to be shared equally by the partners.

 No. 9943.

A. RIGGS & BRO. VS. MRS. JESSE K. BELL ET ALS.

Defendants have a right to object to a cumulation of several distinct causes of action against them, where these have no cognate origin, and where they have no common interest to be adjudicated upon in one judgment.

They may sever, but are not bound to do so.

In a suit in damages for the wrongful obtention of an injunction, the plaintiffs in injunction the sureties on the bond and an alleged instigator or fomentor of the proceeding, though sued, some *ex contractu* and others *ex delicto*, may be joined as defendants in the same suit, reserving their right of severance in their defenses.

Consent cannot give jurisdiction; and when our attention is called to a defect of jurisdiction *ratione materiae*, we are bound to rectify it, whatever the laches of the parties.

A PPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

Thomas J. Semmes, Albert Voorhies and Branch K. Miller, for Plaintiffs and Appellants.

James Timony, Sam'l L. Gilmore and J. D. Hill, for Defendants and Appellees.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit in damages for the wrongful obtention of an injunction.

39 1030
48 673

39 1030
110 728

39 1030
114 256

It is brought against the plaintiff in the injunction case, the sureties on the bond and another party, represented as having maliciously instigated the proceeding.

The amount claimed is \$7000.

The defendants excepted on the ground of misjoinder of parties, the instigator pleading further, prematurity, and no cause of action.

From a judgment sustaining the defense the plaintiffs appeal.

It is evident that the suit is based on a *contract*, as to certain defendants, and on a *tort* as to others.

It is, therefore, apparent that the defendants are all brought in on distinct causes of action.

This would be sufficient to justify their objection, if these causes had not a cognate origin, and if the defendants had not a common interest to be adjudicated upon in one judgment. 32 Ann. 1165.

It is clear that the plaintiffs had a right to two actions, one on the bond, another on the tort; but in the exercise of the first right, they could not claim from the sureties, more than the amount for which they had agreed to make themselves liable by contract, in case the injunction was decided to have been wrongfully obtained.

It is also clear, that they could have joined in the same action, the principal and the sureties, although more be claimed of the former than could be of the latter. Conery vs. Connors, 33 Ann. 373.

If they had the right thus to sue the principal and the sureties, although liable for different causes and for different amounts, it is impossible to discern why they could not bring in the alleged instigator, who may be held liable for the same reason that the principal can be, and which is not the fact of the giving of the bond, but simply the wilful perpetration of a wrong, from which damages have resulted, and for which liability may be incurred without bond.

The defendants surely have a right to sever in the defenses, but this they are not bound to do. This right has been more than once recognized, 17 L. 421; 38 Ann. 187; but this is no reason why they cannot be brought in together to defend the suit, where the causes have a cognate origin, and they have a common interest to be adjudicated upon.

The law abhors a multiplicity of actions, and favors the institution of suits against all defendants who may be liable for the same original cause, and who may have an interest to resist a plaintiff.

Interest reipublicæ ut sit finis litium.

In the present instance it is apparent that, if the defendants collectively and separately are liable, it is for causes which have a primitive

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source, namely, the wrongfully procuring and execution of the injunction, that it matters little, or not at all to them, whether they can be held for the damages said to have been sustained because of a contract or because of a tort, and that they have a decided interest in defeating plaintiffs' claim, for if they succeed in their defense, they will have shielded themselves from all future molestation.

The principle here announced was formally recognized in *Waldo vs. Angomar*, 12 Ann. 74, in which the court distinctly held that defendants have a right to object to a cumulation of several distinct causes of action against them, *unless* they have a common interest to be adjudicated upon in one judgment. To this conservative rule we adhere.

It now remains to consider the pleas of prematurity and no cause of action offered by the alleged instigator or fomentor of the injunction proceeding.

We have not been shown how those pleas can hold, and we do not perceive on what they are made to rest.

No doubt the *first* is based on the assumption that a suit does not lie against him until *after* damages shall have been awarded against the principal in the case, and the *second* on the absence of a sufficient charge to hold him liable.

¶ The first objection might be considered, if urged by the sureties, but it cannot be countenanced when presented by the alleged instigator, for he is sued at least on the same ground which would have sufficed to hold the plaintiff in injunction responsible had no bond been furnished.

The second objection lacks foundation, for, if it be true that this defendant acted maliciously, and so instigated the plaintiff to bring, without probable cause, the injunction proceedings which were instituted, and if the injunction is shown, by legal evidence, to have been wrongfully obtained, it is palpable that this defendant could be held liable for the injury which may be proved to have been sustained.

The exceptions ought to have been overruled.

It is, therefore, ordered and decreed, that the judgment appealed from be reversed, and that the exceptions be overruled and the defendants ordered to answer. It is further decreed, that this suit be remanded to the lower court for further proceedings according to law, the costs from the filing of the exceptions and those on appeal to be paid by the defendants.

ON APPLICATION FOR REHEARING.

FENNER, J. Counsel for the parties defendant who were sureties on the injunction bond, and against whom the plaintiffs only claim a

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judgment *in solido* for \$750, now call our attention, for the first time, to our want of jurisdiction in this case so far as they are concerned.

As no such suggestion was made at the hearing, and as one of their counsel actually appeared and argued the case, we should certainly hold them bound, if consent could give us jurisdiction. But neither neglect nor consent of parties can absolve us from our duty to obey the Constitution, and if that denies us jurisdiction we must heed its mandate.

The record shows that these defendants filed separate and independent exceptions of misjoinder, and, as to them, the judgment of the court *a qua* maintaining the exception and dismissing the action as in case of non-suit, was final so far as any right of review by this court was concerned.

We must, therefore, amend our decree in this respect.

It is, therefore, ordered and decreed, that our former decree be now amended so to restrict the reversal of the judgment appealed from to the exceptions of Mrs. Bell and of Alexander Hill; and it is further ordered that, as to the other defendants, the appeal be dismissed.

No. 9944.

CITY OF NEW ORLEANS VS. JOSEPH A. SHAKSPEARE ET ALS.

Possession "under the title of owner" is one of the essential conditions in the prescription of thirty years by which the ownership of immovables can be acquired without any need of title or possession in good faith. C. C., Art. 3500.

If it appears that the party who pleads the prescription of thirty years acknowledged at any time before his possession, covers a space of thirty years, that the title of ownership was in his opponent, his plea is defeated, and his alleged ownership is destroyed.

The prescription of ten years, established by Art. 653 of the Civil Code, by which a possession under an erroneous fixing of boundary lines, prescribes the title of his opponent who sues for a rectification of an erroneous boundary line, applies only in an action of boundary, and not in a petitory action, in which the prescription of thirty years alone can be invoked in support of ownership without a title or possession in good faith.

A PPEAL from the Civil District Court, Parish of Orleans.
Houston, J.

Walter H. Rogers, City Attorney, and W. F. & D. C. Mellen, for Plaintiff and Appellee.

1. He who would sustain his plea of the prescription of thirty years must show, by satisfactory evidence, a continuous and uninterrupted public and unequivocal possession, under the title of owner, for the full term of thirty years. C. C. 3500 [3465], 3436.
2. The burden of proof is on him who pleads this prescription to prove it, and he must shew, by evidence satisfactory to the court, the beginning of the possession adverse to

39	1033
51	121

39	1033
452	194

39	1033
121	521
121	814

39	1033
125	514

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that of the true owner, that the court may determine if the full term of thirty years has elapsed; and where the evidence has failed to establish the beginning of such possession, but leaves it doubtful, whether the possession has been slightly over or slightly under thirty years, the plea cannot be maintained.

3. To possess under the title of owner one must have the natural or civil possession of the lands, and at the same time the intention to possess as owner—that is, the intention of claiming title to the land in possession, though it be beyond the true line of the party possessing, whenever and as often as any other person shall set up or claim title thereto. C. C. 3436, 3443, 3454, 3499, 3500, 3501, 3505, 3486-2, 3487.
4. If one, honestly (honestly though mistakenly) believing that his lot is bounded by a certain fence, take possession up to the fence, and hold possession thereof under the belief that he is owner, but afterwards, within thirty years from the beginning of his possession, discover that the fence is not the true line, but is on the lot of his neighbor, and acknowledge, or assent to, or silently acquiesce in, or fail to dispute the claim and title thereto set up by his neighbor to the land beyond the true line, or fail to assert his own title thereto, or propose to purchase the title thereto from the true owner, he has not held possession under the title of owner for thirty years, and his plea must be overruled. *Frederick vs. Brulard*, 1 Ann. 382, 383; *Babineau vs. Cormier*, 1 N. S. 456, 460-1; *Broussard vs. Duhamel*, 3 N. S. 11, 15.
5. If one in possession, called on by the true owner to vacate the premises within thirty years from the beginning of his possession, do not claim title in himself, or deny it in the person requesting him to vacate, but simply reply that vacating the premises will be an inconvenience to him, because he will have iron castings to remove, and at the same time know that the person requesting him to vacate is the true owner, prescription will be interrupted. C. C. 3520 and articles before cited; *Gibbs vs. Nelson & Donaldson*, 16 Ann. 275; *Baker vs. Pena*, 20 Ann. 52; *Wilson vs. Bannen*, 1 R. 556, 557.
6. If one in possession, knowing another party to be the true owner, within thirty years from the beginning of his possession of such property, offer to purchase the property from the true owner, prescription will be interrupted.
7. In respect to public rights the city of New Orleans, as a municipal corporation, is not within the ordinary rules of prescription. A lot belonging to the second municipality of New Orleans became the property of the city by the act of consolidation of 1852. It was formerly used as a public pound; afterwards for the workshops and repair shops of the city, and continued to be so used up to the 9th day of November, 1880, when it was leased by the city to Jacques Levy. The long use of the lot as a public pound and for the public work of the city was a dedication of the lot to public purposes and rendered it non-prescriptible. The lease to Levy did not destroy its character. The public nature of the lot affected every part of it; and defendants cannot be permitted to prescribe against that part occupied by them, even though they may have occupied for more than thirty years. 2 Dill. Mun. Corp., § 675; *Parish of Plaquemines vs. Fulhouse*, 30 Ann. 64.
8. The defendants having paid no taxes on the property in dispute, and having made no improvements thereon, are not in a condition to invoke an estoppel en pais against the plaintiff's suit for possession.
9. The fact that the lease to Levy was for a term longer than nine years did not constitute it a contract of sale. The intentions of the parties were clearly to make a contract of lease. The laws of this State do not limit the duration of a lease, provided it be not perpetual. The action was properly brought in the name of the city. *Pothier "Traité Du Contrat de Louage,"* part 1, ch. 1, No. 4, and part 1, ch. 2, No. 27; *Troplong "Du Contrat de Louage,"* No. 4 and No. 22; *Laurent*, tome 25, sec. 4. et seq.; C. C. 2674 et seq.

E. Howard McCaleb, for Defendants and Appellees :

1. The interruption of prescription only dates from the service of citation, or defendant's appearance and answer; and not from the filing of the petition. 8 N. S. 129; 6 R. 142; 36 Ann. 779.
2. A commercial partnership cannot own immovable property; the partners are joint owners. 3 L. 494; 23 Ann. 419; 10 L. 420; 7 M. 244.
3. Thirty years continuous, uninterrupted, public and unequivocal possession of real estate, as owners, gives title, in Louisiana, without the possession being in good faith. R. C. C. 3475, 3499, 3500, 3501, 3502, 3503; 24 Ann. 452. If the possession commenced in good faith, subsequent bad faith will not prevent the prescription. R. C. C. 3482.
4. Ten years' adverse possession, under an erroneous boundary line, prevents rectification of the error by prescription. R. C. C. 852 and 853; 7 N. S. 117; 20 Ann. 343.
5. A dedication of property to public use cannot be inferred, it must be established by evidence sufficient to exclude every other hypothesis but that of dedication. 5 L. 132; 9 L. 153 18 L. 122, 296; 19 L. 62; 10 R. 357; 3 Ann. 287; 7 Ann. 233; 7 Ann. 496.
- A sale, or a lease of property, to a private person for private purposes, by a municipal corporation, conclusively establishes the fact that such property is not a *locus publicus* and *hors de commerce*.
6. In a petitory action, plaintiff must recover on the strength of his own title rather than on the weakness of his adversary's; and where a better title is shown, in a third person: the action will be defeated. 22 Ann. 57; 3 R. 206; 10 R. 505.
7. Where a lot is leased for a period of fifty years, and the consideration or rent is payable cash in advance, such contract is a sale and not a lease; for the essential character of a lease, in which it principally differs from a sale, is that it only has a temporary or limited duration, and the price or rent should be divided in annuities or short periodical installments, representing the fruits or revenues of the thing leased. Thus, the cession of the enjoyment of a thing during a certain number of years, for a unique price, is a sale and not a lease. L'Argentre, Cout. Bret. sur l'art. 52, note 2, n. 5 Fonmaur, Lods et Ventas, Ch. 18, n. 528; Troplong, Louage, t. 1, n. 22; Troplong, de la Vente, t. 1, n. 204; Duranton, t. 17, n. 17; Duvergier, Louage, t. 1, n. 35; Pothier, Louage, n. 4. Marcade sur l'art. 1713; C. N. t. 6, p. 423 *et seq.*

The opinion of the Court was delivered by

POCHÉ, J. This is a petitory action by which the city seeks to recover a piece of immovable property alleged to have been in the illegal possession of the defendants for twenty-seven years, and rents for the use of the same at the rate of \$100 per annum for twenty-seven years.

The defense is the prescription of ten and of thirty years.

The district court sustained the plea of prescription of thirty years, and the city appeals.

There is no dispute as to the chain of titles under which the city claims the ownership of the property, and the discussion is therefore restricted to the question of prescription.

The undisputed facts in the record are that the lot of ground in suit originally formed part of a larger lot purchased by the city, adjoining

City vs. Shakspeare et al.

a lot owned by the defendants, and on which they and their ancestors or predecessors have operated a foundry for many years.

It appears that, between the years 1850 and 1852, up to which time the adjoining lots of the respective parties had remained opened, a partition fence was erected by the municipal authorities on what was then supposed to be approximately the boundary-line between the adjacent estates, and that it was subsequently discovered that the fence had been placed about 32 feet within the city's side of the correct line, thus leaving that quantity of land of the city on the side of the defendants.

But in the meantime, beginning from the year that the fence had been erected, the defendants had occupied the strip of land in dispute, using it to dispose of the cinders falling from their foundry boilers and also as a place to cool and keep their castings and other materials of ordinary use in and about a foundry. That occupation had been continuous and uninterrupted up to the date of the present suit, which was begun in December, 1880.

Defendants date their possession from November, 1850, and plaintiff contends that there is no positive evidence to determine, with legal certainty, the beginning of their possession. Plaintiff also denies that the defendants' possession was under the title of owners.

1st. As this last contention is the pivotal question in the case it calls for our immediate attention.

Under our system of laws the ownership of immovables may be acquired by the prescription of thirty years, without the need of title or of possession in good faith. C. C. Art. 3499.

But "the possession on which this prescription is founded must be continuous and uninterrupted during all the time; it must be public and unequivocal, and under the title of owner." Article 3500 Civil Code.

The record must, therefore, be consulted in order to ascertain the true character of the possession of the defendants, irrespective of the time during which it continued.

From the testimony of two of the members of the defendant firm, it is contended that when their possession began they believed that the lot in suit was their own property, or, in other words, that the partition fence had been placed on the correct boundary line between theirs and the city's adjoining lot, and their possession, although predicated on an erroneous belief, might be held as long as the belief lasted, to be under the title of owner, *animo domini*.

But it appears that the city authorities did not have a similar understanding of the condition of things relative to the lot of ground in suit. Hence, in 1872, it was contemplated by the city surveyor to erect thereon a stable and appurtenances for the use of the city. In furtherance of that intention, one of his officials called on one of the defendants, informed him of the fact, and requested him to remove the things belonging to the foundry, and which were lying about on the piece of ground on which the stable was to be erected. The natural answer to such a message by anyone who claimed to be the owner of the property would have been a vigorous objection to such use of his property or for any purpose by another. But in this instance the defendant merely suggested that such a removal of his things would greatly inconvenience the foundry, and in ending the conversation, offered his own stable for the use contemplated by the officials of the projected stable, the building of which would thus be obviated.

That incident of itself goes a great way to the conclusion that the defendants' possession was, in their own minds, not under the title of owner, but that it was precarious and by sufferance, under the superior and exclusive title which the city held.

But in another part of his testimony, in answering the question as to the time when it was ascertained that the city laid claim to the lot in dispute, the same defendant, evidently more honest than ambitious, made the following candid statement:

"We knew nothing of it; I heard nothing of it until they were some years ago speaking about building a lockup there, and it was surveyed at that time. It was only then that we knew that we were on the city's ground."

And in another place, he says: "This was about eight to ten years ago. It was all open the whole block. It was all vacant property then, when we took possession. The fence was put there in 1850. I always thought we did own the property until after the survey."

While another member of the firm was testifying in his own behalf, he was asked the following question:

"After Mr. Shakspeare's death (father of the present defendant, J. A. Shakspeare), what was the name of the copartnership that owned the lot?" (the lot in dispute), to which he very naively answered:

"The city owned it."

Of course the witness misunderstood the question, but his answer is, for that very reason, more significant, as it not only shows, but clearly demonstrates the fact that the witness knew that the lot in question was the property of the city, and that the possession of the

firm was precarious and by sufferance, under the admitted ownership of the city.

But any doubt which might still linger in the judicial mind on the subject is altogether dispelled by a consideration of the following incident :

In the beginning of November, 1880, the city executed a lease for a term of fifty years, and for a rental of \$1200 to one Jacques Levy, of the entire lot purchased from W. H. Avery in April, 1848 including the parcel of land now in suit. As soon as the passage of the ordinance was made known to the defendants herein; on the very next day, one of the members of the firm called at the City Hall, and offered, in the name of his firm, to the then Mayor, the sum of \$1500 for the same and identical privileges which had been conferred to, or obtained by Levy, under the terms of the lease, which, however, had already been signed by the Mayor. One of the reasons suggested by the defendant for his anxiety to secure that lease was the fact that his firm, or foundry, had had the use of the fragment of the whole lot, which is now in dispute, for nearly thirty years.

The irresistible legal conclusion which must be deducted from those truthful and honest utterances of the defendants themselves, is that their possession was not under the title of owners, at least from the year 1872. And their testimony fairly justifies the inference that they never, for a moment, doubted that the legal ownership of that parcel of land was in the city. If the message from the city surveyor, in reference to the projected stable, was the first information, or a revelation, of the ownership of the city, hitherto unknown to the firm, why is it that the interviewed copartner did not even express or manifest the slightest surprise at such an extraordinary proceeding, if he understood that the official was calling on his firm to relinquish their own property for the use of the city ?

On the contrary, his only suggestion was that the proposed removal of his castings and other things from the ground would greatly "inconvenience him," and the inconvenience was so great that he actually offered the use of his own stable for the housing of the city officials' horses as the shortest way out of the difficulty.

Is this the language or course of dealing of any owner in the face of a cool and deliberate proposition to oust him of the possession of property which he claimed adversely to the world to be his own ?

But such conduct is natural, and is in logical keeping with the subsequently-avowed knowledge of the defendants that "they were on the city's ground," that after the survey they knew that they were not

owners, and with the offer made in 1880 of an advanced price on the Levy lease, as a means of quieting their possession of the property.

We do not mean to hold that knowledge or belief that title is in another of itself defeats the prescription of thirty years; but such knowledge or belief, when accompanied by acts or conduct indicating acknowledgment of the adverse title justifies the legal conclusion that the party pleading that prescription did not claim to be owner, and that his possession is not under the title of owner.

From defendants' whole conduct, as explained by their own testimony, it appears clearly, to our mind, that they never lost sight of the city's superior and exclusive right of ownership of the ground which they occupied, to which they admittedly subordinated their right of possession. Now, as the title of ownership is a unit, indivisible in its nature between two hostile or adverse claims to the same right, and as ownership in one person is absolutely incompatible, and cannot co-exist with ownership of the same thing in another person, it follows that defendants' possession was avowedly not under the title of ownership. Thus their case is stripped of one of the essential and indispensable conditions which must characterize the possession on which the prescription of thirty years is founded. *C. C. 3500, Wilson vs. Baumen, 1 Rob. 556; Dodsman vs. Barrow, 11 Ann. 87.*

We, therefore, hold that the plea of prescription of thirty years is not sustained by the evidence, and not made out under the law.

These conclusions find additional support in the fact that defendants have never had the property in dispute assessed in their name, have never paid taxes on the same, and have never placed any improvements, not as much as a shed, thereon.

2d. The plea of prescription of ten years is predicated on the provisions of Art. 853 of the Civil Code, which reads:

"If the boundaries have been fixed according to a common title, or according to different titles, and the surveyor had committed an error in his measure, it can always be rectified, unless the part of the land on which the error was committed be acquired by an adverse possession of ten years, if the parties are present, and twenty years, if absent."

But in the case in hand we are dealing with a petitory action, and not with an action of boundary, in which plaintiff would be seeking to rectify an erroneous survey. The article is found in the Code under the title of "Fixing the limits and of surveying of lands;" and it must be construed with reference to other articles under the same title which treat of the same subject-matter.

City vs. Shakespeare et als.

The pivotal article under that title, Art. 833, provides that "whether the limits be fixed judicially or extra judicially, it must be done by a sworn surveyor of this State, who shall be bound to make a *proces verbal* of his work in the presence of two witnesses, called for the purpose, who shall sign the *proces verbal* with him." * *

There is no pretence here that such fixing of limits preceded the location of the partition fence erected by the commissary of the municipality, at the time which he describes as being some time before the consolidation (in 1852.)

It is in proof that the surveyor fixed no stakes or made no marks indicating the precise boundary line, and that the commissary built the fence "as near the line as he could recollect," and there is no proof, or even an intimation, that the work of the city surveyor, such as it may have been, was ever accepted by the parties as settling the division line.

A similar question came up before this court in the case of Gray vs. Corvillon, 12 Ann. 730, and similar views were therein entertained and enforced.

We, therefore, conclude that the provisions of article 853 have no possible application to the present contention, in which the prescription of thirty years alone could be considered. Hence the plea of prescription of ten years must also fail.

3d. Defendants also make the point that the contract entered into between the city and Jacques Levy on November 9, 1880, although styled a lease, was in law and in reality a sale, and that, therefore, the city has no more claim to, and has no interest to revindicate, the property in dispute.

That contention rests on the fact that the term of the pretended lease is fifty years, and the whole rental was paid in advance, and not by yearly, or shorter, installments.

A careful examination of the contract leaves us under the impression that counsel can hardly be serious in that contention.

Our Code defines the contract of lease as one "by which one of the parties binds himself to grant to the other the enjoyment of a thing during a certain time for a certain stipulated price, which the other binds himself to pay him." Art. 2674.

In this case the city leases for a term of fifty years and for a stipulated price, which the lessee paid in cash.

And the contract contains the further stipulation that, at the expiration of the lease, the improvements on the property shall revert to the city on certain stipulations not necessary to enumerate here.

State ex rel. Heath et al. vs. Judge et als.

The manifest intention of the parties was to enter into a contract of lease, and we must decline to construe them into other and different intentions.

With these views we conclude that the case is with the city, and that the defendants must be held liable for rents during their entire occupation of the premises. From the record, it appears that the rents are worth about ten dollars per annum. As stated in this opinion, the evidence is not conclusive as to the precise time when defendants' possession began; it was between the years 1850 and 1852. For the purposes of rentals we fix it as beginning in January, 1852.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, and it is now ordered that there be judgment in favor of the city of New Orleans decreeing her to be the lawful owner of the property described in her petition in this case, and ordering the Civil Sheriff of the parish of Orleans to place her in possession thereof, and condemning defendants to pay rent on said property at the rate of ten dollars per annum from the 1st of January, 1852, until the property is delivered or restored to the city, and that defendants pay costs in both courts.

No. 10,023.

THE STATE EX REL. W. H. HEATH ET AL. VS. THE JUDGE OF THE
TWENTY-SECOND DISTRICT COURT ET ALS.

A bond to cover all costs is sufficient for a suspensive appeal from a judgment dismissing a third opposition claiming a preference on the proceeds of a sale in the hands of the sheriff over seizing creditor.

Where there are a number of oppositions claiming preferences on such proceeds, which are dismissed, the appellants from the judgment of dismissal may join in the motion for the appeal, and in one appeal bond.

APPPLICATION for Mandamus and Prohibition.

Sims & Poché, for the Relator.

The opinion of the Court was delivered by

TODD, J. The relators, by third oppositions, claimed to be paid by preference out of a fund in the hands of the sheriff, realized from the sale of a certain plantation described in the pleadings.

There was judgment rejecting their demands. From this judgment they asked a suspensive appeal, and tendered a bond to cover all costs.

State ex rel. Heath et al. vs. Judge et als.

They complain of the judge by whom said judgments were rendered, for refusing to grant them a suspensive appeal on the bond tendered, and denying them the privilege of such appeal unless upon a bond for one-half over and above the amount of the judgment or claim of the other and successful party to the controversy; and they have applied to this court for a mandamus to compel the judge to grant the appeal upon the execution of a bond for a sum to be fixed by him, sufficient to cover the costs, and also for a prohibition to stay proceeding pending their application.

The judge, in his answer, denies that the case presented is one in which the relators are entitled to a suspensive appeal on giving bond for costs. He assigns, also, other causes for his refusal to grant the appeal, which, as they pertain to the merits of the controversy, we must decline to consider in this proceeding. They may furnish ground for the dismissal of the appeal, but are out of place here.

The relators do not seek to appeal from a money judgment against them, or from a judgment for the delivery of property, but only from one denying them a preference in a certain fund in the possession of the court or its officers.

In such case it has been established by a long line of decisions running through a half century, that the law only exacts a bond sufficient to cover the costs. *Heath et al. vs. Vaught et al.*, 16 L. 513; *Blanchin vs. St'r Fashion*, 10 Ann. 345; *Suc. of Edwards*, 34 Ann. 216; *State ex rel. Moller vs. Judge*, 36 Ann. 189; *Pasley vs. McConnell*, 38 Ann. 470; *State ex rel. Durand vs. Judge*, 30 Ann. 283.

In the face of these and many other decisions to the same effect, it is surprising that there can now exist any controversy on the subject.

Another ground urged for the refusal of the appeal is that there is no privity between the different relators, and they could not join in one motion for the appeal.

There is no force in this contention. In the case of *Schlieder vs. Martinez*, 38 Ann., the present court said:

"There is no provision of law or rule of practice which requires each party dissatisfied with the judgment rendered should separately appeal and give a separate and distinct bond. They can all well join in the same motion and furnish one bond, in the case in which the judgment appealed from was rendered."

It is, therefore, ordered, adjudged and decreed, that the writs of mandamus and prohibition be and the same are hereby made peremptory.

Succession of Auch.

No. 9952.

SUCCESSION OF KASPAR AUCH.

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A legacy to the incorporated churches of a particular Christian denomination in the city of New Orleans "to the end that the poor of said respective churches may be cared for," is a donation to pious uses expressly recognized in the Civil Code and highly favored by our jurisprudence.

It contains no element of a *fidei commissum* or prohibited substitution.

The uncertainty in such a designation of the beneficiaries of the bequest is a characteristic of donations to pious uses, and is no obstacle to their validity.

There is no uncertainty as to the legatees described in the will.

Charity is not foreign to the objects and purposes of incorporated Christian churches, but, on the contrary, is an essential function in their economy, and they are competent to receive and administer donations for charitable purposes.

A PPEAL from the Civil District Court, for the Parish Orleans.
Rightor, J.

Henry P. Dart, for Plaintiff and Appellant.

Singleton, Browne & Choate, for Defendants and Appellees:

1. The defendant corporations have the power, under their respective charters and the laws of this State, to receive the legacy in question, whether it is viewed as a legacy for charitable purposes in a strictly limited sense, or as partaking of the character of a religious charity: (a) because it comes with the express purposes and objects of their organization, which are, the religious worship of the Almighty God, and to cultivate and propagate the Christian religion, according to the Presbyterian faith; (b) because it is a part of their religious faith, and, therefore, one of the object of their organization, that the poor members should be provided for by the corporation; (c) because their rules and by-laws especially provide for the care of the poor, and the collection and distribution of the offerings of the people for pious uses; (d) because it was "the will and intention of the donor" that they should receive the legacy in question. Charters; Book of Church Order; Will, R. S., secs. 677, 681; 2 R. 512; 9 Ann. 266; 7 Ann. 363; 3 Ann. 294; 17 L. 46; Morawetz on Corp., vol. 1, secs. 27, 327, 36, 333, 362, 364, 5; Perry on Trusts, sec. 43, p. 25; 2 How. 188; 15 How. 367; 4 Wheat. 636; *Parish of Sutton vs Cole*, 3 Pick. 237; 5 Met. 155; *Watson vs. Jones*, 13 Wall. 679; 8 N. Y. 525; *Domat*, secs. 3583-86-87; *Suc. McDonough*, 8 Ann. 246; *Williams vs Western Star Lodge*, 38 Ann. 629.
2. The legacy in question is not too vague to be carried into effect; the poor members of each body are well known and susceptible of positive identification. The designation in the will is sufficient in law. C. C. 1549; 2 R. 438; 12 Ann. 301; 8 Ann. 171; 38 Ann. 620; *Domat*, secs. 3337, 3588-89-90-904; *Biapham on Equity*, p. 164; *Perry on Trusts*, secs. 687, 732.
3. The title to the legacy is vested in the churches, and not in their poor members. 2 *Redfield on Wills*, p. 492; 38 Ann. 621; *Domat*, Book 3, sec. 8, Nos. 3214-15 90.

The opinion of the Court was delivered by

FENNER, J. The decedent, Kaspar Auch, left a large estate, which he disposed of by a testament containing the following clause:

"I give and bequeath to the several incorporated religious associa-

Succession of Auch.

tions of the city of New Orleans, propagating the teaching of religion according to the form of government and book of discipline of the Presbyterian Church, all the rest and residue of the property and effects which I may die possessed of, of whatever nature and kind, to the end that the poor of said respective churches may be cared for."

The executors named in the will opened the succession and caused the will to be probated.

The several incorporated Presbyterian churches of the city of New Orleans intervened in the succession by a petition praying for a citation of the executors and for a judgment recognizing them as sole residuary legatees and instituted heirs, and ordering the executors to sell the property and liquidate the succession.

After due proceedings such a judgment was duly rendered and signed. While it was in process of execution, Rosina Miller, a sister and legal heir of decedent, filed a petition citing the executors and the several residuary legatees, and praying for a judgment annulling both the will and the judgment.

The clause above quoted from the will is the basis of the attack, and its nullity is claimed on four grounds :

1st. Because it is therein attempted to create, hold and perpetuate a fund not recognized by law.

2d. Because the said clause is in effect a *fidei committum*, and substitution in violation of law ; and

3d. Because the said claimants and said legatees are incompetent to receive said legacies, the objects and purposes of same being beyond the scope of the power granted the churches by the laws of this State for the creation and government of the same.

4th. Because the said attempted distribution is too vague and indefinite, and can never be carried into effect by reason of said vagueness and indefiniteness.

The first two grounds are frivolous.

The disposition contains not a single feature of the *fidei commissum* or prohibited substitution, and is the simplest possible example of a legacy to pious uses recognized in the text of our Code and favored in its judicial construction. Rev. C. C. 1549 ; Suc. of Vance, 39 Ann. 371 ; State vs. McDonough's executors, 8 Ann. 171 ; Williams vs. Western Star Lodge, 38 Ann. 620 ; Suc. Mary, 2 Rob. 438 ; Fink vs. Fink, 12 Ann. 301.

As much may be said of the fourth ground. There is no intrinsic difficulty in determining what are the incorporated Presbyterian asso-

Succession of Auct.

ciations of this city, and the record shows that, without any contest among themselves, they have accepted the legacy, and made proof of their identity, under the designation contained in the will.

So far as the beneficiaries of the legacy are concerned, viz: "the poor of said respective churches," there is no indefiniteness which is not inherent in all charitable bequests. This question was fully discussed and disposed of in the opinions of C. J. Eustis and Judge Rost, delivered in the McDonough will case, 8 Ann. 171, where it was said: "It is plain that under the civil law it is no objection to the validity of a legacy to pious uses, that it is for the benefit of the poor, even without any designation of locality. There is no principle better settled than that such legacies are valid. Indeed, the very generality complained of is an illustration of Christian charity; and uncertainty of individual object at the time of the gift is its character and element."

The final contention that the corporations are incompetent to take because organized solely for religious, and not for charitable purposes, involves the monstrous proposition that charity is foreign to the purpose of Christian religious organizations—even charity to their own members. This is contrary to the general knowledge which we all have of the objects and practical workings of such organizations, and is contradicted by specific evidence in regard to these particular corporations showing that the care of their poor members is a special function in their economy confided to the direction of their deacons, who are officers constituted mainly for this purpose.

The laws under which such corporations are authorized expressly provide:

"Said corporations shall be capable in law, according to the terms and conditions upon which the said corporations are formed and established, to take, receive and hold all manner of land, tenements, rents and hereditaments, and any sum of money, and any manner and portion of goods and chattels, given and bequeathed unto them or acquired by them in any manner respectively; to be employed and disposed of according to the objects, articles and conditions of the instrument upon which the corporations respectively are formed and established, or according to their articles and by-laws, or of the will and intention of the donors." Sec. 681 R. S.

Exposition of a matter so plain would be "lighting candles when the sun was shining."

Judgment affirmed.

Succession of Boullemet.

No. 9946.

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SUCCESSION OF R. H. BOULLEMET.—RULE ON THE LOUISIANA STATE
LOTTERY COMPANY.

The surviving parent, holding property in common with minor children of a marriage with the deceased spouse, whether of the late community or derived by testament, may cause same to be adjudicated to him, or her, in whole or part, at an estimation of value fixed by experts appointed and sworn by the judge, after a family meeting shall have declared that such adjudication is for the minor's interest and advantage, and their undertutor shall have given his consent thereto.

A judicial adjudication of property thus held in common will not be annulled for *informativités* anterior to the decree of adjudication. Such decree is conclusive as to the facts on which it rests, *until corrected on appeal*, or annulled in a direct action.

When, as in this case, the property sought to be adjudicated to the surviving spouse is shares of stock of a corporation, and a rule is taken on such corporation to show cause why the stock should not be transferred on the books of the corporation, in conformity with the decree of adjudication, the answer of the corporation thereto, presents an issue that must be decided as a necessary step to the completion of the adjudication. On appeal taken from the decision of the judge *a quo*, on the rule, we may decide upon the regularity of the anterior proceedings, and whether the consummation of same would be to the best interest and evident advantage of the minors.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Joseph H. Spearing, for Plaintiff and Appellant.

T. J. Semmes & Legendre and *Hornor & Lee*, for Defendaut and Appellee.

The opinion of the Court was delivered by

WATKINS, J. R. H. Boullemet died on the 12th day of February, 1886, leaving a widow and two minor children, to each of whom he bequeathed one-third of his estate.

The widow caused the will to be probated, an inventory to be taken, and herself to be qualified as testamentary executrix. Thereafter she was qualified and confirmed natural tutrix for the minors, and had an abstract of the inventory recorded in the book of mortgages, and H. P. Buckley, grandfather of the minors, was appointed and qualified as their undertutor. On the 20th of December, 1886, the executrix filed an account, showing the liquidation and settlement of succession debts and charges, and, on due proceedings had, procured the homologation thereof.

In her capacity of natural tutrix, Mrs. Boullemet filed, subsequently, an account on which was carried the value of 108 shares of stock of the Louisiana State Lottery Company fixed at \$16,200, i. e., \$150 per share; and the total amount of assets for distribution at \$20,494 14.

Succession of Boullemet.

On that basis the respective shares of the widow and heirs were fixed at \$6831 38—that is to say, \$13,662 76 for the two minors. The undertutor having been cited, filed an answer, in which he acknowledged the account to be correct, and consented to the liquidation and fixing of the shares of the minors at the amounts stated. Thereupon the account was homologated. Mrs. Boullemet then filed a petition requesting the convocation of a family meeting to advise whether it was to the best interest and evident advantage of the minors, that the property held in common by her children and herself should be adjudicated to her, upon the execution and registry of an adequate special mortgage in their favor. The proper order was made, and experts appointed. They reported in favor of the adjudication being made at the price of \$13,662 76, as fixed in the inventory. This report was duly approved and homologated.

The family meeting was duly convened, and recommended the adjudication to the surviving widow, of all the property that is described in the inventory, at the price of \$13,662 76 for the share of the two minors, upon her executing an adequate special mortgage in lieu of the general mortgage, in their favor. In these recommendations the undertutor concurred, and the same were duly homologated, and the special mortgage was accepted, and the cancellation of the general mortgage ordered.

Mrs. Boullemet procured an order directing the Lottery Company to show cause why the judgment adjudicating to her the shares of stock, the deceased held and owned, should not be complied with, and the same duly transferred to her upon the books of the company, and new certificates of stock issued to her in its place.

In answer to the rule, the Lottery Company assigns as a reason why the transfer should not be made that, in their opinion, "an apparent wrong was being committed to the prejudice of the minors, without the knowledge of the court, in that the appraisement of the property of the succession, was much less than the officers of the company knew to be the amount of the interest of the children in the capital stock of their father in said company; and, therefore, said officers believed it to be their duty to make an investigation of the proceedings," etc. The answer then declares that their investigation led to the discovery that said stock was worth, at the date of those proceedings, \$500 per share, "and for this reason, and from the fact that the officers are advised that they might be held liable to said minors if they transferred the stock in obedience to the judgment of the court, with-

Succession of Boullemet.

out bringing to the notice of the court the true market value of said stock."

To this answer are annexed the affidavits of two stockbrokers of this city, stating the value of this Lottery stock to have been "upwards of \$500 per share," and it contains an offer on the part of the company "to take the whole of said stock at the price of \$500 per share, payable cash."

On the trial of the rule no other evidence was offered than the record and proceedings referred to on the part of plaintiff in the rule, and the two affidavits on the part of the Lottery Company. To the introduction of these the plaintiff objected on the following grounds, viz :

1st. That said judgment and proceedings cannot be attacked collaterally.

2d. That said judgment and proceedings fixed the value of the property to be adjudicated.

3d. That said affidavits are irrelevant.

4th. That the Lottery Company is without interest.

5th. That the minors are the only interested parties.

6th. That only the undertutor, or some one claiming to represent the minors, can attack the report of the experts fixing the value of the property to be adjudicated, and the judgment adjudicating same.

7th. That all of the proceedings leading up to the judgment being regular, same cannot be attacked in the absence of a charge of fraud.

The idea sought to be conveyed by the Lottery Company is that their shares of stock are worth a large premium in the market, and in cash ; and that, instead of the 108 shares that are held in indivision by the widow and heirs of Boullemet only being worth \$16,200, they are now, and were at the time, worth \$54,000 ; and that the interest of the minors amounts to \$36,000, instead of \$13,662 76.

The question presented is an equitable rather than a legal one.

The provisions of the Code are : " Whenever the father or mother of a minor has property in common with him, they each can cause it to be adjudicated to them, either in whole or in part, at a price of an estimation made by experts appointed and sworn by the judge, after a family meeting duly assembled, shall have declared that the adjudication is for the interest of the minors, and the undertutor shall have given his consent thereto." R. C. C. 343 ; 5 Ann. 122, Succession of Hebert.

In Orr vs. Thomas, 3 Ann. 582, our predecessors said on this subject:

Succession of Boullemet.

"A judicial adjudication of community property made to the surviving husband, under proceedings before a court of competent jurisdiction, in which the minor heirs were represented by their undertutor, will not be annulled for *informalities anterior* to the decree of adjudication.

"The minors being represented by their undertutor, the judgment of adjudication is conclusive as to the *facts* on which it rests, *until corrected on appeal*, or annulled in a *direct action*."

It cannot be fairly argued that so great a disparity in value as alleged in the instant case is a mere *informality*; nor can it be said that the Lottery Company have *appeared* in this cause without interest.

They appear in answer to plaintiff's rule and for the purpose of bringing to the attention of the court a fact of material importance to the minors, and possibly to themselves; and it is substantiated by the judicial admission of the company, and the uncontradicted testimony of two witnesses who are professedly familiar with the value of its stock.

No objection was urged to the affidavits on account of their being *ex parte*.

The proof furnished by the Boullemet *mortuaria* is not of the satisfactory character that evidence contradictorily taken, is.

Such proceedings are too frequently taken "as a matter of course"—simply as routine business, and not carefully weighed or properly inspected. We are, it is true, not justified, from anything in the record, to pronounce such judgment in this case; but if the testimony of the Lottery Company is to be taken into account—and we think it is—it inevitably creates this impression.

While it is, no doubt, true that the undertutor is a very worthy and responsible person, and devoted to the interest of his grandchildren, yet it is within the range of probability that he was unaware that so large a value was placed upon, or could be obtained for this Lottery stock. We are unwilling to declare that he has been unfaithful, and we cannot consent to deprive him of the opportunity of investigating the value of this stock, and of testing the sincerity of the company's offer "of \$500 per share, payable cash."

We regard the rule to show cause, taken on the Lottery Company, as a necessary step in the judicial proceedings to complete the adjudication to Mrs. Boullemet. The stock was not sold at public auction.

It had not been transferred by authentic act.

 Leibe vs. Hebersmith.

The judgment of homologation of the *proces verbal* of the deliberations of the family meeting was *ex parte*. It is not such a final judgment as will conclude investigation. We think the ends of justice will be best subserved by an affirmance of the judgment appealed from and it is ordered.

Judgment affirmed.

 No. 9996.

ARTHUR LEIBE VS. ERNEST HEBERSMITH.

Acts acknowledged before a Louisiana commissioner have no effect as authentic acts unless the acknowledgment takes place also before two witnesses, legally competent.

Other wise, they remain acts under private signature, which are inadmissible in evidence until the signature is proved. 15 Ann. 392; 22 Ann. 457, affirmed.

Admission in evidence to prove *rem ipsam*, of a document which is not authentic and the signature to which is not proved, is irregular. The document ought not to have been received at all.

The judgment of *non-suit*, rendered by the lower court, is justified.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Braughn, Buck, Dinkelspiel and Hart, for Plaintiff and Appellee.

"An act under private signature is inadmissible in evidence until the signatures have been proved." 22 Ann., p. 457.

"An act executed before a Louisiana commissioner is not entitled to the effect of an authentic act unless same has been done in the presence of two witnesses." 15 Ann., p. 392.

"While an act under private signature, duly registered, may be held sufficient as notice to third persons, yet a distinction exists between the effect of the registry as to notice, and the effect of the act itself as proof of its contents." 33 Ann., p. 1949, and authorities there cited.

"A common law mortgage has no effect in Louisiana as to third persons." 34 Ann., p. 797 38 Ann., p. 890; *Suc. of Mrs. Larendon*, decided Nov. 21, 1887.

W. W. Handlin, for Third Opponent and Appellant:

A common law mortgage is not similar to a *vente à réméré* under the Civil Code of Louisiana. S. C., No. 9787; C. C. 2464.

An act under private signature dates from its registry, made to appear by the certificate of the Recorder of Mortgages.

The acknowledgment of a deed under private signature before a Louisiana commissioner, makes full proof *akunde*, of the genuineness of the document.

An attaching creditor can have no greater rights than his debtor had over the property when his attachment was levied.

"No privilege shall have effect against third persons, unless the act or other evidence of the debt is recorded within seven days from the date of the act or obligation of indebtedness." Act No. 45 of 1877.

Private acts whose date is proved by evidence *dehors* the instrument being recorded in the Mortgage Office and the transaction being *bona fide*, have the same effect against third persons as the parties themselves. 35 Ann. 847; 33 Ann. 1249; 2 Ann. 951, 469; 9 Ann. 547; 14 Ann. 701; 11 Ann. 57; 4 N. S. 369; 2 N. S. 171.

39	1050
152	584
39	1050
112	1070
39	1050
123	823
125	976

Leibe vs. Hebersmith.

A private act once registered in toto, it is immaterial as to whether the evidence of its execution was registered or not. *Pierce vs. Clark*, 25 Ann. 111; C. C. 3367; C. C. 3397-3; C. C. 3392; C. C. 3357.

The employment of a shorthand reporter is optional. It is the duty of the minute clerk to take down the evidence if a party declines to employ a stenographer. The law authorizes one note of evidence or transcript in each case. A note of evidence taken by a stenographer, as an officer of the court, may be filed by him, and need not be submitted to the clerk. The law does not warrant the stenographer in not filing his transcript unless he is paid in advance.

The opinion of the Court was delivered by

BERMÚDEZ, C. J. This is a contest for the distribution of the proceeds of real estate judicially sold.

The third opponent claims to be entitled to preference over the seizing creditor, by virtue of an agreement between her and the defendant, termed a mortgage, executed in New York and subsequently recorded in New Orleans, where the property was situated, at a date anterior to the registries on which the plaintiff relies.

On the trial, the opponent offered in evidence the agreement in question, which, notwithstanding objection, was admitted to prove *rem ipsam*.

The opponent contends that it ought to have been received without qualification, as an authentic act, but the plaintiff insists that it should have been rejected altogether, as it is not authentic, and the signature was not proved.

The agreement purports to be signed by the defendant before a notary public in New York, on November 19, 1883, and to have been recorded in the Mortgage Office of the parish of Orleans, on December 14 following.

It was subsequently acknowledged before a Louisiana commissioner in New York, on November 25, 1886.

The acknowledgment before the New York notary was not made in the presence of any witnesses, and that before the Louisiana commissioner was made before one witness only.

No proof was adduced of the signature of the parties to the agreement.

Under the terms of the law and the construction put upon the same by a previous court, the instrument, to operate as an authentic, ought to have been acknowledged in presence of *two* witnesses before the Louisiana commissioner.

In *Langley vs. Burrows*, 15 Ann. 392, in which the acknowledgment had been made before a Louisiana commissioner and *one* witness only, the court said:

Succession of Forstall.

"The section of the act of 1855 authorizes commissioners appointed in other States by the Governor of the State of Louisiana, to take acknowledgment and proof of any deed, mortgage, etc., and the eighth section gives to all acts thus acknowledged, the force and effect of authentic acts executed in this State. Thus we may conclude that those commissioners are by express provision of the law, vested with all the powers of our justices of the peace and notaries and as an authentic act of sale, mortgage, assignment, etc., is an instrument executed or acknowledged before a notary and two witnesses, it necessarily follows that the documents produced by the plaintiff are acts under private signature."

This ruling is perfectly correct. It cannot be pretended that the Legislature intended to vest commissioners for this State, acting in other States, with powers superior or more efficacious than are conferred on home notaries, who must be citizens of the State.

Hence, it is apparent that an act acknowledged before a Louisiana commissioner acquires no authenticity in this State, unless executed in the presence of *two* competent witnesses. R. C. C. 2234; R. S. 596 to 603.

In *Miller vs. Wisner*, 22 Ann. 457, the court held that documents under private signature are inadmissible in evidence until proof of the signature. Thus reads the law. R. C. C. 2242.

The admission of the document to prove *rem ipsam* was barren of any effect; a white sheet of paper might as well have been admitted. It should not have gone in *at all*.

The district judge properly non-suited the opponent. The record is not in a condition to enable this court to pass upon the merits of the controversy.

Judgment affirmed.

39 1052

46 843

39 1052

51 1469

No. 9950.

SUCCESSION OF OCTAVE J. FORSTALL.

The sale or transfer of a note secured by a special mortgage and vendor's privilege carries with it both the mortgage and privilege.

This right accrues to the purchaser by mere operation of law, and is not dependant upon the articles of the Civil Code, which treat of payment with subrogation, legal or conventional.

The right is acquired by the purchaser, even if the payment of the note, which is in suit by executory process, is made to the sheriff; provided, the contract be shown to be one of purchase between the seizing creditor and the transferees of the note.

In a sale of an immovable, burdened with a mortgage and vendor's privilege, belonging to a succession, no other claim or charge can be preferred to the vendor's privilege out of the proceeds of the sale, but the expenses incurred for making the sale.

Succession of Forstall.

In the case of a sale of succession property, burdened with mortgages, by executory process, the purchaser at such sale cannot be compelled to turn over to the succession representative the amount of ranking special mortgages, which he is entitled to retain, after satisfying the junior mortgage of the seizing creditor. *Morris vs. Cain*, 34 Ann. 657.

But if the unsatisfied mortgages are general, the residue of the purchase price cannot be retained by the purchaser, and the same must be paid over to the succession representative to be administered upon. *Telasier vs. Bourgeois*, 38 Ann. 256.

A natural tutrix, administering in that capacity the succession of her husband, is entitled to administrator's commissions.

A PPEAL from the Civil District Court, for the Parish of Orleans.
Monroe, J.

W. E. Murphy, for Opponent and Appellee :

1. The U. C. Art. 3337 grants a vendor's privilege on the property sold for the payment of the price, or so much of it as is due, whether sold for cash or on credit.
2. This is a right which springs from the nature of the debt, and by force of law is embodied in the contract.
3. It is also a right of very high character conferring advantages superior to those which flow from a mortgage.
4. Although a renunciation of rights of this character may be implied, it must be held by sound principles of interpretation, should be established, not by doubtful, but by clear and cogent inferences from the acts of the parties. *Boner vs. Mahlé*, 3 Ann. 600, and authorities there cited, a leading case on this subject.
5. *Nemo facile presumitur donare*. *Merlin* expresses, with his usual accuracy, the just rule for interpretations of renunciations. "Les renonciations se font de deux manières, expressément, et par des faits. Mais pour que les faits emportent, il faut qu'il en résulte une volonté manifeste de renoncer, c'est-à-dire, que ces faits soient directement et à tous égards contraires et au privilège dont il s'agit." *Merlin, Verbo Renon*, § 3; *Duranton*, vol. 10, § 158.
6. Even a release of a special mortgage to secure the vendor the payment of the debt does not effect the vendor's privilege. *Citizens' Bank vs. Curry*, 12 R. 379; *Suc. Johnston*, 3 R. 217; *Howard & Thomas*, 3 L. 112.
7. The burden of proof as to the renunciation falls on the party holding the affirmative. The tutrix in this case representing the deceased is estopped from denying her husband's contract to subrogate opponent.
8. The tutrix claiming \$1000 from the succession, under the Homestead clause, is not entitled to commissions, all she can take from the creditors is the \$1000 allowed by law. R. S. p. 333, sec. 1693. As tutrix, she is entitled to a commission on the minors' revenue. C. C., Art. 349; *Suc. of Weber*, 16 Ann. 420.

Sambola & Ducros, for the Tutrix and Appellant :

1. Legal subrogation is *stricti juris*, and can take place only in cases expressly provided for by law. 11 Ann. 435; C. C. 2161, 2645; 3 *Larombière*, pp. 180, 301; 1 *Troplong*, Priv. No. 349; 4 *Marcadé*, Nos. 704, 710; 7 *Toullier*, Nos. 102, 139; 12 *Duranton*, No. 180; 2 *Zachariæ*, p. 376.
2. Conventional subrogation is not presumed; it must be express, unequivocal, and made in writing and at the same time as the payment; and only by notarial act, when made by the debtor. C. C. 2159, 2160; 12 *Duranton*, Nos. 117, 118; 3 *Larombière*, pp. 194, 215; 7 *Toullier*, Nos. 116, 117, 121; 5 R. 207; 11 Ann. 295; 30 Ann. 23; 9 R. 476.
3. Facts, not alleged by a litigant, are inadmissible in evidence. C. C. 2161; 9 Ann. 120; 24 Ann. 158; 14 Ann. 356; 12 Ann. 77; 9 R. 477.

Succession of Forstall.

4. An administrator cannot justly be charged with uncollected funds, which the action of the law and of the complaining party himself has put it out of his power to receive. C. P. 679, 683; 2 L. 280; 12 Ann. 592; 34 Ann. 662.
5. A widow and natural tutrix, administering and settling, *us nominibus*, the insolvent estate of her husband, is entitled to an administrator's commission. C. C. 1044, 1069; 1 Zacharie, § 40; 1 R. 400; 7 Ann. 212; 34 Ann. 40.
6. An appellate court has no power to review the judgment of the lower court as to appraisals *inter sese*. C. P. 838, 889; 2 Ann. 548, 994; 12 Ann. 775; 11 Ann. 546; 16 Ann. 195; 18 Ann. 265; 20 Ann. 123; 23 Ann. 456; 25 Ann. 508; 26 Ann. 542; 32 Ann. 196.

The opinion of the Court was delivered by

POCHE, J. The principal contention presented in this appeal grows out of the opposition to the account and tableau of distribution of the natural tutrix administering in that capacity the succession of her husband, interposed by James P. Guinault, as the holder of twenty-two notes, amounting together, in capital, to \$1900; and originally secured by a special mortgage and vendor's privilege on an immovable, the proceeds of which constitute the principal asset of the succession.

He complains that, in her proposed distribution, the tutrix has recognized him as a privilege creditor for the amount of only eleven of the notes which he holds, treating him as an ordinary creditor for the amount of the eleven others; and he also charges error in the omission of the tutrix to include as an asset of the succession the sum of \$910 87, the residue of the adjudication of another immovable belonging to the succession, which had been sold under executory process at the instance of opponent, as the holder of a mortgage, second in rank, on said property. He finally resists the amount claimed by the tutrix as administrator's commission, as well as the fees allowed to the attorneys and to the notary of the succession, which he alleges to be excessive in amount.

The tutrix appeals from a judgment which recognizes the opponent as a privilege creditor for the full amount of his twenty-two notes in capital and interests, and orders the proceeds of the property sold under executory process to be charged as an asset of the succession, or as much of the same as may be necessary to satisfy the claim propounded by the widow under the provisions of act 171 of 1852, now article 3252 of the Civil Code. The judgment also rejects her claim for commission as administratrix, and finally homologates her account as thus amended.

The first point of discussion involves the proposed reduction of opponent's privilege by one-half. Appellant's position on this point will be best understood by a reference to the facts which gave rise to the contention.

Succession of Forstall.

It appears that a short time previous to the death of Forstall, the holder of the twenty-two notes, eleven of which had then matured, took out a writ of seizure and sale of the property subject to the mortgage and vendor's privilege, by which the notes were secured, and that before the date fixed for the sale, at the instance of Forstall and with the consent of the seizing creditor, the opponent (Guinault) purchased the entire series of the notes on which execution had issued, for the purpose of assisting and befriending Forstall, whose home was thus saved to him. In order to avert and suspend the sale which was to have taken place on the very day that the transaction was consummated, the amount of the eleven matured notes in capital and accrued interests, together with costs thus far incurred, was paid into the hands of the sheriff, and that a few days later, as soon as the notes could be legally withdrawn from the files of the court, the purchase price of the eleven notes was paid to the attorney of the seizing creditor, who had been vested with full authority by his client to carry out the agreement of the parties, and who thereupon delivered the entire series of notes to Guinault, the purchaser, to whom he executed a conventional subrogation of the rights of mortgage and privilege securing the eleven matured notes, the payment of which was therein stipulated to have been made as hereinabove stated. Relying on that circumstance and on the alleged fact that this instrument was not executed on the day that payment was made, coupled with the fact that in his return on the writ the sheriff stated that he had received the amount which the writ called for from the debtor Forstall "through Jas. P. Guinault," appellant makes the point that the transaction thus evidenced was, in fact and in law, a payment by the debtor of the eleven matured notes, under the operation of which the vendor's privilege was extinguished and cancelled, and that therefore the attempted subrogation of such defunct rights was, and must be treated as, an absolute nullity.

Under our reading of the record the evidence shows clearly and conclusively that the transaction which resulted from the negotiations carried on by Forstall and Guinault with the duly authorized counsel of the seizing creditor, and in consequence of which Guinault acquired the possession of the twenty-two notes in question, was one of purchase.

Hence, we hold that the rights which he acquired as purchaser and transferee could not be in law, and were not in fact, affected by the mode, awkward it was, adopted of making the payment of the eleven matured notes and of the costs incurred in the executory proceedings.

Succession of Forstall.

The practical result of the transaction was, as shown by the record, that the seizing creditor, as vendor, received the price of his notes, and that the purchaser received the notes, which he bought, in their full legal and intrinsic value.

The securities which were thus transferred to him, together with the notes, were the special mortgage and vendor's privilege with which they were duly identified. Those rights are secured to him by the very text of the law.

Article 2645 Civil Code reads: "The sale or transfer of a credit includes everything which is an accessory to the same, as suretyship, privileges and mortgages."

Hence, our jurisprudence has invariably enforced the rule that the mere transfer of a note secured by mortgage carries with it the mortgage itself. In such a transaction the articles of the Code which treat of the payment with subrogation have no application, as the right acquired by the transferee derives from another and a different provision of law. *Oakley vs. Sheriff*, 13 Ann. 273.

It follows, therefore, that the accessories of the notes which Guinault acquired were vested in him by the mere operation of law, without reference to the attempted conventional subrogation evidenced by the instrument executed by the seizing creditor's attorney and agent, which was mere surplusage. As such it can add to, or detract no strength from, the legal rights which Guinault acquired under his purchase.

It is plain, under our well-settled jurisprudence that, on presenting his notes, with authentic proof, as was the case here, that they were made payable to the order of, and indorsed by, the drawers, with a copy of the sale with which they were identified, to a court of competent jurisdiction, he would have been irresistibly entitled to executory process to enforce payment thereof.

Hence, his rights to a mortgage and vendor's privilege are perfect in law, and must be enforced. *Race vs. Bruen*, 11 Ann. 34; *Scott vs. Turner*, 15 Ann. 346; *Seckel vs. Fried*, 18 Ann. 192; *Frost vs. McLeon*, 19 Ann. 80; *Perot vs. Levasseur*, 21 Ann. 529; *Miller vs. Capel*, 36 Ann. 264.

On the second branch of the controversy, the record shows that the purchaser of the immovable sold under the executory process in the suit of Guinault vs. Forstall, after paying the amount of the seizing creditor's claim, costs of suit and taxes, retained in his hands the sum of \$910 87 to meet the payment of a special and ranking mortgage affecting the property sold, and an additional sum of \$170 96 on ac-

Succession of Forstall.

count of a tacit mortgage recorded in favor of the minor children of the deceased, against their mother, the accountant.

Under our well-settled jurisprudence the succession representative was without legal right to claim from the purchaser the amount retained by him on account of the special ranking mortgage *Morris vs. Cain's executors*, 34 Ann. 662.

But she had the right, and it was her duty, to claim and recover the amount retained by the purchaser on account of the general mortgage in favor of the minors. *Tessier vs. Bourgeois*, 38 Ann. 256.

This is conceded by her counsel, and they argue that the account should be credited with the additional sum of \$170 96, as it appears, as a result of the developed insolvency of the succession, that the inscribed mortgage of the minors, resulting from the abstract of the inventory, lapses and is without effect.

We, therefore, conclude that the district judge erred in treating the entire proceeds of the sale as an asset of the succession; that part of his judgment covers only \$170 96.

At this stage of the case comes the practical conflict between the opponent, Guinault, in the enforcement of his rights of vendor's privilege on the proceeds of the immovable subject thereto, and the widow's claim of \$1000 under the act of 1852. The total assets of the succession are insufficient to satisfy both and the funeral and law charges and other privileges recited and contained in the account.

Under the provisions of the act of 1852, the claim therein created must "be paid in preference to all other debts, except those for the vendor's privilege and expenses incurred in selling the property."

Hence, it follows that the only debts or charges which can be preferred to opponent's privilege are the costs of the sale of the property subject to his mortgage. Now the record informs us that the judicial costs incurred for that sale amount to \$90 90, and that the property was liable for taxes amounting to \$75 95.

Beyond this the record is silent, and we are not informed of the items which make up the amount of costs as above stated. But we are authorized to conclude that the total amount consists of the clerk's and sheriff's fees, appraiser's charges, advertisement of sale, etc., and these, we hold, are the only costs which can rank the vendor's privilege. *Succession of P. O. Lauve*, 18 Ann. 721; *Succession of Markey*, 2 Ann. 265.

The judgment appealed from is in accord with these views, although it does not detail the charges which are allowed; these must be restricted to the two items hereinabove enumerated,

Winter vs. Fraenkel.

Protected by that decree, opponent has no concern with the amounts allowed for attorneys' and notary's fees, for the reduction of which he has filed a prayer to amend the judgment. And as the other creditors of the succession have not appealed, the judgment in that particular cannot be reviewed by us in the present appeal.

We do not approve of the conclusion reached by the district judge on the claim of the tutrix for commissions of administration, which was rejected in the judgment appealed from.

The right of a natural tutrix to such commissions has been judicially recognized. Succession of De Lerno, 34 Ann. 40. Hence we shall allow them, but they are inferior in rank to opponent's privilege.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be amended in the following particulars :

1st. By reducing the amount of the proceeds of the property sold under executory process in the suit of Guinault vs. Forstall, to be accounted for by the natural tutrix, to the sum of \$170 96.

2d. By allowing to accountant administrator's commissions, under the restrictions hereinabove stipulated.

And it is now ordered that said judgment, as thus amended, be affirmed at the costs of Jas. P. Guinault, opponent on appeal.

No. 10,039.

JAMES L. WINTER VS. MAX FRAENKEL.

To authorize an appeal from an interlocutory decree the decree must be such as would work an irreparable injury.

So where a lessor complains that the lessee has placed an electric battery and erected machinery in a part of a building leased by him, in violation of the contract of lease, and claims damages to the amount of the rents to be paid for the residue of the building, which he avers will be abandoned by the tenants, and demands the dissolution of the lease, and at the same time asks for an injunction to stop the running of the machinery *pendente lite*, the order of the judge refusing to grant the injunction is not appealable. The injury likely to be caused by the disturbance is not irreparable, nor is the refusal of the injunction decisive of the cause on its merits.

A PPEAL from the Civil District Court, Parish of Orleans.
Voorhies, J.

F. L. Richardson, for Plaintiff and Appellant.

E. E. Moise, for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. This is an appeal from the refusal of the district judge to grant an injunction.

There is a motion to dismiss the appeal on the ground that the appeal is from an interlocutory decree, which does not work an irreparable injury.

The petition for the injunction contained in substance the following allegations :

That the plaintiff had leased to the defendant parts of certain buildings and their appurtenances in the city of New Orleans for thirty months, and that defendant had taken possession of the same. That the defendant, a few months after the commencement of the lease, placed in the building an electric battery of five-horse-power for the purpose of running sewing machines and fans, which caused so much noise, tremor and jarring of the walls of the building that the offices on the second floor thereof, occupied by the plaintiff and his other tenants were rendered almost uninhabitable. That the use thus made of the premises was not contemplated at the time of making the lease.

That he found the tenants would abandon the building if the disturbance from the battery and machinery was not stopped, and that he also would be obliged to give up the use of his office.

That the rents of the building, including his own office, for the term of the lease would amount to \$2118.

Plaintiff prayed to have the lease cancelled and annulled, and for an injunction restraining defendant from running the machinery and for damages.

A rule to show cause was issued, and on trial of the same the injunction was refused.

The order of refusal complained of was an interlocutory order.

It is not for us to say whether the judge should have granted the injunction or not. That is not the question before us, but whether the interlocutory order refusing the injunction was appealable.

The general rule is that an interlocutory order or decree to be appealable must be calculated to work an irreparable injury.

There is, however, no allegation in the petition that such an injury, or an injury irreparable in character, would be caused by the refusal to grant the injunction. On the contrary, it is plainly inferrible from the nature of the complaint urged, that the injury could be repaired.

The substance of the complaint is that plaintiff and his other tenants will be compelled to quit the building, and he measures his loss "therefrom at \$2118, as before stated. That is, if he and his tenants abandon the buildings on account of the disturbance complained, \$2118, but no less sum paid to him by defendant will compensate him for his loss.

State vs. Valere.

An injury, as has often been said, to be irreparable must be of that kind that cannot be compensated in money.

But, as we understand the plaintiff's counsel, he does not put the appealability of his case on this ground—of irreparability—but rather on the ground, substantially, that the refusal of the judge to grant the injunction was equivalent to deciding the case on its merits, and refers us to authorities, favorable, in such case, to the right of appeal.

If the premises of the counsel were correct, the authorities cited might greatly aid him. But are they correct?

The petition distinctly charges that the defendant, by the acts complained of, had violated the conditions of the lease, and that he, plaintiff, was entitled to have it annulled, and he prays that it be annulled and cancelled for the dissolution of the lease.

This demand, it is obvious, is the substance of his action—his main demand—whilst the injunction asked for can only be properly viewed as ancillary to that demand—to stop the disturbance—until he could be absolved from the unfortunate contract and get rid of his obnoxious tenants.

For these reasons the motion to dismiss the appeal must prevail.

Appeal dismissed.

No. 10,050.

THE STATE OF LOUISIANA VS. GUILLAUME VALERE, ALIAS PETER VALERE.

It is not safe for counsel to charge that a case has been decided without having been fixed for trial where the minutes of the court show that it was regularly called and submitted, and where, after such submission, counsel file briefs in support of points made.

It is with little good grace that counsel complain that a decision delivered does not pass upon points made by him, where he himself admits that he has not read the reasons assigned, and where the opinion shows that the points were considered and overruled.

The grave charges made ought not to have been preferred at random, but with circumspection.

A PPEAL from the Twenty-first District Court, Parish of St. Martin.
Mouton, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

E. Simon, F. Voorhies and *Dan Voorhies*, for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The record teems with charges of error embodied in bills of exception, a motion for new trial and a motion in arrest of judgment, most of which require only the briefest mention.

1st. The indictment is assailed as insufficient in law because the endorsement thereon did not specify the offense charged and because the foreman of the grand jury signed simply as "Foreman," without adding the words "of the grand jury." The objections are frivolous. State vs. Mason, 32 Ann. 1019; State vs. Granville, 34 Ann. 1089.

2d. It is objected that the venire and indictment were not served two full days before the trial. The return of the sheriff showed the contrary, and it was not successfully contradicted.

3d. The copy of the indictment served is assailed as not a true copy, because certain words endorsed on the original were not contained on the copy. The omission charged was utterly immaterial. 32 Ann. 1019.

4th. Objections were raised to the method of summoning jurors *de talibus*, which have no force, and were sufficiently disposed of by the reasons given by the judge.

5th. Certain defects in the minutes of the court were assigned as ground of the motion in arrest, whereupon the judge ordered the minutes to be corrected so as to conform to the facts. This he had the right to do, whenever his attention was called to the errors.

6th. The claim that the accused was not present at all important proceedings on the trial, is not sustained. State vs. Price, 37 Ann. 215.

7th. Defendant offered in evidence a deposition of one of the State's witnesses, taken before a justice of the peace, for the purpose of contradicting the evidence given by the same witness on this trial. The judge refused the same, without proof of the signature of the witness, which was by cross-mark, holding that the attestation thereof by the justice of the peace did not afford authenticity, because said justice had no jurisdiction, *ratione materiæ*, to swear witnesses and take down depositions in a murder case, and his action was *coram non-judice*, and gave no effect to the declaration other than that of a private writing.

The ruling was correct, and the reason sufficient.

8th. After the foregoing ruling, defendant offered to prove the signature of the justice of the peace by a witness in court or by a comparison of hand-writing, which the judge refused to permit, on the ground that the testimony of the justice himself was the best evidence. And then the defendant moved for a delay of ten hours in order to enable him to secure the presence of the justice.

We fail to see what would have been accomplished by proving the signature of the justice; the matter requiring to be proved was the

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signature of the witness. As that signature was by cross-mark, the justice, who attested it, was no doubt the best witness; but the judge assigns sufficient reasons for not granting the delay applied for, in the lack of diligence displayed by defendant, who, though aware of the necessity of offering this evidence from the time when the witness to be contradicted had testified, took no steps to secure the witness until long afterward when the trial was nearly completed. Defendant was presumed to know the law, and cannot avail himself of the plea of surprise by rulings of the court, which were legal and proper, and should have been anticipated.

We have thus disposed of all the charges of error, none of which have the slightest merit.

Judgment affirmed.

ON APPLICATION FOR A REHEARING.

BERMUDEZ, C. J. The judgment rendered herein on Nov. 8th is assailed on two grounds:

- 1st. That the case never was set for trial.
- 2d. That the court did not pass upon an important question presented by bill of exception to the admissibility of certain evidence.

I.

The appeal was made returnable at Shreveport in October last.

In the country, cases are not fixed for any particular day, but are taken up in the order in which they stand on the docket.

The minutes of the court show that the case was called in its regular order, on October 17, and was *submitted* on briefs filed and to be filed.

On the following day, the Attorney General filed his brief, and on the 19th a brief on behalf of the accused was also filed.

On October 22, the court, considering, from appearances, that the issues presented demanded ample consideration—the accused being prosecuted for manslaughter, and having been sentenced to ten years at hard labor—ordered the case to be transferred to New Orleans, *not* for reargument, but for *final decision*.

Counsel for the defendant complains, urging that he had been informed by an attorney that the case had been transferred to New Orleans *there to be tried*.

This court is not responsible for the information thus conveyed to the counsel, who ought to have sought the same from the minutes.

Charges of such grave character ought not to be made at random, as was done in this instance, but with circumspection.

St. Julien vs. Railroad Company.

It thus appears that the case was regularly called, *submitted* and decided, and that the accused has no cause to complain.

II

The court took pains to consider the case, not only from the briefs of the State and of defendant's counsel, but also from the record, and did actually pass upon every point presented. Had counsel read the opinion delivered in the case, he would have found that his second objection is utterly groundless.

His complaint can hardly be deemed serious, when he himself, in his application for a rehearing, confesses that he has not read the opinion. If so, with what grace can he complain that his points have not been determined.

We have reviewed the opinion, and see no reason to disturb the conclusions reached.

Application refused.

No. 10,036.

J. G. ST. JULIEN vs. MORGAN'S LOUISIANA AND TEXAS RAILROAD
AND STEAMSHIP COMPANY.

The Legislature, in granting to the defendant company immunity from suit elsewhere than at its domicile, for causes of action other than trespass, designed to restrict the character of suits *not* brought at the place of domicile, to actions of tort, for wrongs committed, and its *unlawful* entry upon the lands of citizens *vi et armis*.

Trespass is an unlawful act committed with violence on the property or rights of another.

An action of trespass is that which is instituted for the recovery of damages for a wrong committed with immediate force.

In case the owner of land permits its use and occupancy by a railroad corporation, and the construction thereon of a *quasi* public work, without resistance or complaint, he cannot thereafter require the demolition thereof, nor prevent its use by such corporation.

Such owner is not debarred of his action for *compensatory* damages, if instituted at the domicile of the company; but he cannot affect to treat such entry as tortious, and sue it as a trespasser, at the place where the injury is alleged to have been sustained.

A PPEAL from the Twenty-sixth District Court, Parish of Lafayette
De Baillon, J.

M. E. Girard, for Plaintiff and Appellee.

H. L. Garland and Leovy & Blair, for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The demands of the plaintiff are founded upon the reservation in his favor contained in our decree in the previous suit between the same parties. 35 Ann. 924.

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St. Julien vs. Railroad Company.

He claims of the defendant company the sum of \$3911 50, as compensatory damages, and which may be correctly itemized as follows, viz :

1. Value of land taken.....	\$1087 50
2. Cost of fences.....	500 00
3. Injury to 100 acres of land.....	500 00
4. Value of embankment.....	1824 00—\$3911 50

In the court *a qua* the case was tried by a jury, and they found a verdict in favor of the plaintiff for cost of fences and hedges, \$500, but disallowed the remainder of his demands as prescribed. The defendant appealed.

In limine the defendant company filed an exception to the jurisdiction of the court on the ground that, under its charter, suit could not be brought against it, elsewhere than at its domicile, the city of New Orleans, for other cause of action than *trespass*. Sec. 12, act 37, of regular session of 1877.

And that the claim herein made did *not*, confessedly, arise from a *trespass* committed by the company on the person or property of the plaintiff, as will appear from his petition.

This exception was overruled by the judge *a quo*, and the correctness *vel non* of his ruling must be first ascertained, and decided.

In making the exception defendant relied upon the provision of its charter contained in section 12, as restricting the right to sue it, *elsewhere* than at the place of its domicile, to actions of *trespass*, and as taking said company, in all other respects, out of the operation of C. P. 165, paragraphs 8 and 9.

In State *ex rel.* Morgan's L. and T. R. R. and S. S. Company vs. Judge, 33 Ann. 955, we held the company's act of incorporation to be a private statute, and not a public law ; and that the word "*trespass*," as employed therein, was "employed in its broadest sense, so as to comprehend a variety of wrongs, having the common element of a *use of force*, whether direct, or indirect."

In the more recent case of Heirs of Gossin vs. Williams, and Morgan's L. and T. R. R. and S. S. Co., 36 Ann. 187, we said of the same statute :

"It is evident that the Legislature, by granting to the company immunity from suit, out of New Orleans, its legal domicile, *except in cases of trespass*, meant to confer some privilege or advantage, which otherwise would not have existed. The design was clearly to restrict the character of suits, *not* brought at the place of domicile, to cases of *trespass*."

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Though it cannot be said to have, in any legal sense, repealed the article of the Code of Practice, it did have the effect of relieving the corporation from the effect of those provisions conferring jurisdiction on the judge of the place where the property is situated, to try and determine suits for damages *other than for trespass*.

In the opinion last quoted from we also treated of the action of trespass, as contemplated by the defendant's charter, and said :

"Trespass is defined to be an *unlawful act* committed with violence, *vi et armis*, on the person, property, or relative rights of another.

"An action of trespass is that which is instituted for the recovery of damages for a *wrong* committed against the plaintiff with immediate force." P. 188.

Our predecessors, in construing C. P. 165-9, employed similar language :

"The Legislature contemplated the *active* violation of some right, or the doing of some *illegal* thing, acts of *commission*, which give rise to an action for damages, and that the rule does not apply to *omissions*, neglect or failure to do.

"Wrongs of this class are excluded by the use of the words "commit" and "committed," * * and which, necessarily, imply action." 30 Ann. 609, *Montgomery vs. Levee Company*; 31 Ann. 566; 39 Ann. 29.

The plaintiff does not, in his petition, class, or style this as an action of trespass. In our former opinion (35 Ann. 924) the character of his original suit was fully examined and defined, and the reservation in his favor clearly outlined.

It was regarded and treated as one possessing some of the characteristic of a petitory action for the recovery of certain land occupied and used by the defendant as a road-bed for its railway—claiming that it had entered thereon in July, 1879, without his permission, and without purchasing, or appropriating it—and for rents and revenues.

After carefully reviewing the evidence, we said : "It is unnecessary for us to say, or intimate how, or whether he would have been protected had he done more than talk to a lawyer. Certain it is he did not invoke the arm of the law, at the time it could have been of service to him, but, on the contrary, acquiesced in the defendant's taking possession, and using his property; encouraged it to prosecute its work by abstaining from every attempt to prevent it, and made no complaint in a court of law, of the injuries inflicted upon him, until the defendant had expended large sums of money in completing it. Having thus permitted the use and occupancy of his land, and the construction of

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a *quasi* public work thereon without resistance, or even complaint, he cannot afterwards require its demolition, nor prevent its use, nor treat the company erecting it as his tenant.

"He is not barred from an action for damages by reason of the taking of the land, and for its value; but having acquiesced in the entry, and encouraged, if he did not invite it, he cannot affect to treat it as tortious.

"Considerations of public policy, not less than the suggestions of natural justice, require that, in such case, the owner shall not be permitted to reclaim his property free from the servitude he has permitted to be imposed upon it, but shall be *restricted to compensation*."

The taking possession of plaintiff's land was not accomplished by a resort to violence, nor through the commission of a wrong, a tort, or other illegal act. The plaintiff not only did not make resistance to the entry of the defendant, but acquiesced in it, and encouraged it to construct its railway thereon.

He cannot now prevent the defendant's use of it, nor treat it as a trespasser in so doing.

In support of the views expressed by the court the opinion quoted the following very pertinent paragraph from *Pierce on Railroads*, viz :

"If the company had made an *unlawful* entry to construct its road, it would be liable in an *action of trespass* for the injury accruing therefrom, and the satisfaction of that judgment would not have the effect of making the appropriation legal, as would the payment of the award in proceedings for condemnation; but the company would remain liable to *successive actions of trespass for the continuing nuisance*, or to successive actions for the recovery of rent for the continuing use of the land." P. 169, 230.

Hence, the defendant is not liable in an action of *trespass* for the injury accruing for its use, but may be sued, only, for compensation.

The opinion also quotes with favor, *Mills on Eminent Domain*, who says :

"Slight acts of acquiescence on the part of the owner will estop him from interfering with the running of a railroad.

"He will not be deprived of his claim for damages, or his right to enforce it in all proper modes; but, if he has, in *any sense*, for the shortest period, clearly given the corporation, either by his express consent, or by his silence, to understand that he did not intend to object to their proceeding with the construction and operation, he cannot, on non-payment of compensation, maintain ejectment. If there was, in fact, a waiver, either express or implied, by acquiescing in the

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proceedings of the company, to the extent of not insisting upon prepayment as a condition precedent, but consenting to let the damages lie and remain a mere debt, with or without a lien upon the road-bed, *then it is impossible to regard the corporation, in any sense, in the light of a trespasser, or liable to ejectment.*" Sec. 140.

The converse of that proposition is clearly stated in Salt Lake City vs. Hollister, 118 U. S. 256, in which the Supreme Court held that a railroad company, authorized to acquire a right of way by the exercise of eminent domain, which *seizes* upon the land of a citizen, makes no compensation, and takes no steps for its expropriation, "is a *naked trespasser, and can be made responsible for a tort.*" The two are easily reconcilable, and are reconciled on the theory of our opinion.

In that case the plaintiff's demand for ejectment was refused because the entry of the defendant on the plaintiff's land was with his consent or acquiescence. The logical deduction from that decree is that plaintiff has no right of action for *trespass*, and had only reserved to him therein, an action for *compensatory* damages for the value of his land, and the injury he may have suffered by the taking of it. The plaintiff's suit should have been instituted at the defendant's domicile. The exception to the jurisdiction of the court should have been sustained, and the suit dismissed.

It is, therefore, ordered, adjudged and decreed, that the verdict of the jury be set aside, and the judgment appealed from annulled; and it is now ordered, adjudged and decreed that the defendant's exception to the jurisdiction of the court *a qua* be sustained, the suit dismissed, and that all costs be taxed against the plaintiff and appellee.

No. 10,035.

A. P. MOORE ET AL. VS. F. M. WARTELLE ET AL.

In the absence of proof that an act of sale, under private signature, attacked by forced heirs, as designed to serve as a disguised donation—was such in the intentment of the parties, the court will not pass upon the sufficiency of the act *sous seign privé*, as translatif of the property.

The sales of immovable property made by parents to their children may be attacked by the forced heirs as containing a donation in disguise, if the latter can prove that no price was paid, or that the price was below *one-fourth* of the real value of the immovable sold, at the time of sale. R. C. C. 2444.

The law does not favor actions by forced heirs to undo transactions of their ancestors as done in fraud of their rights. The burden is upon them, and, in the absence of convincing proof, and in the presence of evidence which merely cast a suspicion, the court will not take the property of one man to give it to another. (Act of 1884 not applicable here.) The law does not, in proper cases, leave the heirs without relief.

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48	518
39	1067
111	806
39	1067
119	789
39	1067
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If it be true that forced heirs can be likened to creditors, and may resort to the revocatory action, their right to sue would be barred by *one* year from the death of the parent.

A partition cannot be ordered of property which cannot be described, so as to give bidders an exact knowledge of what is to be offered for sale.

A PPEAL from the Thirteenth District Court, Parish of St. Landry.
Hudspeth, J.

Lewis & Bro., for Plaintiffs and Appellants.

Kenneth & Baillio and John N. Ogden, for Defendants and Appellees.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This suit has a double object: *First*, to *annul* a transfer of real estate made by plaintiffs' grandmother to the defendants, their uncles, on the ground of defect of form, of simulation or fraud; and *second*, to compel the latter to account for certain movable property of the deceased, which they unlawfully retain in their possession.

The nullity of the transfer is sought, *because* the transfer, in the form of a *sale*, was intended as a disguised donation, and was made under private signature; *because* the conveyance was made without any real or valid consideration, and *because* it was made with the fraudulent design of depriving the plaintiffs of their *legitime*, as forced heirs of their deceased grandmother.

The defense is substantially a denial of the charges propounded. It avers the validity of the transfer attacked and the fact that the deceased, Mrs. Wartelle, has died leaving no estate susceptible of any partition, save some gas stock.

The defendants, however, reconvened, claiming, in case of eviction, \$13,000, for money paid, improvements, etc.

They further plead that the action is barred by prescription.

The trial lasted three weeks, resulting in an accumulation of pleadings and evidence exemplified by a transcript of over eight hundred pages.

After a patient hearing, careful investigation and due consideration, the esteemed district judge, who has passed from among us, and whose character for integrity, industry, perspicacity, correctness and ability is indisputable, gave judgment for the defendants, resting his conclusions on elaborate reasons.

For an appreciation of the merits of the controversy, it is sufficient, nevertheless, to know that the plaintiffs complain that on the 20th of February, 1879, their grandmother, Mrs. Wartelle, made a title, which

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they claim is a *donation*, under the form of a sale, to their uncles, the defendants, to the only real estate she owned, for \$5400, part cash and part on time, and that neither the cash nor the portion on credit has been paid; or, if any compensation was received, it was below one-fourth of the value of the property at the date of the conveyance, and that the transaction was made for the purpose of giving the defendants an undue preference, and so defraud the plaintiffs of their *reserve*.

The first ground of attack is that the act by which it was donated is under private signature, and thus an absolute nullity, as the law emphatically provides that an act of donation shall, under pain of nullity, be executed before a notary and two witnesses.

The act in question does not purport, *on its face*, to be a donation. It is, on the contrary, in appearance, an act of sale, an onerous contract. The burden was upon the plaintiffs to show that it was disguised to be a disguised donation, and was not an onerous contract.

They could have had this court so to declare it only after the foundation had been laid; but as they have failed to do so, and the reverse is shown that the act was intended to operate as a sale, the solution of the question must be eliminated. 2 L. 215.

The second ground relied upon for the nullity is, that the conveyance was made without any real and valid consideration, and with the fraudulent design of depriving the forced heirs of their *legitime*, by a disguised donation encroaching on the same.

The plaintiffs would probably have no standing to ask the nullity, for the law declares that: any disposal of property, whether *inter vivos* or *mortis causa* exceeding the *quantum* of which a person may dispose to the prejudice of the forced heirs, is *not* null, but only reducible to that *quantum*. R. C. C. 1502. But as the defendants do not appear to have made the objection, or if they have, seem to have waived it, by going into the trial on the merits, we must consider the plaintiffs, as in court.

On this subject the law is likewise clear. Art. 2444 R. C. C., emphatically declares, that the sales of immovable property made by parents to their children, may be attacked by the forced heirs as containing a donation in disguise, if the latter can *prove* that no price has been paid, or that the price was below *one-fourth* of the value of the immovable at the time of sale.

It was incumbent on the plaintiffs to have *proved*, either that no price had been paid, or that the price paid, or consideration received, was insufficient, being *less* than one-fourth of the value.

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The act of sale is perfect on its face. It is just and translativè. It can convey property.

It describes the real estate, specifies the price in cash and on time, acknowledges payment and settlement.

It must stand for what it purports to be until it is set aside. The burden was upon those who attack to "*prove*" that it was made without consideration, or for an insufficient one.

The burden was not, as is contended, on the defendants, to uphold the act assailed. The letter, spirit and construction of the law are in that sense. *Laycock vs. Thomson*, 13 Ann. 173.

We find, as the district judge did, that there was a consideration, and that the property was not only not worth more than four times the price agreed to and settled, but also that the price stipulated was the actual value of the real estate at the date of sale, viz, \$5400, whereof \$1400 appears to have been paid, or settled for at the time of sale, and \$2000 some short time before the maturity of the notes, while the remaining \$2000 were considered to be satisfied by the obligation assumed by the purchasers to provide for their mother's necessities during her life.

There is no reason to doubt that the payments and settlements acknowledged by the deceased to have been made to her, have indeed taken place; but if there was, this would be no reason to set the conveyance aside, for it must stand until the plaintiffs show that no price was paid, or that the price paid was less than *one-fourth* of the actual value.

This court has no concern with what Mrs. Wartelle may have done with any money paid her, for she was the owner of it, and could have disposed of it as she might have thought proper, and there is nothing here to show that she has unduly done so.

The controversy is not on a question of *lesion beyond moiety*. The considerations which Mrs. Wartelle admits to have received and the obligation assumed by the defendants to provide for the wants of their mother during her life, surely constitute more than one-fourth of the value of the property at the date of sale.

The law does not favor actions of this character. It imposes on the complainants the burden of adducing convincing, if not irresistible, proof, to undo the act of their deceased parent; but it may not leave them without some remedy in proper cases, of undue advantage. 13 Ann. 173, 207; 15 Ann. 641; 21 Ann. 367; R. C. C. 1324, 1326.

The law of 1884 (No. 5); to which the plaintiffs refer, was passed

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since the occurrence of the facts involved in this controversy, and has, therefore, no bearing on them.

In the case of *Carter vs. McManus*, 15 Ann. 641, which was an analogous suit, although the evidence adduced created strong suspicion, the court deeming it slight, said, *Land, J.*:

"Such evidence is too uncertain to justify the courts in taking an estate from one man and declaring it to be the property of another."

The plaintiffs further insist that, as forced heirs, they are assimilated to creditors and entitled to ask a revocation of the sale which they allege was made for the fraudulent purpose of depriving them of their just rights to the *legitime*, in the succession of their grandmother.

If this were true, the pleaded prescription of one year would bar the claim, not because that time had elapsed between the date of the sale, (February 20, 1879), and that of Mrs. Wartelle's death, (June 14, 1883), but because that delay expired between the death and the bringing of the suit, (July 14, 1884), the time of death being fixed by law as the initial point for the computation of prescription. R. C. C. 1504, 1994, 3527.

There can be no doubt, and there is no dispute on the subject, that the shares or gas stock remains the joint property of the heirs, plaintiff and defendants, and can be sold to effect a partition among them, if they cannot be divided in kind.

It is impossible, under the averments and the proof, to say, so as to be able to describe them as might be necessary for a judicial advertisement, what other effects remain likewise to be divided. The district judge properly reserved the right of any heir to have the stock and the other movable property, whatever it be, sold for division among them.

We find no error either in the reasons, or in the judgment complained of.

Judgment affirmed.

Rehearing refused.

No. 9934.

MRS. WALTER REGAN VS. W. W. WASHBURN.

All final judgments rendered by the Supreme Court are liable to be revised on application for a rehearing, made within the delay prescribed by law.

The rule applies to judgments making a final disposition of applications for mandamus, certiorari and other remedial writs. *State ex rel. Gerson vs. Judge*, 37 Ann. 261, affirmed. Hence, a final judgment disposing of an application for a *certiorari* is not executory before the expiration of six judicial days, or before a final disposition of an application for a rehearing in the case.

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122	91

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But this rule cannot be construed as an absolute prohibition on the party in whose favor the judgment has been rendered in the Supreme Court from proceeding to an execution thereof before the expiration of legal delay.

A premature execution of such a judgment is a mere irregularity which may be corrected by an application for rehearing timely made, and which becomes valid after the expiration of the delay. And for having recourse to such an execution the party cannot be held responsible in damages.

A PPEAL from the Civil District Court, for the Parish Orleans.
Rightor, J.

Frank Michinard & Horace L. Dufour, for Plaintiff and Appellant.

Horace E. Upton, for Defendant and Appellee :

1. This court will not issue the writs of prohibition and *certiorari* to inferior judges in cases in which they have exercised their legal authority and discretion. Previous decisions affirmed. 33 Ann. 378, 794, 1284, 1356. Writ of *certiorari* refused by this court on the ground that, under the supervisory power granted by article 90 of the Constitution, it cannot pass upon the correctness of the judgment of an inferior court, in an unappealable case, when said judgment appears to have been legally rendered. 33 Ann. 378.
2. Art. 911 C. P. having reference to applications for a rehearing, has been construed as not applying to the writ of *certiorari* issued from this court, under Art. 90 of the Constitution, to revise the proceedings of inferior courts in cases where no appeal lies. That article of the Code of Practice could not embrace such cases, for they were not in existence at the adoption of that Code. The effect of the remedy granted in *certiorari* cases is the same as in *habeas corpus* cases. The judgment on its rendition becomes immediately executory in such cases. State ex rel. DeBuys vs. Judges Civil District Court, 32 Ann. 1263 and 1264.
3. In an application for a writ of *certiorari*, the record of the proceedings below makes full proof of itself, and is conclusive if not assailed and proven to be incorrect and untrue. The unsupported affidavit of the relator, of facts and proceedings, when contradicted by counter affidavits, and negatived by the record, cannot avail the applicant. State of Louisiana ex rel. Mr. and Mrs. Walter Regan vs. Judge of the First City Court of New Orleans, 36 Ann. 977. In 18 Ann. 113, a mandamus case, the court refused to entertain an application for a rehearing, and in 21 Ann. 50, in a proceeding for a prohibition, also refused to entertain an application for a rehearing. Such was the law at the date the writ of *certiorari* was denied by this court in case just cited. State ex rel. Regan vs. Judge First City Court, 36 Ann. 977.
4. The judgment of a justice's court ejecting the occupant of a house under the laws of landlord and tenant, charged to be null and void in an action of damages for wrongful ejectment, cannot be inquired into collaterally, if regular in form and valid on its face. Huyghe vs. Brinkman, 34 Ann. 831. Same authority, p. 533, the court adds: "As the judgment under which plaintiff was expelled is final and valid on its face, and as she does not claim title or ownership to the property from which she was ejected, we are at a loss to conceive upon what grounds she can recover damages in this suit."
5. The premature issuing of execution is a mere irregularity, which the defendant may have corrected within the delay for, or after he has taken his suspensive appeal; but if he suffer the delay to expire, it does not then even give him the right to an injunction. Dayton vs. Commercial Bank of Natchez, 6 Rob. 20; Morgan vs. Whiteside, curator, 14 L. R. 280. See, also, 1 Rob. 497; Leggett vs. Potter, 9 Ann. 309; Hatch vs. English, 12 Rob. 136. The execution of a judgment is not void because issued before the delay had expired, but becomes valid by the expiration of the delay, there being no attempt on

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the part of the defendant to correct the irregularity. *Sowle vs. Pollard*, 14 Ann. 287, and authorities cited.

6. A rehearing can be asked and allowed only where the court has erred. *Bacas vs. Smith*, 33 Ann. 141. Where there is no such error, the rehearing must be refused. 33 Ann. 588.

The opinion of the Court was delivered by

POCŒ, J. This is a suit for damages for an alleged wrongful ejectment of a tenant by the owner of the premises.

It is brought by plaintiff in her own right and in behalf of her minor children, and it is based on the following facts and incidents:

Previous to his death, Walter Regan and his family occupied certain premises in this city, owned by the defendant Washburn; and in November, 1884, he was made a defendant in ejectment proceedings, instituted by Washburn in one of the city courts, in which judgment was rendered in favor of Washburn, ordering the ejectment of Regan from the premises.

Complaint was then made in an application for a writ of *certiorari* in this court, by Regan and his wife, of the irregularity and illegality of the judgment rendered against them, on the ground that the trial had taken place in their absence, and without legal notice of such trial on them.

The proceedings thus assailed were sustained by the judgment of this court, which was rendered on the 15th of December, 1884.

Now, it appears, that on the next day, Washburn proceeded to execute the judgment rendered in his favor by the city court, by ejecting Regan and his family from his premises.

This act, perpetrated before the expiration of the six judicial days allowed by law for an application for rehearing of final judgments rendered by this court, is made the basis of the damages claimed against the defendant Washburn, in the sum of \$2450.

Among other defenses, Washburn interposed an exception of no cause of action and of *res adjudicata*, and the present appeal is taken from a judgment sustaining that exception and dismissing plaintiff's action.

The issue presented to us for review involves two questions of law:

1st. Was the judgment rendered by this court in the *certiorari* proceedings executory before the expiration of six judicial days?

2d. Can a party be held responsible in damages for a premature execution of a judgment rendered in his favor?

1. Defendant's proposition that a judgment of this court on an application for a writ of *certiorari* is executory on its rendition, and before the expiration of the delay within which a rehearing may be ap-

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plied for in other cases, is not sustained by our jurisprudence as at present established.

Two decisions of this court which tended to favor the rule that judgments of this tribunal rendered on applications for mandamus, prohibition and other remedial writs, were not open to farther discussion by applications for rehearing have been formally overruled, as sanctioned by no law. *The State vs. Judge*, 18 Ann. 113; *The State ex rel. Gausson vs. Judge*, 21 Ann. 50.

The question came up before our immediate predecessors in the case of *The State ex rel. Newman vs. Judge*, 32 Ann. 210, in which it was disposed of in the following language: "But we do not concede that a judgment on a mandamus is such a decree as to become final on its rendition. That it is a final judgment has been determined. The mere fact that the proceeding is summary does not make the judgment in which the proceedings culminated a summary docket.

In the absence of positive provision of law we would be without authority for treating a final judgment rendered in a mandamus proceeding differently from other final judgments."

The same rules were entertained and enforced by the present bench in the case of *The State ex rel. Gerson vs. Judge*, 37 Ann. 261. In that case the previous adjudications, now invoked by defendant, were reviewed, and were in terms and in fact recalled and obliterated. We therein formulated the rule as follows:

"Judgments rendered by this court on the merits of petitions for writs of *mandamus*, *prohibition* and the like are as much *final judgments* as any which it can render, and are therefore *revisable* on applications for a rehearing, seasonably and properly made."

Adhering to that rule, which flows from the text of the law itself (C. P., Art. 911), we hold that the judgment rendered by this court on December 15, 1884, in the matter entitled "*The State ex rel. Regan vs. Judge of the First City Court of New Orleans*, was not executory on its rendition, and before the expiration of six judicial days.

2. But conceding, as the record shows, that the ejectment of Regan and family on the 16th of December, 1884, was a premature and irregular proceeding, is Washburn legally responsible in damages therefor?

To all practical intents and purposes the proposition of law involved in that question is precisely similar to the discussion of the legal consequences of the premature execution of a judgment rendered by a district court.

The only impediment to the execution of the judgment rendered by the city court in favor of Washburn, and authorizing the ejectment of

Regan and his wife from the former's premises, was the preliminary writ of *certiorari* emanating from this court. That impediment was removed by our final judgment, which did away with the effect of the writ. Hence, the judgment complained of revived in all its legal bearings and effects, except in so far as its executory condition depended upon the delay within which our own judgment could have been revised on an application for rehearing.

This is exactly the condition with all appealable judgments rendered by district courts, under the provisions of article 624 of the Code of Practice, which in terms, restricts the right of execution of such judgments within a delay of ten days from the rendition of the judgment or from notification thereof on the party cast.

In the latter case, by an appeal taken within the prescribed delay by the party cast, the execution of the judgment is suspended until the final determination of the cause.

In the case of a final judgment rendered by this court, the party cast may suspend or retard the effect of our decree by an application for a rehearing seasonably made, until the final disposition of his application.

But in both cases the evident object of the law is the same; it is to secure to the party cast a delay within which he may call for a review or a revisal of the judgment or of the decree rendered against him.

But nothing in either provision of the law can be construed as an absolute prohibition against the right of the party, in whose favor the judgment in either case has been rendered, to take the risk of a premature execution of his judgment.

In reference to judgments rendered by district courts our jurisprudence has settled the rule adversely to such a prohibition, and legal effect has uniformly been given to the execution of judgments pending the delays within which a suspensive appeal could have been taken therefrom, and when no such appeal had been taken.

From numerous adjudications on this subject we cull the following rule:

"The object of article 624 C. P. * * is to protect defendant's right to a suspensive appeal by granting him a certain delay, the right to which being in his interest, and not affecting public order, he may waive. C. P. 567.

"If execution issue prematurely, it is a mere irregularity to be corrected within the delay for a suspensive appeal or after it is taken, but insufficient, if not so corrected, to authorize an injunction, or impair the execution which becomes valid after the expiration of the de-

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lay." LeBarre vs. Dunbar, 10 Martin 182; Morgan vs. Whiteside's curator, 14 La. R. 280; Hatch vs. City Bank, 1 Rob. 497; Hatch et al. vs. English, et al., 12 Rob. 136; Leggett vs. Potter, 9 Ann. 309; Sowle vs. Powell, 14 Ann. 287.

Applying the rule to the case in hand, we find from the record, that no attempt or effort was made by Regan and wife to obtain a reversal of our decree which set the judgment of the city court in motion, and hence the conclusion is not only warranted, but it is inevitable that the execution of the judgment by Washburn, although premature and irregular, became valid after the expiration of the delay within which our judgment could have been revised on an application for rehearing seasonably made. It thus follows that the irregularity of the execution of the judgment was cured by the silence and want of action of the parties cast therein, and no damages can flow from a valid execution of a final judgment.

It is true that the reported cases in which the rule has been uniformly enforced presented moneyed judgments, but surely, the right of the owner of an immovable to recover possession of premises illegally occupied by a recalcitrant tenant is not less entitled to the protection of the law than the right of a creditor to judicially recover money which is due to him.

These considerations lead to the conclusion that the district judge committed no error in sustaining the exception of no cause of action.

Judgment affirmed.

 No. 10,009.

SIGFRIED GRUNER & Co. vs. AUG. STUCKEN.

Plaintiffs, as agents of defendants, entered into certain contracts of sale of cotton for future delivery with third persons. Held: That the legality of said contracts depends on the dealings between the parties thereto; and cannot be affected by the fact that in various previous transactions which plaintiffs, as agents, had made with other third parties, settlements had been made by adjustment of differences.

This raises no presumption that the parties to these contracts intended and impliedly consented to such mode of settlement.

Plaintiffs having been invested by defendant's firm with express discretionary power to manage and settle the contracts "as if they were their own," defendant is bound by the mode of settlement adopted in absence of proof of fraud or injury.

The liability of one partner for the contracts made by his copartner, without his knowledge or assent, is a question of agency. Third persons are not bound by special limitations in the articles of partnership of which they have no notice, but may assume that the partners have the power ordinarily incident to the business pursued by the firm.

Dealing in futures is not, as a matter of law, and in absence of evidence, presumed to be an incident of the business of cotton buyers and commission merchants.

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But where defendant's firm had two places of business—one in New Orleans, directed by him, and the other in Savannah, conducted by his copartner, and where both branches had repeatedly employed plaintiffs in dealings in futures, and had received and settled the accounts. Held: that plaintiffs had the right to assume that such dealings were within the scope of the business, and within the presumed knowledge of all the parties.

In this case plaintiffs received from the Savannah partner two orders for purchase of futures, one for account of the firm, the other for his individual account. Held: that, without the clearest proof that the latter was for the firm, in such manner as to make it certain that, if profit had resulted, the firm would have received it, the latter cannot be held for the loss.

A PPEAL from the Civil District Court for the Parish of Orleans. *Houston, J.*

E. W. Huntington & Horace L. Dufour, for Plaintiff and Appellant:

1. A contract of sale of property for future delivery is not an illegal as being of a gambling or wagering nature, unless there was a mutual intention not to receive or deliver the goods, mutually known to the contracting parties, and existing at the time of the contract was entered into. 37 Ann. 814; Art. 2983 C. C.
2. A partner is the agent of his copartners, and has the authority and power to bind them by acts done within the usual scope of their business.
3. The correctness of the claim in suit is established by the evidence.

Farrar & Kruttschnitt for Defendant and Appellee:

1. The facts show that the transactions sued on were individual speculations of defendant's former partner.
2. This is undoubtedly the case as to three hundred bales bought and sold in the name of Carl.
3. This last transaction sued on is characterized by the fifteen other transactions had between plaintiffs and Stucken & Co. From the fact that they were all settled by differences, the presumption is irresistible that it was the mutual intention of the parties to settle the last by differences.
4. This conclusion is emphasized by the fact that plaintiffs used these contracts on the floor of the Exchange in settlement with their fellow-brokers—in other words, ringed them out—and paid no money in settlement thereof. That is why the loss occurred to them.
5. After this use of the contracts on the floor of the Exchange, there was no contract left which Stucken & Co. could enforce. *Irwin vs. Willar*, 110 U. S. 499.
6. Under the facts, plaintiffs are not in the position of an innocent non-participating broker, seeking to recover disbursements made on account of his principal.

The opinion of the Court was delivered by

FENNER, J. The defendant was a member of the firm of August Stucken & Co., composed of himself and Carl Eglinger, and engaged in the business of buying cotton on commission. The business was conducted in New Orleans, under the control of Stucken, and in Savannah, under the control of Eglinger.

The firm was dissolved in April, 1885, and the present action is brought against Stucken as an individual member, on an account for

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losses on certain contracts for future delivery of cotton entered into by plaintiffs, who are cotton brokers in New York, as agents and by orders of Stucken & Co.

Defendant sets up two defenses:

1st. He denies that plaintiffs, in said dealings, were employed or acted as agents of his firm, but alleges that their employment was by Carl Eglinger individually.

2d. He alleges that the dealings were gambling transactions, for losses on which no recovery can be had.

So far as the latter defense is concerned, we discover nothing in the case to difference it from that of *Conner & Hare vs. Robertson*, 37 Ann. 814, where we very carefully and fully defined the principles applicable to such dealings.

The evidence clearly shows that contracts (made under the rules of the New York Cotton Exchange), contemplated and required the actual delivery of the cotton, and created, as between the parties, absolute rights and obligations to demand and to make such delivery.

Although plaintiffs were guarantors of the contracts, yet, in making them, they acted as agents of their principal, and they dealt for him with other third persons. There is not a tittle of evidence of any agreement or mutual intent as between the parties to these contracts at the time of their execution, that they should be settled otherwise than according to their terms. The fact that in various previous transactions which plaintiffs had made for Stucken & Co., settlements had been made without actual delivery, cannot infect those contracts with any such presumed intention, because it does not appear that the third parties to the present contracts were the same as those dealt with in the former cases, and who consented to such settlements.

Neither can defendant complain of the method of settlement adopted by plaintiffs. After the contracts had been made, and on the eve of Eglinger's departure for Europe, he conferred upon plaintiffs the fullest possible discretionary power to manage and settle these contracts "as if they were their own." There can arise no question, therefore, as to their authority to settle in the way adopted, just as Eglinger himself might have done. There is no aspersion of their good faith or proof of any injury to defendants by their action. The case of *Irwin vs. Williar*, 110 U. S. 499, has no application, the brokers there having acted without authority.

We will next consider the authority of Eglinger to bind his copartner by dealing in cotton for future delivery, without the latter's actual

knowledge or consent. In the case just cited the Supreme Court of the United States said :

"The liability of one partner, for acts and contracts done and made by his copartner, without his actual knowledge or assent, is a question of agency. If the authority is denied by the actual agreement between the parties, with notice to the party who claims under it, there is no partnership obligation."

Here, there is no pretense of any notice to plaintiffs of any special limitations on the authority of the partners. But the court proceeds:

"If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business, according to the usual and ordinary course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution."

Here we have no evidence as to whether dealings in futures are in the usual and ordinary course of business of persons engaged in the business of cotton-buyers and commission merchants pursued by Stucken & Co., and we should hold, on the principle adopted in *Irwin vs. Williar*, that without evidence, as a matter of law, such dealings are not necessarily implied as essential parts of such a business.

Finally, the United States Supreme Court said :

"If it cannot be found in that, it may still be inferred from the actual, though exceptional, course and conduct of the business of the partnership itself as personally carried on, with the knowledge, actual or presumed, of the partner sought to be charged." *Irwin vs. Williar*, 110 U. S. 490.

Now, in the instant case, it is proved that from 1881 plaintiffs have been frequently employed in future transactions by the firm of Aug. Stucken & Co., on orders, some of which came directly from the New Orleans house, controlled by defendant himself; that accounts of these transactions have been rendered to, and settled by, the firm, both at New Orleans and at Savannah, and that no question of authority had ever been raised.

We consider that, under this course of dealing, plaintiffs had the right to assume that such transactions were within the scope of the partnership business, and within the presumed knowledge of all the copartners.

But, admitting Carl Eglinger's authority to bind his firm by dealing in futures in the name of and for account of his firm, the question

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remains whether these particular transactions were for account of the firm.

The evidence shows that Eglinger sometimes dealt in futures on his own as well as on the firm's account, and that in the same month with these transactions he had so dealt through plaintiffs.

The orders concerned in this case were received and transmitted by Haynes & Schley, agents of plaintiffs in Savannah.

They are telegraphic, and the first, dated April 14, 1884, reads : "Buy two July Stucken." The other, dated April 15, 1884, reads : "Buy three July Carl," both signed Haynes & Schley.

The return telegrams of plaintiffs are, to the first : "Bought 200 bales July delivery 12.17 Stucken;" to the second, "Bought 300 July 12.01 Carl order 15th."

When these contracts were closed out plaintiffs' telegram, announcing it, read : "Sold 200 bales July delivery Stucken, and sold 300 bales July delivery Carl."

This correspondence clearly and unequivocally impresses upon these dealings the character of transactions for separate and distinct accounts; and while we may fairly infer that the word "Stucken" in the first order, was a telegraphic abbreviation of August Stucken & Co., the inference is irresistible that the word "Carl" in the second order, meant Carl Eglinger.

Had the transactions resulted in a profit, it is plain that Eglinger could have claimed the profit on the last order as his own, and that plaintiffs would have been bound to account to him alone. Nothing but the clearest explanation of the difference in the orders and distinct proof of a contemporaneous understanding between all parties could justify the shifting of the loss upon the firm. No such explanation or proof is found in the record. Eglinger merely says : "I gave the order for 500 bales in the name of August Stucken & Co.," which is obviously contradicted by the dispatch.

Gruner glibly says : "Carl, referred to in telegram of April 15, we understood to mean August Stucken & Co.; it had been so used on previous occasions." The correspondence contradicts such understanding, and is unexplained. Otto Arens, the other member of plaintiffs' firm, who testified, does not refer to the matter at all.

The testimony of Haynes & Schley is not taken.

The only payment on account of the loss was one of \$500, made by Eglinger for Stucken & Co., in October, 1884. The heavy balance now claimed was suffered to remain uncollected without demand on plaintiffs until long after the dissolution of the firm of Stucken & Co.

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Although Gruner met Stucken in Europe after the loss, he did not mention the matter to him.

We are bound to treat the order for account of Carl, as it appears on the face of the correspondence, as an individual transaction of Eglinger, for which defendant cannot be held responsible.

This leaves defendant liable only for the loss on the 200 bales, subject to the credit of \$500, which having been paid by Stucken & Co., must be imputed entirely to their account.

That loss is the difference between 12-17, at which the cotton was bought and 11-01 at which it was sold.....\$1024 00
Add 3-5 of commissions and charges..... 51 00

Total due and bearing 6 per cent. from June 24, 1884.....\$1075 00
subject to credit of \$500, with like interest, from October 17, 1884.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed; and it is now adjudged and decreed, that there be judgment in favor of plaintiffs and against the defendant, August Stucken, for one thousand and seventy-five dollars (\$1075), with interest at 6 per cent. per annum from June 24, 1884, subject to a credit of five hundred dollars, with like interest, from October 17, 1884, defendant to pay costs of the lower and of this appeal.

No. 10,047.

THE STATE OF LOUISIANA VS. WILL. A. STRONG.

An indictment, or information, which contains an averment negativing prescription, presents a material issue of facts, which a jury can alone decide.

It is the duty of the Auditor of Public Accounts to direct *prosecutions* in the name of the State, against officers or individuals who, by any means, become possessed of public money and fail to pay the same upon due and proper demand therefor.

On the trial of such offenders as may be charged with having possessed themselves of a portion of the public money, by means of Auditor's warrants drawn upon the State Treasury, a transcript from his books is competent evidence

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

M. J. Cunningham, Attorney General, and *L. D. Beale*, District Attorney, for the State, Appellee:

When the trial judge refuses a continuance for want of due diligence in procuring the attendance of absent witnesses, his ruling will not be disturbed, unless it clearly appear that his discretion has been abused. 37 Ann. 128, 774, 786; 31 Ann. 179, 408; 34 Ann. 381; 34 Ann. 679; 36 Ann. 151, 852, 872.

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As non-resident witnesses can be summoned or attached in vacation (R. S. 1026), it is not due diligence for defendant to wait till court meets and his case is fixed for trial to make the necessary affidavit to procure subpoenas for witnesses residing in distant parishes.

A defendant failing to give the city address of a witness residing in New Orleans, does not use due diligence to procure his attendance.

Defendant is not entitled to a continuance on account of the absence of witness whose evidence is material, and its materiality must appear from the affidavits for continuance and attachments.

When defendant is prosecuted for the embezzlement of money actually received, evidence as to amounts due him and never paid him is not material or relevant.

Defendant is not entitled to a continuance when the facts claimed to be provable by the absent witnesses could be established by other evidence.

The Attorney General engaged in the prosecution cannot be excluded from the court-room on the ground that he is a witness in the case. In any case the power to exclude witnesses is discretionary. Wharton's Pl. and Pr., § 569; Bishop's Cr. Pro. §§ 1086, 1087.

A Secretary of State receiving the proceeds of election tickets, paid for by State, and by him sold under the provisions of Act 101 of 1882, is indictable for its embezzlement under R. S. 903.

A person embezzling money by virtue and under color of his office or employment cannot be heard to question the right of his principal, or the legality of his own act in receiving it. Wharton's Cr. L. (8th ed.), §§ 1024, 1025, 1038.

R. R. 176, 17th paragraph, empowers the Auditor to direct prosecutions, by civil action, for debts due the State, and has no reference to prosecutions for crime.

Prescription begins to run in favor of an offender only from the time his offense is made known to a public officer having the power to put the machinery of the courts in motion for its punishment, and this includes only the Attorney General, the District Attorney, the grand jury and a magistrate, perhaps, if an affidavit is made before him. R. S. 988. And facts must be made known to the officer which constitute an offense.

The question as to whether a verdict is contrary to the law and evidence, and the question as to the amount embezzled, in prosecutions for embezzlement, are questions of facts, not subject to review on appeal.

When the information charges the embezzlement of a specific amount, and the jury finds the accused "guilty as charged," the verdict is for the amount charged in the bill.

When the information charges the embezzlement, on the day the officer's term expired, of money received by him at different dates, the date of the embezzlement is specifically charged. But even if the bill is defective in this particular, defendant's remedy was to demand a bill of particulars before the trial, and such defect cannot be taken advantage of by motion in arrest. Wharton's Cr. L. (8th ed.), § 1048, and authorities cited; Wh. Pl. and Pr., §§ 157, 702, 703, 407 b; Bishop's Cr. Pro., §§ 643 to 646.

It is unnecessary to allege the particular manner in which the embezzlement was committed. Various amounts may have been embezzled in different ways, but failure to pay demand is sufficient *prima facie* proof of embezzlement of the whole. R. S. 903.

It is unnecessary to allege by whom the demand was made; but any defect in the proof as to the authority of the officer making the demand would have to be taken advantage of by objection to evidence, or by charge requested, and cannot be reached by motion in arrest.

An information charging the embezzlement of the proceeds of election tickets sold by defendant, is not open to the charge of duplicity, because it explains that said election tickets had been paid for with money drawn from the Treasury—which explanation was necessary to show the State's right to the proceeds.

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The prescription of six months against prosecutions for fines or forfeitures under R. S. 986, does not apply to crimes and offenses merely because the penalty therefor, or part thereof, may be a fine.

Under that section only the prescription of twelve months bars prosecution for crimes and offenses, whatever be the character of the penalty.

The object of a prosecution for embezzlement is to punish the crime, and not to recover the fine, although it is a necessary part of the penalty. 13 Ann. 369; 15 Ann. 499.

Sections 903 and 904 of the Revised Statutes are not repealed by Sec. 88 of Act No. 68 of 1870, or by Sec. 90 of Act 42 of 1871.

G. W. Duckner, K. A. Cross, E. W. Sutherlin, and Young & Thatcher,
for Defendant and Appellant :

The offense charged was made known to the Auditor more than twelve months next preceding the filing the information, and is therefore prescribed. Section 176, paragraph 7, R. S.; Act 42 of 1871, section 92. Case of State vs. H. C. Dibble, No. 1847, Sup. Criminal Court of Parish of Orleans.

The judgment should be arrested, because sections 903, 904 R. S., are repealed by section 88, Act 68 of 1870, and section 92 of Act 42 of 1871, which provide that the prosecution shall be by indictment, and therefore indictment is the only method allowed. *Hawkins' Pleas of the Crown*, vol. 2, pp. 301, 302; 1 *Burrows*, pp. 544, 545; 2 *Burrows*, p. 803; 1 *Crauch* 252; *Woods' U. S. Circuit Reports*, vol. 1, p. 227; *Woodbury & Minot's Mass. Reports*, vol. 3, p. 345; 7 *Robinson* 173; *State vs. H. C. Dibble*, Sup. Court, parish of Orleans, No. 1443.

The charge of the trial judge, that no one but the Attorney General, District Attorney or magistrate with criminal jurisdiction, is authorized to direct a criminal prosecution, is wrong, and misled the jury. R. S., Secs. 904, 176; Act 42 of 1871, Sec. 92.

The verdict is nugatory, because a special verdict was necessary where the punishment, is imprisonment, fine and restoration. 5 Ann. 329; 2 *Eastman's Pleas of the Crown*, 708, 784; 5 *Burrows* 2062.

The opinion of the Court was delivered by

WATKINS, J. The defendant is proceeded against by information, under Sec. 903 of the Revised Statutes, on the charge of embezzlement of public money, property of the State, while he was Secretary of State; and from a verdict of guilty and sentence by the court to fine and imprisonment at hard labor, he has appealed, and rests his claim to relief upon several bills of exception taken to the rulings of the trial judge, refusing to grant a continuance to obtain the attendance of absent witnesses; declining to give him a new trial; refusing to give to the jury certain special charges, and refusing to arrest the judgment.

I.

Counsel for the accused sought to arrest the judgment and sentence of the court on the ground that Sec. 903 *et sequentes* of the Revised Statutes, under which this information was found, had been repealed by Sec. 88 of Act 68 of 1870, and Sec. 90 of Act 42 of 1871, both of which provide for the prosecution of such cases by indictment only,

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and that he cannot be legally punished under verdict and sentence on information, as demanded.

We are fully satisfied, from a careful examination of those acts, and comparisons made with the provisions of the sections of the Revised Statutes referred to, that there is no inconsistency between them, and that the latter is not repealed. As this prosecution was instituted under those sections, the provisions of those acts are not necessarily involved. The Constitution declares that prosecutions may be by indictment or information. Art. 5.

II.

The defendant tendered a plea of prescription of one year, and demanded his discharge from prosecution on that ground, without avail, and renews that resistance here.

The information charges that the defendant did, on the 22d of May, 1884, then and there being Secretary of State, embezzle the sum of \$4251 85, money belonging to the State, "which money he, the said Will. A. Strong, had theretofore, to-wit: From the 15th day of August, 1882, to the 5th day of May, 1884, both inclusive, received, and been entrusted with in his said official capacity, and under color and by virtue of his said office of Secretary of State, as the proceeds of election tickets sold by him, and for his account, under the provisions of Act 101 of 1882, which election tickets had been paid for with the money of the State, drawn from the State Treasury, out of the appropriation made for election purposes, under the appropriation bill of 1882, Act 63 of said year, on Auditor's warrants, issued on the orders and vouchers of said Strong, from the 6th day of September, 1882, to the 28th of April, 1884, both inclusive; which money, to-wit, the sum of \$4251 85, the property of the State of Louisiana, as aforesaid, he, the said Will. A. Strong, has failed to pay, or account for to the State, notwithstanding due and legal demand made upon him therefor; and which money the said Strong did then and there, to-wit, the 22d day of May, 1884, feloniously, wrongfully, fraudulently and corruptly use, dispose of, conceal, convert to his own use, and embezzle."

The information contains an averment to the effect that it was presented and filed within one year next after the offense had been made known to a public officer having power to direct a prosecution.

As thus presented, the evidence of prescription *vel non* was properly submitted to the jury.

It was a proper issue for them to try. It was a question of fact appertaining to the *merits* of the controversy, which could be passed upon

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by the jury *alone*. 36 Ann. 975, State vs. Victor; 7 Ann. 255, State vs. Foster.

During the progress of the trial it became an important question in the case whether the Auditor of Public Accounts was authorized to direct prosecutions in the name of the State, and the defendant's counsel requested of the trial judge the following special charge to the jury, viz:

"That the Auditor of Public Accounts of the State of Louisiana was, as public officer, authorized by law to direct prosecutions in the name of the State of Louisiana, for all official delinquencies against all the debtors of the State, in cases such as the one on trial; therefore, if you find from the evidence that the defendant did embezzle the public moneys of the State of Louisiana, as is alleged in the bill of information, then, and in that event, if you find from the evidence that such official delinquency was made known to the Auditor of Public Accounts for more than twelve months after the expiration of defendant's term of office as Secretary of State, and for more than twelve months before the information was presented and filed in this case, the defendant cannot be punished therefor, and it is your duty to acquit him."

The trial judge declined to give this in his charge to the jury on the ground that the "Auditor is authorized to direct prosecutions by *civil* action alone; and that no one but the Attorney General, District Attorney, or magistrate, with criminal jurisdiction, is authorized to direct *criminal* prosecutions, like the one at bar."

This ruling was manifestly erroneous.

The duties of the Auditor of Public Accounts are specifically enumerated in sections of the Revised Statutes, 172 *et sequentes*; and 176 declares, in express terms, that "it shall be his duty . . . to *direct prosecutions* in the name of the State for all official delinquencies in relation to the assessment, collection and payment of the revenue; against all persons who, by any means, become *possessed* of public money or property, and *fail* to pay, or deliver the same; and against all debtors of the State."

The language herein employed is quite similar to that of the Statute in reference to the prescription of offenses. It declares that "no person shall be prosecuted, tried or punished for any offense, wilful murder, etc., excepted, unless the indictment or presentment for the same be found or exhibited within one year next after the offense shall have been made known to a public officer having the *power to direct the investigation* or prosecution." R. S., Sec. 986.

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Not only does the statute quoted confer the *power* on the Auditor, but it makes it, unmistakably, his "duty" to "direct prosecutions in the name of the State," in each of the three following cases, viz:

1. "For all official delinquencies in relation to the assessment, collection and payment of the *revenue*."
2. "Against all persons who, by any means, become possessed of *public money* or property, and *fail to pay* or deliver the same."
3. "Against all ~~debtors~~ *of the State*."

The charge against the defendant comes within the terms of paragraph second, as he is alleged to have embezzled public money, property of the State, which he had received and been entrusted with, as Secretary of State—same being the proceeds of the sale of election tickets, which had been paid for with the money of the State, drawn from the State Treasury, on warrant issued by the Auditor, and against an appropriation made by the Legislature for that purpose.

Indeed, upon the trial of persons thus charged, the books of the Auditor are not only *competent* evidence, but the statute of 1871 declares that "upon the trial of any such officer for embezzling public money, under the provisions of this act, it shall be *sufficient* evidence for the purpose of showing a balance against such officer or person, to produce a *transcript from the books of the Auditor of Public Accounts*, and proof of the refusal of any such officer, or person, whether in or out of office, to pay," etc. Sec. 90 Act 42 of 1871.

By the terms of Sec. 91 of Act 68 of 1870 it is made the duty of the Auditor to cause a thorough examination to be made as often as once in every six months, "of all the receipts and business, books and vouchers of each collector and each receiver * * and every other State officer, or agent, having an office in which business of the State is attended to, done or performed," etc.

By the terms of Sec. 92 of Act 42 of 1871, it is provided that if, in the course of any such examination, any evidence of embezzlement, or breach of trust is discovered on the part of any officer, or persons whose accounts have been thus examined, the same shall be made known to the Auditor, "and it *shall be the duty* of the said Auditor to *forthwith cause the arrest* of collector, receiver, or agent, or person, or persons, whose official functions shall be suspended," etc.

We are at a loss to conceive of any room left, in the face of such provisions, for any argument in support of the theory that the Auditor is not, in the eye of the law, a public officer, "having the power to direct an *investigation*, or prosecution" within the intendment of Sec. 986 of the Revised Statutes.

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The quoted provisions of those statutes deal with the same subject-matter as that treated of in R. S., Sec. 903 *et sequentes*, and are entirely consistent therewith.

We are of the opinion that the charge requested was a proper one, and that it was error on the part of the trial judge to have refused it. This was evidently to the prejudice of the accused, and he is therefore entitled to a new trial.

It is, therefore, ordered, adjudged and decreed, that the verdict of the jury be set aside, the sentence of the court arrested, and the cause remanded to the lower court for further proceedings, according to law and the views herein expressed.

Mr. Justice Fennor dissents, and files a separate opinion.

DISSENTING OPINION.

FENNER, J. Section 936 R. S. provides: "No person shall be prosecuted for any offense, wilful murder, etc., excepted, unless the indictment or presentment for the same be found or exhibited within one year next after the offense shall have been made known to a public officer having the power to direct the investigation or prosecution."

It is obvious that the "public officer" referred to is one whose official duty it is to inaugurate criminal proceedings for offenses of which he has cognizance, and who represents the State in such proceedings. It is the negligence of the State, through her officers authorized and required to represent her in such matters, which forms the basis of prescription.

In a certain sense, every public officer, in common with every citizen, has the power to inaugurate criminal prosecutions for any offense, by making affidavit before the proper authority; but their neglect to do so would operate no basis for prescription, except in the case of public officers, to whom the State had confided the right and duty to act as her agent in such matters, and whose neglect would be the State's neglect.

Such, I think, to be the clear meaning of the statute.

The Auditor of Public Accounts is a constitutional officer, whose duties appertain to the fiscal department of the government, and who has no connection whatever with the administration of criminal justice, except where duties in connection therewith are imposed by special statute, as for instance, by Sec. 92 of the Revised Statutes, Act No. 42 of 1871.

The claim of defendant that such duties are imposed on the Auditor by Sec. 176 of the Revised Statutes, I think, has no foundation. That

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section, in ten paragraphs, defines the various duties of the office, all of which, as therein set forth, relate to the fiscal affairs of the State; and the seventh paragraph makes it his duty: "To direct prosecutions in the name of the State for all official delinquencies in relation to the assessment, collection and payment of the revenue against all persons who, by any means, become possessed of public money or property, and fail to pay or deliver the same, and against all debtors of the State."

If, instead of the words "direct prosecutions," the words "direct suits" had been used, no one would have supposed, for an instant, that anything was intended except *civil suits*.

But the word "prosecution" by no means necessarily refers to criminal proceedings.

It is equally applicable to civil actions.

Mr. Abbott gives the following definition:

"Prosecute: To carry forward, wage or maintain a judicial proceeding.

"Prosecution: The act of conducting or waging a proceeding in court."

We commonly speak of *prosecuting* a civil, as well as a criminal, action.

The use of the word, therefore, leaves us at entire liberty to determine in what sense the Legislature used it.

When we find that the prosecutions directed are to be "against all persons who by any means become possessed of public money or property and fail to pay or decline to deliver the same, and against *all debtors of the State*," the inference seems irresistible that civil suits for the recovery of the money or property or of debts due the State are alone contemplated, since it is evident that debtors of the State and even persons who come into possession of money or property belonging to her, are not necessarily criminal, and the same may be said of delinquent revenue officials, who may or may not be criminals, and whose prosecution for criminal delinquencies is provided for in the revenue laws of the State.

This view is strengthened by the use of the words "in the name of the State," which would be the sheerest superfluity, if criminal proceedings were referred to, because these are, always and necessarily, carried on in the name of the State; whereas, in order to bring a civil suit in the name of the State, the Auditor required special authorization to that effect.

Considering, further, that the representation of the State in criminal

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proceedings is confided to special officers established for that purpose by the Constitution and laws, and that such duties are utterly foreign to the functions of the Auditor of Public Accounts, I think the Auditor does not belong to the class of public officers referred to in section 986 R. S., and must, therefore, dissent from the opinion and decree of the court.

No. 9985.ALEXANDER KALLMAN VS. HIS CREDITORS.

An opposition charging fraud and undue preference against an insolvent, and seeking to have him debarred from the benefit of the insolvent laws, cannot be maintained, when the act complained of was undone *before* the cessation and matters restored to their previous condition, the less so where the transactions appear to have taken place in good faith, and no injury resulted therefrom to the complainants.

The rule of evidence is well recognized and well settled: that, where a litigant resorts to the declarations of another, he must take the whole or none. They are a unit. He cannot use the portions favorable and repudiate the rest.

It has, accordingly been held that, where such party introduces in evidence, without qualification, an instrument of writing, in which the other party has an interest, he cannot be permitted to impeach or gainsay the verity of its statements.

A PPEAL from the Civil District Court, for the Parish of Orleans.
Voorhies, J.

Braughn, Buck, Dinkelspiel & Hart, for Plaintiff and Appellant.

W. S. Parkerson, for Opponent and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The question presented is: Whether the insolvent has done any act which, under the law, debars him from the benefit accorded to honest debtors who become unable to honor their debts and obligations.

On the 5th of December, 1885, Kallman made a voluntary surrender of his property to his creditors, which was accepted by the court for their benefit.

On the 19th following, Kohlberg & Co., claiming to be his creditors, opposed his application for relief, charging that he had, within the three months next preceding said surrender, made a transfer of all his property to one Fitzner, which was fraudulent, and for the purpose and with the intention of giving him an unjust preference, to their injury.

Preliminary defenses having been overruled and issue being joined, the case was tried before a jury, which returned a verdict for plaintiff

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(opponents), and judgment was rendered annulling the decree accepting the cession, and denying to Kallman the benefit of the insolvent laws. From this judgment Kallman appeals.

The claim of the opponents as creditors is shown.

The partnership between Kallman & Fitzner, the latter *in commendum*, is established, and the dissolution of that partnership is likewise shown.

The opponents introduced in evidence an act of sale by Kallman to Fitzner, on November 11, 1885, of all his property, consisting of a cigar store and contents, his rights to a lease, a phaeton and harness and a horse, etc., for \$3500, stated to have been paid and received. They have also offered in proof an act of rescision of this sale and retrocession of the property on hand and the proceeds of the sold portion. Kallman & Fitzner were also heard as witnesses, etc.

The acts in question were introduced by the opponents without any restriction as to the purpose for which they were offered, i. e., *without any qualification* of object.

As found incorporated in section 1802 *et seq.* of the Revised Statutes, the law enumerates the cases in which an insolvent may be charged with fraud and accused of giving an undue preference to one or more of his creditors, to the injury of the complaining parties, and provides that, when the jury declare in their verdict, on the accusation, that he has been guilty of fraud, he shall forever be deprived of the laws passed in favor of insolvent debtors, in this State, and sentenced to imprisonment for a term not exceeding three years and, if it shall appear that the debtor has only been guilty of conferring an unjust preference, or advantage, upon another *bona fide* creditor, such defendant may be relieved from imprisonment by paying the complaining creditor, or repairing the injury or fraud complained of, etc.

The act of sale of Kallman to Fitzner, as well as the retrocession by the latter to the former, were introduced in evidence by the opponents, as said, *without any qualification*.

It is a general principle of the law of evidence, long recognized and so firmly settled, as to be an axiom, that where either party litigant relies on the admissions, or declarations of his adversary to make out a case against him, the whole of those admissions must be taken together as a unit, and that such party cannot select the favorable portions and repudiate the others. Pratt vs. Fowler, 3d N. S. 454; 9 B, 145; 9 Ann. 163; 14 Ann. 581.

In keeping with that equitable rule of practice, the present court, has declared that a party who introduces in evidence, *without qualifica-*

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tion, an instrument of writing, cannot be permitted to impeach or gainsay the correctness of its recitals. *McCleir vs. Insurance Co.* 33 Ann. 801.

In the present instance, the act of retrocession contains the joint declarations of Kallman and Fitzner, as to the nature, extent and purport of the act of sale already mentioned.

It alludes specially to that sale, and distinctly declares, that the contract was entered into by them in error of law and fact; that no fraud was intended by either, and that the parties in interest can well be placed in the situation, to all intents and purposes, as they would have been in had said contract not taken place.

It contains the further statement by Fitzner, admitted by Kallman, that he has sold the cigar stock, the phaeton and the horse for amounts which are specified; that the unsold property is in kind and returned, the sums realized being deposited in the hands of the notary who passed the act, for safe-keeping.

This took place on the 24th of November, therefore anterior to the voluntary surrender, which was made on the 5th of December following:

On the trial, Kallman & Fitzner were heard as witnesses to prove the sincerity and reality of the transaction.

It may, indeed, well be that Kallman thought that in his straightened circumstances he could legitimately set over all his property to his partner *in commendam*, who had an interest in a proper liquidation of the concern, in trust, as is done elsewhere to an assignee, for the common benefit of his creditors and that, subsequently, when informed that such a course was not sanctioned by the law in this State, Fitzner consenting, the transaction was instantly annulled.

All this: the sale, the retrocession, the cancelling of the lease, the sale of tobacco, carriage and horse; the deposit of funds realized with the notary, far from showing bad faith and fraudulent design, may well establish precisely the reverse; particularly, when it is considered that those events transpired *before* the judicial voluntary cession, and that it is not charged or shown that any wrong was actually perpetrated.

It is evident that, when the opposition was filed, the transfer of which complaint is made, had been undone, and that matters had been put back in the condition in which they would have stood had the transfer not taken place.

Practically, that which might, under the law, have possibly been

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done *after*, was accomplished before prosecution, and suffices to relieve the insolvent from all imputation.

The opponents then, in point of fact, had no standing in court and, under the circumstances, they cannot be further listened to.

It is unnecessary to determine whether Fitzner was or not, at the date of the transfer, a creditor of Kallman, as, in either case, the transaction assailed must be viewed as having never existed, and as having produced no effect or injury whatever.

The burden was upon the opponents to have proved fraud, or undue preference. They have failed to do either and, on the contrary, have established the reverse.

Hence, it follows, that the verdict of the jury and the judgment upon it, are erroneous.

It is, therefore, ordered and decreed, that the judgment appealed from be reversed, that the verdict of the jury be annulled and set aside, and that the opposition of Kohlberg & Co. be rejected, with judgment in favor of Alex. Kallman with costs in both courts.

 No. 10,007.

SUCCESSION OF J. B. D. DAUTERIVE.

A will executed in the country, and purporting to be a nuncupative testament, under private signature, in the presence of *three* witnesses only, one of whom did not understand the language in which the testator expressed himself and the will was drawn up, is invalid. The circumstance that, while it was being dictated, what was then said had been translated to that witness, does not supply the want of knowledge of the language in the latter.

The law disqualifies as a witness to a testament a person who is deaf. A witness who does not understand the language in which a will is dictated and written down is intellectually deaf, and practically, is as though he had not attended at all.

A nuncupative will, under private signature, executed before two competent witnesses only is invalid.

A PPEAL from the Twenty-fourth District Court, Parish of St. Bernard. *Livaudais, J.*

Sambola & Ducros, for the Appellant:

1. The irregular or incomplete fulfillment of a formality required by law for the last will and testament, carries with it the nullity of the will in its entirety. C. C. 1581, 1582, 1583, 1585; Duranton, Nos. 21 and 71; 3 Troplong, Dan., No. 1741; 5 L. 396; 5 Zachariæ. § 663; 21 Demolombe, No. 22; 16 Ann. 229; 5 Toullier, No. 410, 11 Ann. 679.
2. He who understands not the language of the testator is not a competent witness to his nuncupative will. 11 Ann. 679, 8 Merlin, quest., verbo testament xvii, art. 1 and 2, Mackelday, § 642, 1 Febrero, Nos. 12 and 16; 14 Ann. 233, 11 L. 365, 4 Marcadé, p. 42; 5 Toullier, No. 393; 9 Duranton, No. 79; 4 Saintespedés-Leescot, Don., p. 97, No. 1038; 2 Mourlon, No. 785; 21 Demolombe, Nos. 196, 197, 251; 13 Laurent, No. 268.

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3. Clear proof that no more than three witnesses to a nuncupative will, under private signature, could be had, must be adduced by him who applies for the probate thereof. 6 N. S. 88; 3 Ann. 155; 1 Febrero, No. 4; C. C. 1583; 7 Ann. 118; 1 R. 361; 1 N. S. 400; 12 L. 489; 15 L. 31.

R. T. Beauregard and H. Chiapella, for the Appellees :

"A nuncupative testament under private signature, must be written by the testator himself or by any other person from his dictation; or even by one of the witnesses in presence of five witnesses. * * * Or it will suffice if, in the presence of same number of witnesses, the testator presents the paper on which he has written his testament, or caused it to be written out of their presence, declaring to them that the paper contains his will." R. C. C. 1581.

"In either case, the testament must be read by the testator to the witnesses, or by one of the witnesses to the rest, in presence of the testator; it must be signed by the testator, if he knows how or is able to sign, and by the witnesses, or at least by two of them * * * This testament is subject to no other formality than those prescribed by this and the preceding article." R. C. C. 1582.

Nuncupative testaments, under private signature, are valid with three witnesses in the country, if more cannot be had. R. C. C. 1583.

"We do not perceive in what particular there was a failure to comply with the requirements of the Code for this kind of testament, which are that it will suffice if in the presence of five witnesses the testator presents the paper on which he has written his testament or caused it to be written out of their presence, declaring to them that that paper contains his last will." *Bourke vs. Wilson*, 38 Ann. 322.

"To constitute a presentation of the will in the sense of the Code it is not necessary that it shall be delivered to the witnesses by the testator with his own hand, and no particular words or set form of speech is necessary to constitute a declaration that the instrument is the testator's will." *Bourke vs. Wilson*, 38 Ann. 322.

"The affirmative answer of a testator to a question whether the paper contains his last will amounts to the presentation prescribed by law. The presentation need not be manual or more formally made." *Pfarr vs. Belmont*, 39 Ann. 594.

For qualifications of witnesses to wills see R. C. C. 1591.

The nuncupative testament, under private act, is unknown in France. See C. N. 967, et seq. 975, 980.

The qualifications of witnesses to testaments are more numerous and strict than at Rome formerly, or in Louisiana. C. N. 975, 980; Rogron, *Code Civil Expliqué*, Art. 980, Note 4.

Paillet (*droit civil*, pp. 358, 359, note 11), commenting on Art. 980 C. N., says: "Le témoin doit-il entendre la langue du testateur? La loi romaine décide que cela n'est pas nécessaire, si d'ailleurs il comprend de toute autre manière pour quel acte il a été appelé." L. 20, 36, ff. qui testam.

"Testamentary freedom is too valuable and important in every respect to be restricted without the most stringent reasons." *Godden vs. Burke*, 35 Ann. 183.

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The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an appeal from a decree ordering the execution of the will of the deceased as being in the nuncupative form, under private signature.

The objections urged against its validity are: *That* it was executed in presence of *three* witnesses in the country, where more could have

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been obtained, and *that* one of those witnesses neither understood nor spoke the French language, in which the will was framed.

It is unnecessary to pass upon the first objection.

As to the second, it is fatal to the validity of the will.

The evidence conclusively shows, that the witness Main did not understand or speak the French language.

It is, however, contended that, as the will was translated to him in English, by another witness, while the testator was uttering his intentions—this ceremony supplies the absence of knowledge of the language.

There might be some plausibility in the retort had the will been translated, not only at the time that it was being taken down, but also when it was read to the testator, if he understood the English language; but it does not appear that this was done.

The law is emphatic. It disqualifies a person who is *deaf*, as a witness to testaments, and it exacts that its requirements touching the formalities to which wills are subjected, be strictly observed, under pain of nullity. R. C. C. 1591, 1595.

Under the Roman, the French and the Spanish law, knowledge of the language in which the will is dictated and written down, is deemed indispensable for the validity of the will, when, to be valid, it must have been executed in the presence of witnesses. Mackeldey, § 642; 1 Febrero, No. 12 and 16; 4 Marcadé, p. 42; 5 Toullier, No. 393; 9 Duranton, p. 113, No. 79; Saintespes Lescot Donat, p. 97, No. 1038; 2 Moulon, No. 785; 21 Demolombe, No. 196-7, 251; 13 Laurent, No. 268; Merlin, vo. Test. (Quest de Droit) xvii, art. 2.

In *Hebert vs. Hebert*, 11 L. 364, and *Breaux vs. Gallusseau*, 14 Ann. 233, in this State, it has been held that a witness who does not understand the language in which the will is couched, is incompetent, and the testament is a nullity.

Had the witness Main, in the instant case, when interrogated, been asked to state his knowledge of the contents of the will, as acquired from the reading *only*, and not from the translation, whatever it be, previously made to him, assuredly he would have remained perfectly dumb. From a legal standpoint, he was intellectually deaf, and disqualified from service.

It is apparent that it was impossible for him to have compared the translation in English with what was read in French, and that as to him, the will was no more read than if he had not been at all in attendance.

It does not appear that the testator understood the English language,

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and that he was on that account able to ascertain whether the translation was or not faithful.

While fully appreciating the utterance of our immediate predecessors touching the sacredness of the will of the departed ones, which should be respected as their graves, (30 Ann. 217), we cannot say that the ceremonies observed at the making of what is termed the will of the deceased have impressed upon it a sanctity which shields it from the assault now made, and we are driven to the necessity of declaring that one of the three subscribing witnesses being incompetent, the ceremony has taken place before *two* witnesses only, while the law imperiously requires that *three* at least should attest its execution.

The pretended will must, therefore, be considered as having never been made, and having no legal existence.

It is, therefore, ordered and decreed, that the judgment appealed from be reversed, and that the application for the probate and execution of the will be rejected, with costs in both courts.

No. 10,082.

THE STATE OF LOUISIANA VS. CHARLES PETE.

The refusal of a new trial in a criminal case cannot be reviewed on appeal if no bill of exception was reserved from the ruling of the district judge on the motion for a new trial. Numerous previous decisions reaffirmed.

A complaint involving a matter of fact not patent on the face of the record cannot be presented in a motion in arrest of judgment.

A PPEAL from the Twenty-first District Court, Parish of Iberia.
Mouton, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

A. & C. Fontelieu, for Defendant and Appellant.

The opinion of the Court was delivered by

POCHE, J. The complaints of the accused who appeals from a conviction of feloniously shooting at another, and a sentence to hard labor for one year, are presented in a motion for a new trial, and in a motion in arrest of judgment.

1. His motion for a new trial rested on newly-discovered evidence, and is supported by his own affidavit and by that of the person whose testimony would constitute the newly-discovered evidence.

But no bill of exception was received from the ruling of the trial judge on the motion, and hence the question cannot be reviewed on appeal.

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We note the statement in the brief of his counsel that a bill of exception had been reserved from the ruling of the judge, but after the most diligent search of the record, we have failed to find as much as a mention of any bill of exception reserved throughout the trial.

No rule of criminal jurisprudence is more firmly settled and more uniformly enforced than that which requires a bill of exception as an indispensable condition to entitle any matter connected with a motion for new trial to the attention of this court in a criminal case.

With the hope that the profession may be fully informed on the subject we have taken the pains of collating the following recent cases in which the principle has been recognized :

State vs. Williams, 30 Ann. 1029 ; State vs. Given, 782 ; State vs. Nelson, 32 Ann. 842 ; State vs. Ross, 32 Ann. 854 ; State vs. Hudson, 32 Ann. 1052 ; State vs. Chatman, 34 Ann. 881 ; State vs. Williams, 35 Ann. 742 ; State vs. Jackson, 35 Ann. 769 ; State vs. Belden, 35 Ann. 824 ; State vs. Miller, 36 Ann. 158 ; State vs. Comstock, 36 Ann. 310 ; State vs. Walker, 37 Ann. 560 ; State vs. Redwine, 37 Ann. 780 ; State vs. Deas, 38 Ann. 581 ; State vs. Wier, 38 Ann. 684 ; State vs. Boyce, 39 Ann. 229 ; State vs. Darrow, 39 Ann. 677 ; State vs. Waggoner, not yet reported.

2. In his motion in arrest the defendant charges that the minutes of the court do not show that the indictment was presented by the grand jury in open court.

It appears from the record that, while the court was in session, the grand jury entered the *court-room* and presented their report, which included the indictment in this case.

Under this showing, the argument that the indictment was not presented in *open court* is untenable. The awkwardness of the clerk's composition does not destroy the fact which is shown by the entry.

He next contends that the indictment was not indorsed by the foreman of the grand jury, but by the district attorney. The record shows the very reverse, and discloses no irregularity on that score.

His last complaint is that the grand jury was defunct when the indictment was found, because the jury had adjourned for more than three days without leave of the court.

That point involves the discussion of a question of fact which cannot be presented in a motion in arrest of judgment. The alleged error is not patent on the face of the record. State vs. Miller, 36 Ann. 158.

We find no error to the prejudice of the accused.

Judgment affirmed.

Todd, J. absent.

 Pasley vs. McConnell.

No. 9949.

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JOHN PASLEY vs. ANN MCCONNELL.

AND

ANN MCCONNELL vs. JOHN PASLEY.

(Consolidated.)

Motions to dismiss appeals should be based on alleged irregularities in the lower court or in the appellate court in the proceedings relating to the appeal, or want of jurisdiction in one or both courts, and should contain nothing relating to the merits of the controversy except for the purpose of illustration.

One is not disqualified from being a security on an appearance bond because he is security for costs or on the injunction bond in the court below.

Where a rule was taken to compel a compliance with an adjudication, and the property was adjudicated for a sum exceeding \$2000, this court has jurisdiction.

The plaintiff in execution of a money judgment, becoming the adjudicatee of real property at execution sale, during the pendency of a devolutive appeal therefrom, and put in possession thereunder by the sheriff executing the writ, cannot be treated as being illegally in possession because the only evidence of her title is the sheriff's *proces verbal* of adjudication.

Notwithstanding the amount of such plaintiff's judgment may be subsequently reduced by the appellate court to a sum less than the price of adjudication, and the sheriff's *proces verbal* does not recite the payment thereof by the purchaser, she cannot be treated as in contempt of an injunction obtained by the judgment debtor, restraining her from making sales of the property *pendente lite*, on account of her attempt to procure a deed of sale from the sheriff, by rule, in the meanwhile.

A PPEAL from the Civil District Court, for the Parish of Orleans.
Houston, J.

W. S. Benedict, for John Pasley, Appellant.

J. Magioni and *J. Timony*, *contra*.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

TODD, J. This is an appeal taken from a judgment discharging two rules, taken out by John Pasley against Mrs. Ann McConnell.

One rule was for the purpose of setting aside an order of court requiring the sheriff to make a deed to Mrs. McConnell to certain property previously adjudicated to her.

The other rule charged that Mrs. McConnell had disobeyed an injunction issued for the purpose of preventing her taking possession of the property adjudicated to her, as stated. It being a rule for contempt.

An appeal can only be dismissed on account of some irregularity in the proceedings in the lower court or in this court relating to the appeal, or for the want of jurisdiction.

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There are numerous grounds for the dismissal of this appeal contained in the motion, only two of which relate to irregularities in the proceedings on the question of jurisdiction.

As to the alleged irregularities, they are, in substance :

1. That the appeal bond is not identified with the case in which the judgment was rendered.

2. That the security on the bond of appeal is disqualified by reason of being a security for costs and also security on an injunction in a proceeding relating to or connected with this case.

3. That an order was made in the court below, requiring security for costs to be furnished within a certain delay. That such security was not furnished within the delay stipulated, and by the effect of such default the proceedings or rules abated, and there existed, therefore nothing that could form the subject of an appeal.

We have examined the record carefully with respect to these contentions, and find that they are without force or merit, either in fact or law.

It is also charged by implication that this court is without jurisdiction *ratione materæ*.

It is true that we are without jurisdiction touching the matter of the rule for contempt mentioned, but the other rule has for its object, as stated, to prevent the sheriff making a deed to certain property adjudicated at sheriff's sale. This property was adjudicated for \$9500.

Besides, in the motion for the appeal we find an averment by the appellant that he will be damaged exceeding \$2000, if the sheriff's deed sought to be prevented is executed to the appellee, Mrs. McConnell; and the same averment is made and supported by oath in the injunction proceeding found in the record.

We conclude, therefore, that we have jurisdiction.

The motion to dismiss is, for these reasons, refused.

ON THE MERITS.

WATKINS, J. A brief and additional *résumé* of the salient historical facts connected with this litigation is necessary to a correct understanding of the questions that are presented by this appeal.

In May, 1882, Mrs. McConnell recovered a judgment against John Pasley for \$14,660 59, from which a devolutive appeal was taken, and in this court same was reduced to \$2980. 36 Ann. 998, McConnell vs. Pasley.

During the pendency of this appeal, *fi. fa.* was issued under the judgment of the district court, and real property of Pasley seized and

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advertised for sale by the Civil Sheriff. It was appraised at \$13,900, and adjudicated to the plaintiff in execution at the stated price of \$9500 cash, and the sheriff executed a *proces verbal* of sale accordingly, and same was duly recorded in the convenance records, in January, 1883.

After said cause was decided on appeal, Pasley instituted suit against Mrs. McConnell, and therein sought to obtain *pendente lite* the judicial sequestration of the property which had been adjudicated to her. The plaintiff appealed from an adverse decree of the district court, and we therein expressed the opinion that Mrs. McConnell was "in possession of the property in dispute, and had been for more than eighteen months prior to the institution of the suit, under a sheriff's sale," and affirmed the judgment appealed from. 36 Ann. 703.

Another phase of same controversy was passed upon in 37 Ann. 553.

Finally, the merits of the suit were tried, and decided, and another appeal resulted, in which we announced the following conclusions, viz:

1st. It recited the facts outlined above, relative to the judgment and adjudication to Mrs. McConnell, and the reduction of her judgment on appeal.

2d. That "it is shown that the price has never been paid in money, and it does not appear that it was imputed * * * but that the purchaser received delivery of the property in June, 1883."

3d. "That on the 28th of January, 1884, Pasley brought the suit"—the one under consideration—"against Mrs. McConnell and her transferees, in which he alleges the nullity of her title and that of her transferres on various grounds, and prays to be decreed the owner of the property, and in the possession thereof, and an accounting of the revenues.

4th. Upon the issues thus joined we then decided "that the reduction of the judgment of Mrs. McConnell by this court (36 Ann. 986), has no effect upon her title as purchaser at the judicial sale pending the devolutive appeal."

5th. That "the lack of a sheriff's deed has no significance whatever," and the non-payment of taxes did not affect its validity.

6th. That in "so far as the non-payment of the price is concerned, under the condition of affairs existing at the date of adjudication, there was no payment to be made. * * Mrs. McConnell is bound to pay the price of adjudication to whosoever is entitled to it. Upon removing the apparent anterior incumbrances, plaintiff will be entitled to recover the excess of the price over the amount of her final judgment."

7th. We finally concluded that said suit possessed no such feature,

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and could not be maintained. There was no reservation to the plaintiff of the right to sue for the rescission of the sale for non-payment of the price of adjudication and the restitution of the property, or for the surplus of the proceeds of sale—but there is, in our opinion, a clear intimation to the effect that suit of either character might be brought.

It appears, from the record, that on the 8th day of February, 1883, a few months subsequent to the adjudication to Mrs. McConnell, and several months *anterior* to the institution of the suit last referred to, she applied for, and obtained, a rule on the Civil Sheriff to show cause why he should not execute and deliver to her a deed of sale, in pursuance of the adjudication; but for some cause, unexplained by the record, the same was not made absolute, and no judgment to that effect was signed until the 2d day of December, 1886, long since judgment was rendered in this court in the suit above referred to. Since the final decision of that suit, Pasley, on the 28th of May, 1886, brought a new suit, in which he makes the following averments and demands, viz:

1st. That Mrs. McConnell, as adjudicatee of the property in controversy, has paid no part of the price of adjudication.

2d. That the judgment under which the sale was made was subsequently reversed, and a new one rendered; and that same has long since been paid, leaving no part thereof remaining.

3d. That Mrs. McConnell made a simulated and fraudulent transfer thereof to her children, the Ermans.

4th. That the sale and adjudication to her are null and void on account of the non-payment of the price thereof, and should be dissolved and the property restored to him in the condition it was at the date of the adjudication.

5th. That he pleads compensation and extinguishment of the judgment in her favor, and avers that the sheriff has executed to her no deed of sale to the property.

6th. That he is the owner of the property in dispute, and he fears that the defendant claiming possession thereof may take advantage of her alleged possession to dispose of same pending suit; and that it is necessary, in order to preserve the same, that an injunction issue.

Objection was made by Mrs. McConnell to the institution and filing of this suit in Division B of the Civil District Court, and an exception to that effect was sustained, and the suit was transferred to Division C of said court.

In this situation of affairs, counsel for Pasley filed, on the 23d of December, 1886, one of the rules on Mrs. McConnell, now under con-

Pasley vs. McConnell.

sideration, it having for its object to compel her to show cause why the judgment making her rule on the sheriff—the one above referred to as having been signed on the 22d of December, 1886—absolute, should not be set aside, and his injunction obeyed.

On the same date plaintiff Pasley obtained an order for an additional rule on Mrs. McConhell to show cause why the proceedings taken by her against the Civil Sheriff to coerce the execution and delivery of a deed of sale should not be set aside, and she be punished for contempt therefor, on the ground, and for the reason that by said injunction she and the Ermans had been inhibited and restrained from interfering with said property, or taking possession thereof.

To these rules a variety of exceptions were taken by the counsel of Mrs. McConnell to the effect, viz:

1st. That the court was without jurisdiction because the final judgment against Pasley had been executed and consumed by the sheriff placing her in full and complete possession of the property more than three years before.

2d. That her rule on the Civil Sheriff was a proper and legal one, at the time it was taken, as he had possession under the writ of *fi. fa.*

3d. That since the sheriff's adjudication and delivery of possession to her she had conveyed the property to her children by recorded title translativ of property.

4th. That Pasley cannot by summary proceedings by rule review proceedings that have been disposed of by a judgment of the Supreme Court.

These two rules seem to have been considered and treated by the parties, as well as by the court below, as parts and parcels of same proceeding, and as having for their object the same relief—to test, in this ancillary way, the *bona fides* of Mrs. McConnell's possession—and they may be considered as cumulated into one proceeding.

On the trial of the rules it was admitted by Pasley, that Mrs. McConnell was put in possession under her judgment and adjudication thereunder, and that she is now in possession, and was in possession long prior to the signing of the judgment making absolute the rule herein complained of. It further appears, from the evidence adduced on the trial of the rule, that the sheriff had executed a *procees verbal* of sale to Mrs. McConnell, but no deed of sale to the property.

From a judgment discharging plaintiff's rule he has appealed; and, considering the indubitable evidence furnished by the various records and proceedings herein detailed, we cannot conceive upon what he can entertain a hope of reversing that decree. We do not regard the

 Weill vs. Baker, Sloo & Co.

judgment complained of as having any material bearing on the questions involved in the pending injunction suit. We have already decided that the *non* execution of a sheriff's deed was of no consequence. Plaintiff's injunction suit judicially admits Mrs. McConnell's possession of the property. The ground assigned as evidencing her *contempt* of the injunction is, in point of fact, altogether incorrect. Appellant *must* rely on his injunction suit, and await its trial on the merits for relief. Judgment affirmed.

Mr. Justice Todd absent.

 No. 9743.

MARK WEILL VS. BAKER, SLOO & CO.—GEORGE HORTER, WARRANTOR.

There is no division of ownership of a wall in common; the whole belongs jointly and in indivision to the neighboring proprietors without reference to the dividing line between the lots.

In absence of evidence to the contrary, the whole wall, with its flues and appurtenances, as originally constructed, is presumed to have been so constructed by common consent, at the common expense and for the common benefit of both proprietors.

The circumstance of a flue being constructed in the lower stories of the wall in that half of it which is on the side of one property, does not establish exclusive ownership in the flues, or destroy the presumption that it was intended for the common use and benefit of both, particularly when the extension of the flues in the upper story, without which it would be useless, lies in the centre of the wall.

Nothing in the facts and conditions established by plaintiffs in this case suffices to destroy the legal presumption of the common right of his co-proprietor to use the flue in question, especially when reinforced by the fact that the latter has actually used it from a period whereof the memory of no witness in the case runneth to the contrary.

A PPEAL from the Civil District Court, for the Parish Orleans.
Rightor, J.

Singleton, Browne & Choate, for Plaintiff and Appellant.

White & Saunders T. Gilmore & Sons, for Defendant and Warrantor.
 Appellees.

The opinion of the Court was delivered by
 FENNER, J. Plaintiff and warrantor are owners of adjoining properties, (two brick stores), Nos. 6 and 8 Magazine street.

The two buildings were constructed in 1840. They are separated by a wall in common, in which exists a flue to conduct the smoke from store or fire-places connected with the wall.

This flue, beginning at the basement, is in the half of the wall on

Weill vs. Baker, Sloo & Co.

the side of No. 8, through the first and second floors, where the wall is eighteen inches thick.

Above the second floor the wall is only thirteen inches, but in the third floor, where the flue is located, a brick projection of about three inches is added on the side of No. 8, and the flue is thus continued mainly, but not wholly, in the half of the wall on that side. In the fourth floor, the flue is in the centre of the wall, and finds exit through a chimney which is built directly over its centre.

There is a fire-place on the side of No. 8, without a grate, and also a hole for a stove-pipe cut into the flue, which was covered with tin.

There is no clear evidence that either was ever used, and it is conclusively shown that they had never been used since 1847.

On the side of No. 6 there is no fire-place, but there does exist a hole for a stove-pipe cut into the flue, and actually occupied and used for the purposes of a stove. With regard to the length of this use, no witness testified whose personal knowledge reaches farther back than 1852; but at that time he found the use existing, and there is nothing to prove, or even to raise a presumption, that the aperture for the pipe had not been made when the wall was built, and that the flue had not been used for a stove in No. 6 from the time of its first occupancy.

Such were the conditions existing when, in 1885, the plaintiff, Marx Weill, purchased and occupied No. 8.

Discovering the aperture in his side of the wall for a stove-pipe, he put up a stove, and conducted his pipe through the hole into the flue. He found that his stove obtained a draught insufficient to induce the free consumption of fuel and also smoked.

He brings the present action, based on the substantial averments: that the flue in question was built and intended for the exclusive use of his property; that the use thereof by the occupant of No. 6 was illegal and without right; that such use destroyed the draught in said flue so as to prevent the use thereof by plaintiff, occasioning him great damage and inconvenience; and he asks for a judgment enjoining the continuance of such use by defendants and for \$2500 damages.

The antiquity of the construction deprives us of the benefit of evidence as to the purposes or intentions of those who built the wall.

In absence of evidence to the contrary, the whole wall, as it stands, including the projection above-referred to on the third floor, is presumed to be a wall in common. C. C. 677.

There is no division of ownership of a wall in common. The whole belongs jointly and in indivision to the neighboring proprietors, and is intended to serve their common purposes without reference to the

Weill vs. Baker, Sloo & Co.

dividing line between the lots. Thus, one co-proprietor may "cause beams or joists to be placed within two inches of the whole thickness of the wall," and his neighbor would have no right to complain unless he had need of the same space for his own construction. C. C. 680.

It follows that the circumstance of the flue being built, on the first and second floors, in the half of the wall on the side of No. 8, does not establish exclusive ownership thereof in the proprietor of that property, nor does it destroy the presumption of community which attaches to the flue as to every other part of the wall. Particularly is this the case when the extension of the flue in the fourth story, without which it would be useless, lies in the centre of the common wall.

The evidence, moreover, establishes that in eighteen inch or four-brick walls, this method of establishing flues on one side is convenient, economical and not infrequent, because accomplished by the simple omission of one brick, whereas, if put in the centre, it would necessitate the cutting of the bricks on either side of the centre.

The existence of the fire-place and of the stove-pipe aperture on the side of No. 8, furnishes very good evidence that the flue *was* intended for the use of that property, but none that it was *not* intended for the use of No. 6. The absence of any fire-place on the latter's side only proves that its proprietor did not intend to use the flue in that at the time of building, but otherwise amounts to nothing in view of the proof that, as far back as the memory of any witness runs, he had an aperture into the flue, and had actually used it for the purposes of his stove.

The projection on the side of No. 8 in the third floor was part of the common wall as originally constructed and presumably built at the common expense. The proprietor of No. 6 is not called on to explain, after this lapse of time, why the wall was thus constructed.

The presumption is that it was done by common consent, and at the common expense, and hence for the common benefit of the proprietors.

The insufficiency of the flue for the full needs of both proprietors may be evidence of lack of skill in the builder, rather than of intention to confine the use of the flue to one property only.

It is certainly much more difficult to believe that the proprietor of No. 6 should have built a wall without providing any flue for the heating of his stove, than that the builder should have constructed an insufficient flue.

The evidence does not satisfy us that by reducing the size of the stoves on either side and by adopting proper fuel, the flue may not

State vs. Harris.

serve the essential needs of both properties. Neighborly concessions would no doubt accomplish this result.

At all events, nothing in the facts and conditions established by plaintiff suffices to overthrow the legal presumption of common right to the use of the flue as part of the wall in common, and the yet more powerful presumption in favor of the destination of the flue to the use of No. 6 as well as of No. 8, resulting from the actual immemorial use of it by the former property.

Judgment affirmed.

No. 10,051.

THE STATE OF LOUISIANA VS. HENRY HARRIS.

In case a jury returns into court a verdict which, in the opinion of the trial judge, does not conform to the charge in the indictment, or to any lesser offense of the same kind, he may remand the jury, under proper instructions, to correct it.

In this manner the delay and expense of a new trial may be avoided and same object attained.

An application for a new trial, predicated on newly-discovered testimony, is properly refused if it appears from the judge's assignment of reasons in the bill of exceptions reserved, that it was cumulative only.

The judge has the right to direct that proper corrections be made in the minutes, so as to conform same to the facts within his personal knowledge, even after the trial and verdict has been rendered.

A PPEAL from the Twenty-first District Court, Parish of St. Martin.
Mouton, J.

M. J. Cunningham, Attorney General, and *C. H. Mouton*, District Attorney, for the State, Appellee.

Felix Voorhies and *Dan Voorhies*, for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The defendant was indicted on two counts, viz:

1st. With having feloniously and wilfully stabbed one Jean Baptiste Lalande with a certain dangerous weapon, to-wit, a knife, with intent to kill and murder him.

2d. With having feloniously and wilfully, and with a dangerous weapon, inflicted on said Jean Baptiste Lalande a wound less than mayhem.

Having been convicted on the latter, he was sentenced to one year's imprisonment in the penitentiary, and from that sentence appeals.

39	1105
44	1110
39	1105
46	1198
39	1105
104	487

State vs. Harris.

I.

When the jury returned into court they reported as their verdict the following, viz :

We, the jury, find the prisoner guilty of stabbing with intent to kill," and the trial judge refused to receive it on the ground that it was responsive to no criminal law of the State. He thereupon again explained the law applicable to the case, and the different kinds of verdicts they could render, and directed them to return to their room for further deliberation, and report.

When the jury returned into court they presented the following verdict. viz :

"Guilty of stabbing with a knife, and inflicting a wound less than mayhem."

This verdict was received by the court, and the jury were discharged.

The defendant made complaint in the lower court of this proceeding on the ground that the judge had no authority to thus decline to receive the first report made by the jury as their verdict, insisting that "said verdict was their judgment, and *had to stand as rendered.*" This objection having been overruled, defendant's counsel retained a bill.

Simplified, the question is, was the one first rendered a verdict responsive to either charge in the indictment ? or to any lesser offense of the same kind ? We think not. It was imperfect and incomplete. The *gravamen* of the charge nominated in the indictment was, an assault with a dangerous weapon with intent to kill and murder, and the inflicting of a wound less than mayhem. As the verdict in question did not, even substantially, respond to either, it was informal and invalid.

In quite a recent case we had occasion to examine and pass upon this question, under somewhat different circumstances. *State vs. Oliver*, 38 Ann. 632.

In that case the ruling of the trial judge was the same as that of the judge *a quo*.

The jury were discharged after having rendered the verdict complained of. The defendant's counsel moved to set same aside, and have him released from custody.

He argued that the verdict did not respond to the charge in the indictment, and no sentence could be imposed thereunder, and that the defendant must be released from custody.

The judge set aside the verdict, and ordered a new trial. The defendant, assuming that this ruling had the effect of terminating the prosecution, appealed. We maintained the ruling of the lower judge,

State vs. Harris.

and remanded the case for a new trial. 36 Ann. 857, *State vs. Foster*; 38 Ann. 357, *State vs. Burdon*.

Had the trial judge, in the *Oliver* case, taken notice of the defectiveness of the verdict, and directed the jury to have reformed it *instantly*, the same result would have been accomplished, without the delay and expense of a new trial, before a different jury. We commend the course pursued by the trial judge as being at once judicious and consistent with a prompt and vigorous enforcement of the criminal law.

II.

The defendant's complaint of the judge's ruling is made the basis of an application for a new trial in part, and same was properly refused.

The objection that the verdict subsequently rendered was, and is, contrary to law and the evidence, cannot be considered. We have so decided frequently and recently.

Of his supplemental application for a new trial, on the ground of newly-discovered evidence, the district judge says:

"It is evident to my mind, from the facts elicited, and other witnesses heard, that such testimony, *if it does exist*, must certainly have been within the knowledge of the accused; the more so, as that alone could have justified, or extenuated his assault; and his failure to procure it shows want of due diligence."

He also states that this newly-discovered testimony being only *cumulative* with that offered and received on the trial, its subsequent discovery does not authorize a new trial."

The refusal of the trial judge to grant a new trial on this ground is in strict conformity with elementary principles and our repeated decisions on the subject.

III.

The defendant's counsel sought to have the judgment arrested on an assignment of various defects and fatal omissions in the record, such as the following, viz:

1st. That the minutes do not show that the indictment was found by the grand jury.

2d. Nor that same was returned into court.

3d. And if returned, it was not in *open* court.

4th. Nor that same was returned by the foreman of the grand jury.

5th. That the minutes do not show that the accused was present during the trial, when the jury were sworn, and at every other stage of the proceedings.

The trial judge assigns as his reason for overruling the defendant's

State ex rel. Jaffray & Co. vs. Judge.

motion that certain corrections in the minutes were necessary, and he caused them to be made, so that they should conform to his personal knowledge of the facts which came under his observation.

As thus corrected and supplemented, all the defendant's objections are answered.

His complaint of their having been made after the trial had been completed and the jury discharged, is not well founded.

As the minutes appeared when this motion was filed they are incomplete, and did not *truthfully* disclose the proceedings had.

Under the circumstances, it was not only the privilege, but the the *duty*, of the judge presiding over the trial, to have the minutes so corrected as to conform to the facts. We have so decided frequently and recently. 38 Ann. 469; State vs. Pierce, 39 Ann.

Judgment affirmed.

Mr. Justice Todd absent.

No. 10,090.

THE STATE EX REL. E. S. JAFFRAY & CO. VS. JUDGE OF THE NINTH JUDICIAL DISTRICT.

Mandamus does not lie to compel a district judge to dissolve a sequestration unconditionally, on bond by plaintiff, where the property sequestered had already been attached. Coupling the dissolving order on bond with the provision that it shall not be construed as a release of the property from the attachments previously levied upon it, was a wise and judicious reserve.

An *ex parte* dissolution of a sequestration on bond does not affect attaching creditors who are not parties either to the suit in which the writs issued, or to the motion to dissolve. A restraining order will not issue where the party seeking it may obtain relief by other adequate remedy in the lower court.

A APPLICATION for Mandamus.

Wade R. Young, for the Relators.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the district judge to dissolve unqualifiedly a sequestration on furnishing bond.

The main averments are, that the relators caused to be sequestered certain goods which they had sold and delivered to certain parties, and which had been attached by creditors of the latter, as their property, although the price of sale had not been paid.

Grand Lodge vs. Tax Collector et als.

On the theory that the non-payment of the price and that the fraudulent devices which had been resorted to by the purchasers to obtain delivery, annulled the sale, and reinvested title in the vendors, the relators obtained a sequestration as against the vendees, and, on their failure and that of any one else, within the legal delay, to dissolve the sequestration on bond, procured that dissolution on giving security in a stated amount; but the judge coupled his decree with a *proviso* that it should not be construed as a release from the attachments issued by other parties against the same property sequestered.

The complaint is that the district judge had no authority to make the reserve, which crippled the order of dissolution, and that by so doing he has acted illegally and arbitrarily.

Conceding that our supervisory power may be invoked in such a case, it is manifest that they cannot be exerted as the relators contend they ought to be.

The attaching creditors are not parties to the sequestration proceedings, and even then, have not been heard on the motion to dissolve the sequestration on bond, which is, as usual, *ex parte*, and surely not binding on any one not legally connected with the suit.

Had not the district judge made the *proviso* it would have been implied in the dissolving order, which cannot prejudice those who are not parties to the record, and have had no knowledge of it.

Asking that the *proviso* be pronounced illegal is to claim that the dissolution shall have the effect of releasing the property from the attachments already levied upon it, which cannot be allowed.

The district judge acted wisely, and the complaint is unfounded.

We did not grant *in limine* the restraining order asked to prevent the sheriff from selling the attached goods, as the relators were not left without adequate remedy in the lower court.

Application refused.

No. 10,014.

THE GRAND LODGE OF THE STATE OF LOUISIANA VS. CHARLES
CAYANAC, STATE TAX COLLECTOR, ET ALS.

39 1109
52 710

A clerk's certificate that a transcript is complete, as containing all the evidence adduced, etc., protects an appellant, although the transcript does not contain that evidence. In such a case, in furtherance of the ends of justice, the cause must be remanded.

State vs. Lewis et als.

A PPEAL from the Civil District Court, Parish of Orleans.
Houston, J.

Hornor & Lee and J. Q. A. Fellows, for Plaintiff and Appellee.

M. J. Cunningham, Attorney General, and J. C. Moise, for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The State appeals from a judgment exempting certain property of the plaintiff's from taxation for the year 1877.

Although the certificate of the clerk is full and such as the law requires, the fact is that the transcript does not contain a particle of the evidence which was actually offered below.

The omission is apparently attributable to the clerk, in the absence of production by him of authority to justify it; but the appellant, not being shown to be in default, is protected by the clerical attestation.

It is possible that proof was administered to establish that the property in question was used in a manner to entitle it to the execution which the plaintiff claims, under Sec. 3 of Secs. 2233 of the R. S.

We consider that, in furtherance of the ends of the justice, it is better to remand the case to the lower court for the purpose of obtaining the desired evidence. 16 L. 572.

While the judgment appealed from must give way to carry out this object, we do not propose to say that it was improperly rendered; for aught we know, it may be justified by the evidence adduced, as the plaintiff claims that full proof was administered showing the extent and nature of the use of the property and fully meeting, to the satisfaction of the court, the special defense in the answer.

It is, therefore, ordered and decreed, that the judgment appealed from be set aside, and that the cause be remanded for further proceeding according to the views herein expressed and according to law.

No. 10,052.

THE STATE OF LOUISIANA VS. THOMAS LEWIS ET ALS.

The declarations of a party voluntarily made, during the preliminary examination of a prosecution of another party, are admissible against the witness, in a prosecution of himself; the more so when the witness sought to incriminate some other one and deposes to his own innocence.

On the trial of a motion in arrest, charging omissions and informalities in the minutes of the

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 50 1314
 39 1110
 1120 750

State vs. Lewis et als.

court, the trial judge has authority to order corrections made, so as to have the minutes conform to the facts, when the same are to his personal knowledge and recollection.

In the absence of any further complaint, the corrections made will be considered as having been properly made, and as showing the real occurrence of facts.

A PPEAL from the Twenty-first District Court, Parish of St. Martin.
Mouton, J.

M. J. Cunningham, Attorney General, and *C. H. Mouton*, District Attorney, for the State, Appellee.

James Simon, for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The accused was prosecuted and convicted for murder, without capital punishment, and sentenced to hard labor for life.

For the reversal of the verdict and sentence he relies on two bills of exception and on a motion in arrest.

I.

In the first bill it is charged that the court admitted in evidence, against the defendant, the deposition and confession of himself, taken under oath, at his preliminary examination; that there was error in this admission, because the deposition and pretended confession was not free and voluntary.

The trial judge states that he admitted the evidence because it had been given by the accused on the preliminary examination of Césaire Lewis, who was then charged with the murder of the man Jacob Simon; because it was given by the accused of his own free will and accord, and in corroboration of what he had stated to him (the judge), before he had been called to testify, and because the testimony did not incriminate him, and was circumstantial.

This statement of the trial judge is in no way assailed, and therefore must be considered as truthful.

There is no legal proposition better settled in criminal practice than that the confessions of an accused, in actual custody, are inadmissible, unless they are his own free and voluntary statements.

In this case, the declarations of the accused were not made by him at the preliminary examination of his own case, but at the examination of another party accused of the same crime, and were given freely and voluntarily, without inducements, hope, threat or fear.

They were not offered and admitted as a *confession*, but as declara-

 Herber vs Abbott.

tions for certain purposes, perfectly legitimate in themselves, and which are set forth by the trial judge in his before-stated remarks in the bill.

Those declarations are annexed to the bill. Far from being a confession, or declarations, incriminating the defendant, they are statements clearly designed to exculpate him (the witness), and to affirm, as it does, in as many words, his own innocence.

It is, indeed, to be wondered, how a declaration of innocence can be upheld as a confession of guilt!!

II.

The motion in arrest charged grave omissions and informalities, apparent on the face of the minutes, namely: that these do not show that the bill was found by the grand jury; that it was returned by the foreman of the same, under his official signature; that it was handed to the judge or clerk; that the prisoner was in court, and pleaded not guilty, when arraigned; that he was present when the motion to sever was filed, argued and submitted; that he was present during the trial at every important stage thereof; that the indorsement on the bill of indictment does not show that the foreman signed his name in his official capacity, and state the crime for the which the grand jury had found.

On the trial of this motion in arrest, the district judge ordered that the minutes be corrected, so as to conform to the facts, as they occurred. To this order the accused reserved a bill. In that bill the judge states that the facts were within his personal knowledge and recollection. He had that right. 38 Ann. 469.

The other charges are not supported by the record.

There is no complaint now that the facts have been improperly set forth in the corrections made.

These views dispose of both the motion in arrest and the bill taken to the corrections ordered.

Judgment affirmed.

 No. 9953.

MICHAEL HERBER vs. ROBERT ABBOTT.

A judgment that has been rendered in an attachment suit against an absentee, represented by a curator *ad hoc*, is one *in rem*. and not *in personam*. It affects the property attached only.

In such case the jurisdiction of the court is derived from the seizure of the property, and its judgment has no validity except against the thing thus subjected to its control.

39 1112
114 731
614 735

Herber vs. Abbott.

The registry of such a judgment does not result in a judicial mortgage, and a subsequent lease of the property is unaffected thereby.

A PPEAL from the Civil District Court, for the Parish of Orleans.
Houston, J.

Braughn, Buck, Dinkelspiel & Hart, for Plaintiff and Appellant.

Howe & Prentiss and John H. Kennard, for the Garnishee, Appellee.

The opinion of the Court was delivered by

WATKINS, J. This is a garnishment proceeding, in which Thomas E. Herndon is sought to be made liable, upon a traverse of his answers as untruthful, for the amount of a judgment of \$2600 against Abbott, an absentee. The garnishee denied the possession of any property of, or the existence of any indebtedness to Abbott.

The plaintiff's reliance is upon the following state of facts, viz :

That on the 9th of April, 1883, in attachment suit, he obtained a judgment against Abbott, with recognition of his attachment of the Planters' Cotton Press, in this city, said absentee being therein represented by a curator *ad hoc*.

This judgment was recorded in the Mortgage Office on the 15th of May following. Thereafter a *fi. fa.* was issued, the property attached was seized and offered for sale, but no sale was effected, mainly because there was no bid for an amount sufficient to discharge prior special mortgages; and the writ was returned without a copy having been retained, and the seizure lapsed and became relinquished.

That at the time of the attachment of the cotton press it was under lease to the garnishee, and this lease expired on the 1st of September, 1884.

That subsequent to the registry of plaintiff's judgment, this property was again leased to the garnishee for a term of three years. In this attitude of affairs these proceedings were commenced on the 30th of November, 1886.

His contention is that Herndon's lease in 1884, subsequent to recordation of his said judgment, resulting in a judicial mortgage on the property, became subject to said mortgage.

That he was entitled to, and did seize the cotton press, and its rents and revenues that had arisen into existence since the registry of said judgment, under an *alias* writ of *fi. fa.*

He does not rest his garnishment upon the attachment, or the lien resulting therefrom; and he does not claim that the rents sought to be seized thereby were then in existence.

Herber vs. Abbott.

To the proceedings the garnishee excepted on the following grounds, viz :

1st. That the district court was without jurisdiction.

2d. That plaintiff's judgment against Abbott, an absentee, in a proceeding wherein he was not cited *personally*, and was only personated by a curator *ad hoc*, can be executed only against the property attached (*if any*), and no other seizure or garnishment can be made under said judgment.

3d. That no property was ever attached in his hands.

Hence we have the following propositions for discussion and solution, viz :

1st. Does the registry in the book of mortgages of a judgment obtained against an absentee, in an attachment suit, who is represented by a curator *ad hoc*, operate a judicial mortgage against his property ?

2d. Under an *alias* writ of *fi. fa.*, issued under such recorded judgment, can the lease of said absentee—whose contract of lease is subsequent in date and registry to the judgment—become compelled, by garnishment, to pay his rents to the attaching creditor, notwithstanding he has issued negotiable promissory notes therefor, payable at future dates ?

I.

The plaintiff relies on the authority of *Summers & Brannon vs Clark*, S. L. Boyd, garnishee, 36 Ann. 436, in which it was held that a lease of real estate, made in good faith, and duly recorded, could not be affected by a seizure of the leased property on the part of the lessor's creditors, unless they had a prior mortgage, duly recorded. In that case the plaintiffs had a judgment *in personam* against Clark, and the lease of Boyd had not been recorded when the seizure was effected. The plaintiffs seized the property of Clark and its revenues and held them. In the suit of plaintiff against Abbott his judgment was one *in rem*.

In an attachment suit against an absentee, represented by a curator *ad hoc*, the judgment rendered is *in rem*, and only affects the property attached. An action is not personal, though founded on a personal obligation, accompanied by an attachment of property, unless it is based on a *personal* citation to the debtor. In such case the judgment bears exclusively on the property attached.

In 4 Ann. 586, *Forest vs. Piane*, it was held : " There is a manifest distinction between the case of a court which has acquired *personal* jurisdiction and that of a court whose jurisdiction being exercised only *in rem*, rests solely upon the property attached. In the latter's case

Herber vs. Abbott.

the power of a court seems to us to be limited to its territorial limits. It acts upon the thing, not upon the person of its owners. Its jurisdiction is derived from the seizure of the property, and its *judgment has no vitality except against the thing thus subjected to its control.*"

In *George vs. LeGrand*, 3 Ann. 652, it was most distinctly held that a judicial mortgage does not result from the registry of a judgment *in rem*. 3 Ann. 301, *Jobson vs. McRae*; 6 Ann. 549, *Page vs. Generes*.

Indeed, we do not see how such a judgment could operate as a judicial mortgage—affecting the present and future property of an absentee, *not personally* cited at its rendition—without impeaching our own jurisprudence and that of the Supreme Court. 2 Ann. 663, 916, 569, 1010; 95 U. S. 714, *Pennoyer vs. Neff*.

This being the case, the first proposition must be decided in the negative.

II.

Inasmuch as the effect of a judicial mortgage cannot be given to the registration of a judgment *in rem*, and as it bears upon the property attached alone, it is of no consequence when the contract of lease is entered into, or recorded.

Question has been made and argued by the garnishee's counsel whether the *original* attachment could be extended to rents accruing subsequently; but as we understand from the printed and oral arguments of plaintiff's counsel, no such claim is made, and hence the question need not be decided.

Having reached the conclusion that the contention of the plaintiff is not well grounded in law, it is needless to discuss others that have been argued.

Judgment affirmed.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN NEW ORLEANS, DURING THE YEAR 1887,

AND NOT REPORTED IN FULL.

No. 9835.

The State of Louisiana vs. B. F. Smith.

Same ruling as in No. 9834—The State of Louisiana vs. Smith *et al.*

No. 10,024.

The State *ex rel.* Heath vs. Judge, etc.

Same ruling as in No. 10,023—The State *ex rel.* vs. Judge, etc.

No. 10,083.

Succession of Thos. J. Martin.

Same ruling as in No. 10,069—Heirs of Hoggatt vs. Crandall, Adm'r.

MONROE—1887.

No. 1179.

W. A. McRay, syndic, vs. Lem Scott, *et als.*

A sheriff must be held to the same degree of prudence, vigilance and care with respect to property under seizure and in his custody as a careful and prudent man would be likely to exercise over his own.

OPELOUSAS—1887.

No. 1286.

Henry Pressler vs. Joffrion, Sheriff, *et als.*

Only questions of fact involved.

SHREVEPORT—1887.

No. 215.

Narcissa Hargrave vs. A. V. Wilson.

In a suit for slander of title, where the value of the property in question and the amount of damages claimed, together do not exceed \$2000, the appeal will be dismissed.

INDEX

ACTIONS.

An action can only be brought by one having a real and actual interest which he pursues.

So where one claiming to be a judgment creditor of another, seeks to annul a mortgage executed by the latter in favor of his children, on the ground of fraud, and the record shows that the judgment, on which the suit is founded, is not in favor of the plaintiff, but in favor of her minor children, for whom she was tutrix, and who had obtained their majority before the action of nullity was brought, and they do not join in the action, the suit must be dismissed.

Ashby vs. Ashby et als., p. 105.

An action by one heir against his co-heirs of a common ancestor, to declare the simulation of a transfer made by the ancestor to two of said heirs of immovable property, to bring said immovable into the succession of said ancestor, and for a decree of partition thereof amongst all the heirs, partakes of the nature of a proceeding *in rem* in such manner as to authorize the bringing in of a non-resident heir by appointment of a service on a curator *ad hoc*.

Wunstell et al. vs. Landry et al., p. 312.

Taxpayers have a standing in court to contest, upon proper charges, the validity of a municipal ordinance and contract executed under it, whenever its enforcement may increase the burden of taxation. A district court, the lower limit of whose jurisdiction is fixed, has jurisdiction to pass on a controversy when the matter in dispute, which is the value of the contract assailed, exceeds that limit; and the Supreme Court has jurisdiction when that value exceeds \$2,000. *Handy et al. vs. City of New Orleans* re-affirmed.

Where an exception is filed denying the capacity or right of the plaintiff to sue or stand in judgment, and together with this exception an answer to the merits or a peremptory exception determinative of the case, and the lower court sustained the first exception and dismisses the suit, this Court, on reversing that judgment, will remand the cause to be tried on the other issues raised by the pleadings.

Conery et al. vs. Waterworks Company et als., p. 770.

ALIMONY.

If the person whose duty it is to furnish alimony shall prove that he is unable to pay the sum demanded out of his revenues, the judge may order that such person shall receive in his own house, and there maintain and support the person to whom the alimony is due.

Schmitt, Tutrix, vs. Schmitt, p. 982.

APPEAL.

An appellee who prays for the reversal of the judgment appealed from, on its merits, waives thereby the right of asking a review by the appellate court of a decree in favor of appellants, overruling a plea of misjoinder filed by the plaintiff to their third opposition.

The World's Exposition vs. American Exposition, p. 1.

Where in a motion for an appeal the return day is left in blank and the judge on his own motion fills up the blank with an illegal return day, the irregularity will not be imputed to the fault of the appellant.

Pasteur et al. vs. Lewis and Lynd, p. 5.

The fact that only *one* of the parties defendant, cited in an action to annul a probate sale of real estate—portions of which are in possession of various other defendants cited—has prosecuted his appeal, from an order obtained in open court, by him, at the same term at which final judgment was rendered against him, cannot be treated as invalidating his appeal. Those who are not appellants are appellees; and such individual appellant has the right to prosecute *his* appeal, which is regularly taken, notwithstanding his co-defendants—against whom judgments have been *previously* rendered—have not been formally cited, and have acquiesced therein.

A motion to dismiss an appeal on account of informality in the bond or order of appeal, or even the *want* of the latter, must be made at the term at which the appeal is made returnable, and within three judicial days after the record is filed.

One filed within the time specified, and not disposed at that term, cannot be supplemented, at a subsequent term, by another motion to dismiss upon other grounds not enumerated in the one first filed.

Webb et al. vs. Keller et al., p. 55.

On separate demands in the same suit, a judgment was rendered against the defendant, and another judgment for a smaller amount in favor of defendant against plaintiff. Defendant appealed devotively from the two judgments.

Held: The devolutive appeal did not deprive plaintiff of the right to execute his judgment.

APPEAL.—Continued.

The two judgments being only devolutively appealed from were equally exigible, and the law operated a provisional compensation between them, effective so long as both judgments existed unreversed.

The plaintiff's right of execution was confined to the excess of his judgment over that of defendant against him.

The existence of execution of a *fi. fa.* for such excess only was not such voluntary acquiescence in the judgment of defendant against plaintiff, as would prevent the latter from asking amendment of such judgment on defendant's appeal to this court.

Duncan vs. Wise, p. 74.

In an action for the transfer of stock and the payment of dividends, brought against the stockholder in whose name the shares stand, and against the corporation, the latter has no interest at stake, and has no right to prosecute an appeal from a judgment rendered contradictorily with both parties defendant, in favor of plaintiff, where the real party in interest—the stockholder—has not appealed, and the judgment has become final and executory.

In such a case the Court, *proprio motu*, will dismiss the appeal.

Board of Liquidation vs. Waterworks Company, p. 202.

Under the *ex parte* showing made by affidavits by the appellees, that the judgment appealed from has been acquiesced in by the appellants, the case is remanded for the purpose of adducing proof of that fact.

Board of Church Wardens vs. Perché, Bishop et al., p. 223.

An interlocutory decree which admits a reconstructed record to replace a mislaid or destroyed record does not belong to the class of orders, the execution of which can cause irreparable injury, and be arrested by a suspensive appeal.

State ex rel. Broussard vs. Judge, p. 225.

A transcript which is shown by the clerk's entry not to contain all the evidence which had been received and considered below, and which does not show that the appellant took the necessary steps to secure and bring up a statement of facts, cannot sustain an appeal.

An assignment of errors, which does not assign any error of law, appearing on the face of the record, but specifies only errors of fact, does not comply with the requirements of the law.

Thibodeaux vs. Winder, p. 226.

APPEAL.—Continued.

An appeal will not be dismissed where the bond was furnished *before* the order of appeal was granted, for an amount corresponding with that fixed in the order. *Le Blanc vs. Rougeau*, p. 230.

A *remittitur* entered after the verdict of a jury has been rendered, in a case in which the matter in dispute, the sum demanded exceeds \$2,000, does not cut off defendant's right to appeal from a judgment rendered against him. This is so particularly when he objects to the *remittitur* being permitted, and the court allows it without prejudice to his right of appeal, and where the plaintiff himself afterwards appealed.

The failure of plaintiff to perfect his appeal does not relieve him from the imputation of admission of the appealable character of the suit. *Gayden vs. Railroad Company*, p. 269.

The amount in dispute is the highest sum for which the appellate court can render judgment under the allegations and prayer of the petition. *Forstall vs. Larche*, p. 286.

A party cast in an action of nullity of twenty-four judgments, in none of which the amount in dispute exceeds \$2,000, brought in one petition, cannot sustain an appeal in the Supreme Court, although the amount involved in all the judgments together does exceed \$2,000.

A cause not appealable in amount to the Supreme Court for the review of the judgment originally rendered therein cannot be made appealable there to review the judgment rendered in an action of nullity in the same cause. *Marshall vs. Holmes et al.*, p. 313.

The appeal taken by a defendant from a decree of executory process, which allows as attorneys' fees a larger percentage than that agreed to in the act of mortgage, is not frivolous, and damages cannot be allowed.

On an application for a rehearing the court can, without granting the prayer and hear the case anew, make verbal corrections which do not change materially the effect of the decree previously rendered. *Insurance Company vs. Lozano*, p. 312.

A defendant, prosecuted for the violation of a municipal ordinance subjecting him to a fine, and in default of payment to imprisonment—who, on arraignment, pleads *guilty*, and on judgment voluntarily pays the fine, is not entitled to an appeal.

Where a discrepancy exists between the return of a judge and the statement of a relator, credence will be given in preference to the return.

APPEAL.—Continued.

The refusal to allow an appeal is justified under the circumstances, and no mandamus will issue to compel the granting of any.

State vs. Lamarque vs. Recorder, p. 328.

In a proceeding by mandamus for the cancellation of an inscription of the drainage tax mortgage, on the ground that the tax is not ex-igible against relator's property, either for want of consideration or for non-performance of the drainage contract, or on account of previous payment, the controversy does not involve the legality or constitutionality of the tax.

In such case the test of the jurisdiction of the Supreme Court is the amount of the tax in discussion, and the appeal cannot be sustained if said amount does not exceed two thousand dollars.

State ex rel., Johnson vs. New Orleans, p. 342.

When a party appeals, but fails to bring up his appeal in time, and it is filed after the return day and dismissed, he cannot, under another order, bring up a second appeal. The appeal will be considered as abandoned.

World's Exposition vs. Railroad Company, p. 355.

When an appellee files an answer to the appeal, wherein he seeks to increase the judgment in his favor, he waives his motion to dismiss the appeal for formal irregularities.

Jacobs vs. Yale & Bowling, p. 359.

Notwithstanding the clerk's certificate is not technically sufficient, and the transcript contains neither a statement of facts, note of the evidence, bill of exceptions nor assignment of errors—the appellant having been absent from and taken no part in the trial, though, constructively, a party to the proceedings—the appeal may be likened to one brought up by a third person, resting his claim to relief upon questions of law alone. The irregularities in the mode of bringing up such appeal may be disregarded by the court when the questions relied upon as determining the right sufficiently appear from the transcript.

In the absence of proof to the contrary, it will be assumed that every fact essential to the validity of the judgment, was proven in the court below.

Succession of Pilcher, p. 362.

The statement, contained in the order of appeal, that there is not sufficient time to prepare the record by the next regular return

APPEAL.—Continued.

day for appeals from the court *a qua*, even if suggested by appellant's counsel, must be held as adopted by, and as emanating from, the trial judge.

Hence, the Court will not consider *ex parte* certificates, or affidavits, or other evidence outside of the record, touching the alleged error of such a statement.

Under Section 4 of Act 45 of 1870, Extra Session, the trial judge has the legal discretion to fix a different return day if time is required to prepare the record for appeal, and the Supreme Court will not presume that he has abused of the discretion vested in him by law.
Bartoli vs. Huguenard, p. 411.

A suspensive appeal suspends the execution of the judgment complained of, but does not divest the court of jurisdiction over a controversy involving, not the identical, but a similar matter.

In such a case prohibition does not lie against the court.

State ex rel., Hug et al., vs. Recorder, p. 507.

A bond furnished in the amount fixed by the order of the court for a suspensive appeal which alone was prayed for, but not furnished within the delay prescribed by law for a suspensive appeal, is sufficient to sustain the appeal as devolutive.

The order, although restricted in terms to a suspensive, covers any appeal, the character of the same, as suspensive or devolutive, being determined by the amount of the bond fixed and furnished, and by the time at which the bond is filed.

Succession of Keller, p. 579.

This Court is without jurisdiction to revise a judgment in favor of one who has not, himself, appealed, and who has not made an answer to the appeal of his adversary.

Morris vs. Cain, et als., p. 712.

When the appealability of the case does not clearly appear, from the face of the pleadings, to determine the question, affidavits relating to the amount of value in dispute filed in this Court will be considered.

In a suit attacking a franchise or privilege granted to a person or corporation, and it appears such franchise or privilege exceeds in value \$2,000, this Court has jurisdiction.

State ex rel., Daboval vs. Police Jury, p. 759.

When a suspensive appeal has been granted from an order dissolving an injunction on bond and has been perfected by filing of proper

APPEAL.—Continued.

bond, the judge cannot afterwards rescind the order of appeal, on the ground that order appealed from inflicted no irreparable injury, and was, therefore, unappealable. Affirming 36 Amr. 192.

The terms of the order of appeal granted, when unambiguous, must speak for themselves, and cannot be controlled by the statement of the judge that he did not intend to do what he has actually done. *State ex rel., Railroad Company vs. Judge*, p. 774.

The appellant who suggests a diminution of the record before the expiration of the three judicial days within which he may file the transcript of appeal, is entitled to a *certiorari* for the correction and completing of the transcript, even after the cause has been argued and submitted for judgment, in case his application be made before the expiration of the three days aforesaid.

Lewis vs. Peterkin et al., p. 780.

In a suit against an administrator for a balance of account, unappealable in amount, the defendant reconvenes, claiming payment to succession of \$7000, proceeds of cotton sold and credited in plaintiff's account. Held: that as any allowance made on defendant's demand necessarily increased the ordinary balance due plaintiff, this involves adjustment of entire account and the whole case is appealable. *Allen, West & Bush vs. Nettles*, p. 788.

In an action for damages on an injunction and a forthcoming bond, appellee cannot urge in dismissal of appeal, that elements of damages claimed on either of the bonds should be eliminated as fictitious, because no recovery could be had under such bond. Such an argument is a begging of the very question, as it can only be adjudicated on a consideration of the merits.

Lullande vs. Trezevant et als., p. 830.

The Supreme Court has no jurisdiction over a suit in nullity of a judgment rendered on an hypothecary action, when the amount, to pay which the property is sought to be subjected, does not exceed \$2,000.

The circumstance that the demand in nullity is coupled with a prayer for damages exceeding that sum, does not make the case appealable. *Mullen vs. Zuberbieer & Behan*, p. 888.

An order of appeal granted at a term of court subsequent to the one at which the judgment appealed from was rendered in open court, is not a legal substitute for citation. In such case, citation of appeal is indispensable to the perfection of the appeal.

APPEAL.—Continued.

In case two different and distinct appeals are granted on one order, one may be sustained and the other dismissed.

When a suit has for its object the revocation of a pretended sale as a fraudulent simulation, the party whose title is attacked is a necessary party. This issue cannot be tried with the debtor alone, after the suit has been dismissed as regards the alleged simulated owner of the property.

An appeal having been, by plaintiff, prosecuted to the Circuit Court of Appeals from the judgment of dismissal, and same having been by that court reversed and the cause remanded; and, thereafter the plaintiff prosecute an appeal from the *same* judgment to *this* Court, he is conclusively presumed to have abandoned the judgment of said Circuit Court of Appeals in his favor.

The principal and necessary defendant having been eliminated from the suit, the only decree this Court can render, is one affirming the judgment appealed from.

Trounstine & Co., vs. Ware & Munn, p. 939.

A bond to cover all costs is sufficient for a suspensive appeal from a judgment dismissing a third opposition claiming a preference on the proceeds of a sale in the hands of the sheriff over seizing creditor.

Where there are a number of oppositions claiming preference on such proceeds, which are dismissed, the appellants from the judgment of dismissal may join in the motion for the appeal, and in one appeal bond.

State ex rel. Heath et al. vs. Judge et als., p. 1041.

To authorize an appeal from an interlocutory decree the decree must be such as would work an irreparable injury.

So where a lessor complains that the lessee has placed an electric battery and erected machinery in a part of a building leased by him, in violation of the contract of lease, and claims damages to the amount of the rents to be paid for the residue of the building, which he avers will be abandoned by the tenants, and demands the dissolution of the lease, and at the same time asks for an injunction to stop the running of the machinery *pendente lite*, the order of the judge refusing to grant the injunction is not appealable.

The injury likely to be caused by the disturbance is not irreparable, nor is the refusal of the injunction decisive of the cause on its merits.

Winter vs. Fraenkel, p. 1058.

APPEAL.—Continued.

Motions to dismiss appeals should be based on alleged irregularities in the lower court or in the appellate court in the proceedings relating to the appeal, or want of jurisdiction in one or both courts, and should contain nothing relating to the merits of the controversy except for the purpose of illustration.

One is not disqualified from being a security on an appearance bond because he is security for costs or on the injunction bond in the court below.

Where a rule was taken to compel a compliance with an adjudication, and the property was adjudicated for a sum exceeding \$2000, this court has jurisdiction.

The plaintiff in execution of a money judgment, becoming the adjudicatee of real property at execution sale, during the pendency of a devolutive appeal therefrom, and put in possession thereunder by the sheriff executing the writ, cannot be treated as being illegally in possession because the only evidence of her title is the sheriff's *proces verbal* of adjudication.

Notwithstanding the amount of such plaintiff's judgment may be subsequently reduced by the appellate court to a sum less than the price of adjudication, and the sheriff's *proces verbal* does not recite the payment thereof by the purchaser, she cannot be treated as in contempt of an injunction obtained by the judgment debtor, restraining her from making sale of the property *pendente lite*, on account of her attempt to procure a deed of a sale from the sheriff, by rule, in the meanwhile. *Pasley vs. McConnell*, p. 1097.

A clerk's certificate that a transcript is complete, as containing all the evidence adduced, etc., protects an appellant, although the transcript does not contain that evidence.

In such a case, in furtherance of the ends of justice, the cause must be remanded. *Grand Lodge vs. Tax Collector, et al.*, p. 1109.

ASSESSMENT.

Proof that there has been a decrease in the values of buildings in the immediate vicinity of that, whose assessment is sought to be reduced by suit, and also a diminution in the rents of such property in the same locality, and proof likewise of extravagance in the construction of the building, so that such cost is not a proper test of its value when assessed, will justify a reduction of the assessment. *Cotton Exchange vs Assessors et al.*, p. 95.

The taxpayer, before bringing suit for the reduction or correction of an assessment, must, as a condition precedent, make the prelimi-

ASSESSMENT.—Continued.

ary opposition thereto and application for redress, provided for by law. *Shattuck & Hoffman vs. New Orleans et al.*, p. 206.

It is permissible for a number of taxpayers, claiming to have a common interest in the enforcement of an ordinance of the police jury, enacted from motives of public policy, for the reduction of tax assessments, to unite in one suit, seeking like relief, from same injury and upon the same grounds.

Section 24 of Act 96, of 1882, does not create a board of equalization in the sense of Article 203 of the Constitution, but delegates to the board of revisors created by Section 24 of that act, amongst others, the power to correct assessments illegally or wrongfully made in the *listing* or *valuation* thereof; and the power to equalize assessments of all properties of *like* character and *relative* value within their parish.

For this purpose said board is empowered to summon and examine witnesses with regard to the value and character of the properties assessed; and upon the evidence to determine the correctness of the listing and valuation thereof.

The police jury, acting as a board of reviewers, cannot, by ordinance, reduce the *percentage* of the assessment for the year, by wards or otherwise. They can levy such a certain *percentum* on the *total assessment* as, in their view, may be necessary to defray the parochial expenses; but they cannot reduce to the standard of parochial necessities.

Such revision, correction, arbitration or equalization as the board of reviewers may make of assessments, are subject to review by the courts, and their action is final, unless "set aside or changed, as provided by law."

State ex rel. Johnson et al. vs. Tax Collector, et al., p. 530.

BATTURE.

In order that recovery be had under R. S. sec. 318, the following conditions must concur, viz:

First. The evidence must show that the plaintiff is a riparian proprietor of the property in dispute.

Second. That there has formed an accretion or batture, in front of same, more than is necessary for public use.

Third. That defendant withholds this accretion or batture.

BATTURE.—Continued.

Batture is an elevation of the bed of a river under the surface of the water; but it is sometimes used to signify the same elevation when it has risen above the surface.

The term **batture** is applied, principally, to certain portions of the bed of the Mississippi river which are let dry when the water is low, and are covered again, either in whole or in part, by the annual swells.

The banks of a river are not sold; they pass as an accessory of the contiguous land when sold, and the property of the bank belongs to the adjacent proprietor.

When the sovereign grants land contiguous to the river without mentioning the bank, it passes as an accessory, and it must do so by the deeds of private citizens.

Under the laws of France and Spain, **batture** did not belong to the cities and towns as riparian owners, in the sense of actual and indefeasible ownership, but solely for the purposes of administration.

The possession of the *locus in quo* by a city simply for administration, and not inconsistent with the ownership in the riparian proprietor, and destined in its nature to terminate upon the happening of a certain contingency, cannot be pleaded against the latter as a basis for prescription.

Land, after being set apart for public use, and enjoyed as such, and private and individual rights acquired with reference thereto, the law considers it in the nature of an *estoppel in pais*, which precludes the original owner from denying the dedication.

A city or town is not authorized to construct permanent edifices upon the **batture**, to the detriment of the riparian proprietor, or to the injury or inconvenience of the public, but it may construct those which may be of public utility and advantage.

The use of the property as a landing and wharf for the reception of coal-boats and coal, is a public use, the public character of which is not destroyed by the fact that it is temporarily farmed out to particular parties.

The original proprietors are not entitled to recover the revenues paid by such parties as a consideration for the privileges, because such revenues result from the exercise of the public easement itself, and not from use independent thereof.

Heirs of Leonard vs. Baton Rouge, p. 275.

BILLS AND NOTES.

The purport of a bill or note is to be collected from the eight corners of it; and a memorandum on the back, effecting its operation, must be regarded as if written on its face.

A memorandum made *after* the execution of the instrument, with the consent of all parties, will modify and control its future operation in market. *Morris vs. Cain et als., p. 712.*

If it were known to the transferee of a negotiable promissory note, acquired for value and before maturity, on taking it that the consideration was future and contingent, and that there might be offsets against it, this would not make him liable for the equities between the original parties.

It cannot affect the negotiability of a note that its consideration is to be thereafter realized, or that from some contingency it may never be enjoyed. *Bank vs. Cason, p. 865.*

CARONDELET CANAL AND NAVIGATION COMPANY.

The Carondelet Canal and Navigation Company have, and its predecessors had, a perfect right to use, appropriate and enjoy the property adjacent to Bayou St. John and Canal Carondelet, on either side, for the purpose of facilitating their operations in the improvement of navigation therein, as contemplated in their several charters.

Among their chartered rights are the construction and maintenance of roads on either side and collection of tolls thereon; to take and receive from each passing vessel toll, according to her tonnage; to prevent any person from using the same in any way injuriously to them, or embarrassing to commerce.

No one can derive any adverse right of possession or ownership to any property adjacent to said bayou or canal from the State, by a title subsequent in date to the Navigation Company's charter; because the State, in such case, would be the common author.

Having the exclusive right, under its charter, to the use of the banks or shores of the Bayou St. John and Canal Carondelet, for its operation for the purpose of navigation, no one has the right to establish a ferry, for the conveyance of passengers, across the same without permission of the defendants; and when such permission is given by them, on the condition that it shall not impede navigation thereon, it may be recalled when ascertained to be inconvenient and a hinderance to vessels.

Singer vs. Carondelet Canal and Navigation Company, p. 478.

CERTIORARI.

Certiorari can only be resorted to when proceedings are absolutely null.

It is only when, upon examination of the record, the proceedings appear to be null and void, that they should be avoided and the respondent directed to try them anew, in conformity with the provisions of the law.

State ex rel. Broussard vs. Justice of the Peace, p. 776.

If no complaint is made of the *legality* of a city ordinance alleged to have been violated, nor of the *regularity* of a judgment pronounced thereunder, and there is nothing on the face of the papers showing that the charge preferred is *not* an offense against said ordinance, an application for a writ of *certiorari* will be refused.

State ex rel. May vs. Recorder, p. 992.

COMMUNITY OF ACQUETS.

Lands purchased in the name of the wife, and paid partly with her paraphernal funds under the administration of the husband, and partly with the funds of the community, fall into the community.

In a suit for dissolution of the community by the wife, an allegation of the wife claiming the funds thus invested, as her paraphernal funds, will debar her of the right to claim the lands in question as her paraphernal property.

She cannot be allowed to claim at the same time the price and the thing, and will be held to that part of her pleadings in which she corrects an error in previous pleadings, in which she had omitted to claim these paraphernal funds. Property purchased during the community, in the name of the wife, will be treated as community property until proof is made by the wife to show that it was purchased for her own account and with her paraphernal funds, of which she had retained the administration. Mere recitals in the acts to that effect amount to no presumption in her favor.

The wife has the right of demanding the administration of the paraphernal property previously confided to her husband whenever she chooses, and such a demand must not be confounded with the action for the dissolution of the community.

The husband who has the administration of the wife's paraphernal funds owes no interest thereon before the dissolution of the community, or before the wife has obtained a judgment for the restitution of her separate funds.

As a general rule husbands and wives are incapacitated from contracting with each other during marriage, save in exceptional cases

COMMUNITY OF ACQUETS.—Continued.

enumerated in Art. 2446 Civil Code. Hence, they cannot, by contract, bind the husband to pay interest on, or create a mortgage to secure the paraphernal funds of the wife, when none are due or exist under the law. But the inscription of such an act will be considered as that of an authentic declaration of the husband touching the paraphernal funds received by him, for his wife, and effect will be given to it as notice, but not as a contract.

A dation *en paiement* by the husband to the wife, on the score of detailed indebtedness from him to her, cannot stand in the face of proof that the indebtedness as therein described did not exist.

Burns vs. Thompson, p. 377.

There can be no reckoning between the spouses *inter sese* as to the *quantum* of labor bestowed, or capital by either withdrawn during the existence of the community.

The distinct interest of the wife attaches at the dissolution of the marriage; but neither spouse can sue for half the price of any specific thing acquired during the marriage, when the liquidation of the community does not show any *gains* to be divided.

The value of improvements and ameliorations made, upon separate property of either spouse, during the marriage, is at the expense of the community, *only* when it is *not* due to the ordinary course of things, to the rise in the value of property, or the chances of trade.

Bartoli vs. Huguenard, p. 411.

In the absence of proof that the husband has invested his individual funds in the community, neither he, nor his heirs can claim that the conjugal partnership is indebted for the same.

Succession of Rhodes, p. 473.

The presumption of law is that property purchased during the marriage, whether in the name of both or either spouse, is community property.

When, however, the property is bought in the name of the wife, she has the faculty of rebutting this presumption by showing that she purchased the property by the investment of her paraphernal funds, which were administered by her separately and apart from her husband.

She carries the burden of proof of three crucial facts: (1) Paraphernality of the funds; (2) administration thereof separately and apart from her husband; (3) investment by her.

Where a man, on the eve of marriage, gives to his intended spouse a

COMMUNITY OF ACQUETS.—Continued.

check for \$20,000 on a banking firm, the donation may be incomplete and revocable at any time before actual collection of the check by the donee; but when she has presented the check and the drawees have honored the same by placing the amount to her individual credit, under her instructions, the donation is complete, and the funds are her paraphernal property.

The case is not affected by the fact that the husband was a member of the banking firm. The firm is a legal entity, separate and distinct from its members, and the possession, custody and obligation resulting from such deposit were those of the firm, and not of the husband, as a member.

When the account thus opened with the wife is kept in her name and subject to her exclusive order and control, without interference by her husband, this constitutes a separate administration by her.

The property here in controversy, having been bought in the name of the wife, by her consent and direction, and having been paid for by her check against her account with the bankers, and having always been regarded and treated as her separate property, it cannot be subjected to the debts of the husband or of the community.

The purchase price of property acquired by an agent in the name of a married woman, with her husband's authority, is considered as paid out of her funds, although the agent drew on the husband for the same, when the evidence shows that the check was endorsed by the husband to be paid out of his wife's money, and she herself directed her bankers to do so, and that it was thus done.

Stauffer, Macready & Co. vs. Morgan, p. 632.

Property acquired during the marriage in the name of the husband is presumed to belong to the community. Nor will such presumption be rebutted by proof that he acquired the property with the money of his children by a former marriage; nor will such fact affect the title of the community to the property, though it may create a debt against it.

The heirs of the wife become vested with a title to her share of the community property at the moment of her death; and though they receive it subject to the payment of the community debts, they are not bound to await a liquidation of the community before resorting to an action to recover it. *Tugwell vs. Tugwell*, 32 Ann. 848, and *Glascock vs. Clark*, 33 Ann. 584, re-affirmed. Nor in such action, petitory in its character, is the indebtedness of the community or its financial condition dissolved, when a legitimate subject of enquiry. *Heirs of Murphy vs. Jurey & Gillis, p. 785.*

COMPROMISE.

Though plaintiffs in a suit may have given no express authority to their attorneys to compromise the same, yet where the attorneys have compromised it, and given proper information to their clients of the terms of the compromise, and remitted to them the money paid under it, which is received, the latter will be held to have ratified it, and will be bound by it. A judgment rendered on the compromise can be pleaded as *res adjudicata* to another suit between the same parties, and embracing the same subject-matter.

Culverhouse vs. Marx, p. 809.

CONTRACTS.

To execute voluntarily, under Article 2272 R. C. C., is to execute with the intention to confirm or ratify.

The act from which confirmation or ratification is sought to be deduced, must evince such intention clearly and unequivocally. None will be inferred when the act can be otherwise explained.

In cases of doubt, the party to whom the act is opposed must have the benefit of the doubt.

A purchaser who pays interest on a note of his vendor, in the hands of a *third* person, assumed by him as part of the price of the lands bought, and which he had bound himself *before* the sale to pay to such person, cannot be treated as one voluntarily executing an obligation, so as to deprive him of the right to prosecute a suit previously instituted by him against his vendors to rescind the sale.

Breaux vs. Sarvoil et als., p. 243.

The condition that, should a railroad *not* be built within a stated time, the contract giving right of way shall be null and void, is *resolatory* in character.

Until the dissolution is judicially demanded for non-performance, the obligor has the right to comply with his part of the contract.

An obligee who is present during the performance of the obligation, *after* the expiration of the delay, who does not object, and allows the work to be completed, cannot be permitted by suit, brought more than a year afterward, to demand the value of the land taken for the building of the road, and claim damages, consequent on the use of the grant, and which were not in the contemplation of the parties when the contract was entered into.

Gayden vs. Railroad Company, p. 269.

A party who makes a transfer in writing of live stock, and who does not prove that the contract, apparently a sale, was designed to be one of suretyship, and that he received no consideration, cannot recover the stock in question.

CONTRACTS.—Continued.

An intervenor who claims ownership of such stock, as having been given in payment to him of a judgment against the defendant, cannot recover where it appears that the debt for which the judgment had been obtained had no existence, having been previously extinguished by payment, and where the surrounding circumstances tend to show that the proceeding is the result of a combination between the defendant and the intervenor (plaintiff in the suit) to frustrate plaintiff from his rights.

Forstall vs. Larche, p. 286.

Want of consideration and knowledge of circumstances of relief, under which a note was issued and a mortgage consented to secure its payment, may be pleaded against a third party, but cannot exonerate the drawer and mortgager, unless fully established against such party whose presumed innocence is always implied.

Representations of indebtedness and of ownership by one and acted upon by another, in good faith, conclude the former and protect the latter.

Dwyer vs. Wolfe et als., p. 423.

A contract made by parties, who are commission merchants and factors, for the storage of cotton assigned to them, during a certain period and at a stated price *per bale*, must be viewed as entered into for *their own account* and not for that of their customers, although it may be that they charge for such storage and other items a price *per bale*, including a rate higher for the storage.

Such parties could not shirk responsibility in a suit against them for unpaid storage, by saying that the contract was not entered into by them for their own account, but for that of their customers. As they could be held liable, they have a right to sue for damages sustained by them, in case of breach of contract, specially the difference between the rate of storage agreed on and that paid.

A right to claim damages for breach of contract, remains unrestricted, in the absence of qualification in the contract and can be exercised so as to include all injury sustained, whether foreseen or not.

A putting in default would be a vain ceremony and unnecessary, in presence of an acknowledged inability to perform.

Allen, West & Bush vs. Steers, p. 586.

Parties may, by their contracts, waive rights which they would be entitled to enforce under the general law.

Plaintiff, being about to erect a dam across a watercourse, which defendant opposed, and was about to enjoin, entered into an agreement with the latter, that if he would not enjoin the work, but permit its

CONTRACTS.—Continued.

completion, defendant might remove the dam if, in the high-water season, it should prove injuriously to subject defendant's land to overflow, on giving plaintiff notice in time to close a ditch leading from the watercourse through his plantation. Defendant having cut the ditch, held that plaintiff was not entitled to damages on defendant's showing that it did subject his land to overflow, and that the ditch was actually closed.

Plaintiff's demand, however, for an injunction restraining defendant from further interfering with the reconstruction of the dam and from tearing it down when rebuilt, is sustained.

The contract being fully executed, and the *status quo* restored, defendant cannot take the law into his own hands, but must resort to legal remedies for further vindication of his rights.

The dam being authorized by the police jury for the purpose of carrying a public road across the watercourse, the police jury should be a party to any proceedings to test the legality of its proceedings, and we decline to pass upon those questions in its absence.

Egan vs. Russ, p. 967.

Plaintiffs, as agents of defendants, entered into certain contracts of sale of cotton for future delivery with third persons. Held: That the legality of said contracts depends on the dealings between the parties thereto; and cannot be affected by the fact that in various previous transactions which plaintiffs, as agents, had made with other third parties, settlements had been made by adjustment of differences.

This raises no presumption that the parties to *these* contracts intended and impliedly consented to such mode of settlement.

Plaintiffs having been invested by defendant's firm with express discretionary power to manage and settle the contracts "as if they were their own," defendant is bound by the mode of settlement adopted in absence of proof of fraud or injury.

The liability of one partner for the contracts made by his copartner, without his knowledge or assent, is a question of agency. Third persons are not bound by special limitations in the articles of partnership of which they have no notice, but may assume that the partners have the power ordinarily incident to the business pursued by the firm.

Dealing in futures is not, as a matter of law, and in absence of evidence, presumed to be an incident of the business of cotton buyers and commission merchants.

CONTRACTS.—Continued.

But where defendant's firm had two places of business—one in New Orleans, directed by him, and the other in Savannah, conducted by his copartner, and where both branches had repeatedly employed plaintiffs in dealings in futures, and had received and settled the accounts. Held: that plaintiffs had the right to assume that such dealings were within the scope of the business, and within the presumed knowledge of all the parties.

In this case plaintiffs received from the Savannah partner two orders for purchase of futures, one for account of the firm, the other for his individual account. Held: that, without the clearest proof that the latter was for the firm, in such manner as to make it certain that, if profit had resulted, the firm would have received it, the latter cannot be held for the loss.

Grunner & Co. vs. Stucken, 1076.

CONSTITUTIONAL LAW.

Act 104, of 1886, relative to the removal of the parish seat in Avoyelles parish, is constitutional in all its parts.

It embraces but one object, and that object is expressed in its title.

It was within the power of the Legislature to allow the removal, on conditions provided for in such cases by the Constitution, viz: The adoption of the law by the electors of the parish and the consent of the property taxpayers voting at such election to pay an increase of taxation beyond the constitutional limit.

It was needless to express the conditions in the title of the law. The enumeration of the one without the other was a superfluity, and is not destructive of the law.

Until the conditions prescribed by the Legislature had been complied with, there existed no authority to undertake the removal.

It is shown that the property taxpayers were not consulted and did not vote at all on the question of increase of taxation beyond the constitutional limits.

The announcement by the Secretary of State that the law had not been adopted was correct.

Edwards et al. vs. Police Jury et als., p. 855.

Act No. 45, of 1880, which is entitled "An Act to organize the City Courts in the city of New Orleans, to regulate the territorial jurisdiction thereof and proceedings therein, and to fix the salaries of the judges," is not unconstitutional as violative of either Article 46, or Article 135 of the Constitution.

Its provisions, which define the territorial jurisdiction of the city

 CONSTITUTIONAL LAW.—Continued.

courts, far from conflicting with, were enacted in furtherance of, Article 135 of the Constitution, in which the courts aforesaid are created. Under its provisions, it is clear that no resident of the left bank of the city of New Orleans can be sued in the Third City Court, whose jurisdiction is restricted to that portion of the city of New Orleans which lies on the right bank of the Mississippi river.

State ex rel. Levy & Bro. vs. Judge, p. 889.

CORPORATIONS.

Where the charter of a railroad company requires that the stock shall be paid for in cash, and that no certificate shall issue until such payment is made, it is a sufficient compliance with the statute prescribing that the charter of such companies must set forth "the time when and the manner in which" the stock shall be paid for.

Railroad Company vs. Frank, p. 707.

COURTS.

The conduct of a district judge who enjoins an execution predicated on a judgment of the Supreme Court, on the ground, as alleged, that said judgment, from its terms and under restrictions placed by the court which rendered it, is not yet executory, is not amenable to the charge that the inferior judge refuses obedience to the mandate of the superior court.

It is competent for the district judge to consider such an allegation, and to act according to his construction of the true meaning of the judgment. His course will not be interfered with by mandamus.

State ex rel. Huyghe vs. Judge, p. 99.

An action (the object of which is the nullity of certain judicial proceedings had in a succession, and the payment of a legacy), when allotted to a division of the District Court for the Parish of Orleans, other than that to which the succession proceedings had previously allotted, can be properly transferred from the former to the latter, on exceptions of defendant. The judge of the division to which the case was allotted has no authority to dismiss the suit, *simply* because it was improperly allotted to his division.

Such action is not necessarily divisible, its purpose being the payment of a legacy out of the assets of a solvent succession, though the proceedings attacked show it to be insolvent.

Pironi vs. Riley, p. 302.

The jurisdiction of a court, competent, *ratione materæ*, represented by divisions, may be assented to, in any division before which the

COURTS.—Continued.

cause or matter may be pending. Each division exercises all the powers of the court it represents.

Nowhere does the Constitution forbid the trial, without previous allotment, of cases by the judge of a division of the Civil District Court for the parish of Orleans, where the parties do not object or assent to such trial. *Ibid.*

The correctness or regularity of the judgment of a competent court, making the appointment of an undertutor, cannot be questioned or reviewed collaterally, even by the court which had made the appointment. His appointment is full proof of his capacity and has effect on third persons until set aside by appeal or in an action of nullity.

Hence, an adjudicatee of succession property cannot set up the nullity of the proceedings leading to the sale, on the ground of the alleged illegality of the appointment of the undertutor who presided over the family meeting which recommended the sale, if the record shows that he was appointed by a court of competent jurisdiction.

Succession of Keller, p. 579.

A suit for the expropriation of property cannot be tried in vacation, but only at a term of the court.

Telegraph Company vs. Railroad Company, p. 659.

CRIMINAL LAW.

APPEAL.

The Supreme Court has no jurisdiction of an appeal taken by the State from a judgment quashing an information for an offense punishable by fine, or in default, by imprisonment or otherwise than at hard labor, as, in such a case, no fine exceeding \$300 can possibly have been actually imposed, which is the constitutional requirement.

State vs. Smith et al., p. 231.

In an appeal by the State from a judgment sustaining a motion to quash an indictment, rulings made in favor of the State cannot be discussed, as the accused who has not yet been tried could not appeal.

State vs. Dubois, p. 676.

An appeal taken by the State to a judgment quashing the general venire of jurors on the ground that the term of court at which it was impanelled was irregular and illegal, and presented here after the jury had been discharged and the term had lapsed, will not be entertained, because any judgment we might render would be utterly futile and inconsequential.

CRIMINAL LAW.—Continued.

It might be different if the indictment had been found by the grand jury formed out of the venire quashed, which, however, is not the case. *State vs. Segura, et al.*, p. 683.

In criminal cases the Supreme Court cannot consider an appeal the record of which contains no plea or matter presenting an issue of law involved in the trial.

The course of attorneys who take appeals in criminal cases to which they pay no further attention, is deserving of judicial censure.

State vs. Paul, p. 795.

A motion of appeal in a criminal case must be made in open court (act 1878, No. 30, p. 56), within ten days after sentence was passed. Where the court adjourns on that day, and the motion is made on the day of its re-opening, the motion is in time.

A transcript of appeal in such a case need not be filed before the opening of the appellate court, whatever the return day be. It is in time if filed for such opening. *State vs. Estoup*, p. 906.

Where there is a disagreement between the trial judge and the counsel for the accused touching the facts connected with a ruling complained of, and the record does not enable the appellate court to ascertain the exact truth, the statement of the judge appearing in the bill of exceptions or otherwise of record should control the conclusion of the court on the controverted points.

State vs. Hill, et al., p. 927.

A decree setting aside a judgment of forfeiture of an appearance bond is theoretically and practically one granting a *new trial* and is not appealable.

State vs. Cole, p. 938.

BURGLARY.

Burglary is a statutory offense. An information charging that the breaking and entering into was done wilfully, maliciously and feloniously, is not defective for not setting forth that the act was done *burglariously*.

State vs. Jordan, p. 340.

CHARGE.

A trial judge is justified in refusing to read to the jury the text of a law which has no bearing on the prosecution, and can, therefore, find no application.

Doing so would be uselessly charging abstract propositions of law.

A charge is not improper or illegal; that it was unnecessary that a person named in the information, as the owner of the property stolen, should be brought to court to testify as to that fact, where the ownership is established to the satisfaction of the jury by other

CRIMINAL LAW.—Continued.

proof and that, if such ownership is not thus proved, the jury should acquit the accused.

Such charge is rather favorable, than injurious, to the accused.

State vs. Primeaux, p. 673.

It is improper that the trial judge should give to the jury a special charge which contains statements of fact, although hypothetically stated, if likely to influence the mind of the jury in reference to the facts proven in the case.

The judge is not forced to adopt the language in which defendant's counsel may couch a requested special charge; he may recast the propositions and submit them in his own *terms*. When special instructions asked for, are partly correct and partly erroneous, the judge is neither bound to affirm nor repudiate it as a whole, but he may restate it in his own terms.

State vs. Durr, p. 751.

EVIDENCE.

A declaration made by a wounded man, who subsequently died from his wound, ten minutes after the wound was inflicted, and seventy yards from the place where the fight occurred, charging that the accused had shot him, is no part of the *res gestae*, and is, therefore, not admissible in evidence against the accused on trial.

State vs. Estoup, p. 219.

Bills of exceptions attached to the record, but unsigned by the trial judge, will not be noticed by this Court.

State vs. Harris, p. 228.

Where a number of persons are on trial charged in one indictment with arson—the burning of a court house—some as principals and the others as accessories before the fact, evidence is admissible as against two of the parties to prove that when the building was burned, there were two indictments on file therein against them for other crimes, in order to show a motive for the commission of the arson and as a circumstance going to establish their guilt; and this fact can be proved without first showing a conspiracy between the parties. The question of conspiracy is not involved.

Where there had been a conversation between a witness and one of the accused in a matter bearing on the charge being tried, it is permissible to give the entire conversation, and the witness is not to be restricted to what the accused said to him.

Where, after the State had closed, a motion is made to discharge one of the accused for the purpose of making him a witness for the

CRIMINAL LAW.—Continued.

others, on the ground that no evidence had been adduced against him the determination of the motion rests largely within the discretion of the trial judge, and where it is refused for the reasons stated by the judge that there *was* inculpatory evidence against him, the ruling will not be disturbed, unless it is made clear that it was unfounded and arbitrary.

State vs. Travis et als., p. 356.

The *proces verbal* of the coroner's inquest is admissible for the restricted purpose of showing the fact and cause of death.

The Constitution authorizing the appointment of an assistant coroner, his authority to hold inquests is recognized, the holding of such inquests being the main and nearly sole purpose for which the office of coroner exists.

Where the *proces verbal* is signed by the assistant coroner, it will be presumed that he was the officer who held the inquest, although there had been a failure to correct the formal recital that the inquest was held before the coroner.

It appearing that no hurt to justice resulted to the prisoner, technicalities will not be strained to avoid a trial and sentence.

State vs. Duffy, p. 419.

Narrations of transactions in homicide trials are inadmissible as part of the *res gestæ*, unless they are admissions of the party charged. Comments and recitals of *observers* form no part of the *res gestæ*. Statements made by them are hearsay. They should be examined as to what they saw.

State vs. Oliver, p. 470.

Proof of the disparity between the size and strength of the prosecutor and the accused is inadmissible unless there has been a *prima facie* case of self-defense laid by the defendant, or it has been preceded by proof that the accused was the attacking party.

The statement made by the trial judge in the bill of exceptions, must be our guide in determining a dispute as to what was the purport of an *oral charge delivered* by him, and of which the accused complains.

A motion for a new trial on the *sole* ground that the verdict is contrary to the law and evidence, will not receive any consideration at our hands.

State vs. Broussard, p. 671.

Evidence pertaining to collateral issues, disconnected with the charge against the accused, cannot be introduced. Same would be confusing and misleading to the jury.

The correctness of the refusal of the district judge to sign *one* bill of

CRIMINAL LAW.—Continued.

exceptions cannot be tested by the presentation and signing of another, with reasons assigned. It must be presented in a different form of proceeding. *State vs. Durr, p. 751.*

That the legality of an officer's appointment cannot be collaterally attacked has been so frequently decided, it cannot be regarded as an open question.

A defendant in a civil suit is not warranted in assuming that a person acting as an executive officer is a naked trespasser and on resisting a seizure of his property, if such person is armed with proper warrant for making such a seizure, and is acting in pursuance of an apparently legal appointment to such office.

Parol is not the best evidence of the contents of judicial records, suits, and proceedings, such records should be produced or their absence or loss accounted for.

The facts and details of a civil suit between accused and other parties is not competent evidence on a criminal trial.

A witness must state facts and leave the jury to draw their own inferences therefrom.

Proof of previous threats cannot be adduced by the accused, until it is first affirmatively shown that he was himself previously attacked or threatened with immediate danger by the deceased.

State vs. Brooks, p. 817.

The true test of the admissibility in evidence of a dying declaration is the belief in the mind of the party making it that he would soon die.

It is not necessary to prove expressions implying apprehension of immediate danger if it be clear that the party does not expect to survive the injury, which may be collected from the general circumstances of his condition, as when a party suffering from a mortal wound expresses his desire to make his dying declaration, stating that he felt that he was going to die, and that his time was very short, and dies a few hours after making the declaration.

State vs. Newhouse, p. 862.

While concomitant circumstances tending to explain a flight from justice, as arising from other motives than consciousness of guilt, are admissible, yet proof of subsequent return after some time, and submission to arrest are of doubtful admissibility, and at all events of too little weight to justify disturbance of judgment because excluded.

State vs. Moncla, p. 868.

A witness on the stand cannot be permitted, over the seasonable ob-

CRIMINAL LAW.—Continued.

jections of the accused, to testify to what another person has told him touching the circumstances of the arrest of the latter, although such person so stated in presence of the accused, who was then in actual custody, and the latter did not contradict him and remained silent. The prisoner had a right to remain dumb.

The subsequent declaration of the trial judge in his charge to the jury that they were not to infer guilt from such silence, could not cure the illegal reception of the testimony.

The trial judge was unable, as the appellate court is, to know what effect the authorized evidence produced on the mind of the jury.

State vs. Estoup, p. 906.

In a criminal prosecution it is not competent for the District Attorney to question a State witness as to the cause of his unfriendly feelings against the accused, which he has admitted on his cross-examination by the defence, without objection. The inquiry cannot be pressed further than the existence of the unfriendly feelings.

The decision in *State vs. Gregory*, 33 Ann. 779, affirmed.

State vs. Jackson, p. 910.

In a prosecution for shooting with intent to murder, though the evidence shows that it would have been murder had death ensued, that, in itself, will not be sufficient ground for the jury to infer the existence of the intention to murder. If the mortal blow is unlawful and malicious and death ensues, the perpetrator is guilty of murder, although he did not intend to murder.

State vs. Evans, p. 912.

In cases of conflicting statements of facts, in bills of exceptions, between judge and counsel, the Supreme Court will accept the statements of the judge; unless proper means are taken by counsel to vindicate their contention.

Evidence taken in support of a motion for new trial will not be considered on appeal if it is not embodied in, or made part of reference of a bill of exceptions.

An attack by the defense on the veracity or credibility of a State witness, may be legally met in rebuttal by the State by testimony to sustain the assailed witness.

If the attempt is to show that the witness had previously made statements or declarations contradictory to his testimony on the trial, it is competent for the State to show that soon after the occurrences which he relates, he had made to persons other than the impeaching witnesses, declarations in harmony with his testimony

CRIMINAL LAW.—Continued.

on the trial, although the particulars of his statements thus made are not admissible. *State vs. Waggoner et al.*, p. 919.

The declarations of a party voluntarily made, during the preliminary examination of a prosecution of another party, are admissible against the witness, in a prosecution of himself; the more so when the witness sought to incriminate some other one and depose to his own innocence.

On the trial of a motion in arrest, charging omissions and informalities in the minutes of the court, the trial judge has authority to order corrections made, so as to have the minutes conform to the facts, when the same are to his personal knowledge and recollection.

In the absence of any further complaint, the corrections made will be considered as having been properly made, and as showing the real occurrence of facts. *State vs. Lewis et al.*, p. 1110.

FORGERY.

A written acknowledgment that A has picked so many pounds of cotton, purporting to be signed by the proper party, amounts to a note or order for the payment of money. Under a charge of *forgery*, it can serve as a basis for an indictment.

Whether such instrument was or not used for the purpose of drawing money, is a matter of fact within the province of the jury.

State vs. Jefferson, p. 331.

INDICTMENT.

In an indictment charging in a single count both burglary and larceny, verdict for larceny alone sustained.

State vs. Morgan, p. 214.

The fact that the final report of the grand jury was not drawn by a member of that body, nor by the District Attorney, but by an attorney at law, called to draft the report, will not invalidate an indictment found by the jury, where it does not appear that the attorney was present at any of their deliberations, or otherwise assisted them in their proceedings and findings.

State vs. Harris, p. 228.

An amendment of an indictment or information in a case of larceny, changing the name of the alleged owner of the stolen property, may be allowed after arraignment, and the accused cannot com-

CRIMINAL LAW.—Continued.

plain, after conviction, that he was not arraigned under the indictment or information as amended.

State vs. Dominique, p. 323.

Where an indictment contains a charge against certain of the defendants as principals and another charge against others as accessories, it is sufficient that it close with the usual words "contrary to the form of the statutes, etc.," and this language need not be repeated after each count.

State vs. Travis et al., p. 356.

When the accused has been once tried upon a valid indictment, and an improper verdict has been rendered by the jury, from which he has been relieved by the court, upon a motion for new trial and one in arrest of judgment, such former trial does not operate a bar to a further prosecution of accused upon the same indictment and cannot sustain the plea of "twice in jeopardy."

State vs. Oliver, p. 470.

Under sections 1049 and 1052 and others the Revised Statutes, which are similar to the Victoria Statute of England on the same subject, the common law requirements as to the framing of indictments have been relaxed; and it is sufficient to charge the crime in the words of the statute, without setting out the particular acts constituting the special offense charged in the indictment. *State vs. McGrau, 37 Ann. 292.*

State vs. Tisdale, p. 476.

An indictment accusing a person of "maliciously, feloniously and willfully assaulting another by shooting at him," prefers a charge within the scope of Section 792 of the Revised Statutes, which contemplates four distinct offenses by means of an assault: one by "willfully shooting at," the second "with intent to commit murder," the third "with intent to commit rape," and the fourth "with intent to commit robbery." In charging the "assault by willfully shooting at," the pleader is not bound to aver or qualify the intent with which the assault was made.

In such a case it is correct to instruct the jury that to convict the accused as charged, they must reach the conclusion from the evidence that if death had ensued from the deed it was manslaughter.

In drawing indictments and informations for statutory offenses, district attorneys would facilitate the administration of justice by confining themselves within the words of the statute.

State vs. Brady et al., p. 687.

CRIMINAL LAW.—Continued.

Where in a single transaction a party commits two distinct crimes, so related to each other that proof to sustain one need not involve the proof necessary to sustain the other, indictments will lie for both, and conviction of one will not bar the other.

Thus when one, entrusted by A with cotton for a particular purpose, obtains money thereon from B, by falsely representing himself as owner and selling to him, he may be indicted as well for embezzling A's cotton, as for obtaining B's money under false pretenses ; and conviction of latter offense will not sustain *autrefois convict* to the other.

State vs. Faulkner, p. 811.

In a prosecution for obtaining money or property by false pretenses, the indictment must contain averments that the accused made false representations of a state of things past or present, and it will not be good if the alleged false representations refer to the future only.

A promise is not a pretense within the meaning of the statute, even when the party making the same does not intend to keep it.

Hence an indictment charging the defendant with falsely offering or promising to procure the release on bail of a person in actual custody, by means of which he obtained money, does not disclose an offense covered by the statute.

State vs. Colly, p. 841.

Where the record exhibits no showing whatever of the return and presentation of the indictment by the grand jury into open court, the defect is fatal.

State vs. Pitts, p. 914.

One may be indicted by a name other than his true one, if he is sometimes called by it, answers to it when called, and makes an appearance in court demanding relief under it.

The provisions of act 124 of 1874, making a distinction between grand and petit larceny do not conflict with, or repeal those of section 814 of the Revised Statutes, denouncing the crime of horse stealing.

An immaterial and impossible date in an indictment may be corrected at any time, particularly when the date is not of the essence of the offense charged.

It is the right and the duty of judges to cause proper corrections to be made in the minutes of their courts, to the end that same may conform to the truth ; especially when errors, or omissions are within their personal knowledge.

It is not necessary that the minutes should show that the defendant

CRIMINAL LAW.—Continued.

was present at the time a motion to quash is tried, nor when an indictment is amended in an *immaterial* matter.

State vs. Pierre, p. 915.

An indictment containing the charge of an "assault with an intent to commit murder," and a charge of "inflicting a wound less than mayhem," is not vicious for duplicity, as the two offenses can grow out of the same act, are kindred offenses and were incorporated in separate counts.

State vs. McDonald, p. 959.

An indictment for a statutory crime need not follow the exact words of the statute in setting forth the offense, it is sufficient if the words employed are of equivalent import and clearly convey the true and complete meaning of the language used in the statute.

An indictment under section 903 for the embezzlement of moneys of the "Board of School Directors of the parish of Red River, which said money had been then and there entrusted to him as treasurer of the public school funds of said parish, etc.," sufficiently embodies all the elements of the offense denounced in the statute, viz.: 1st. That the money was public money, being school funds. 2d. That defendant was a public officer, being treasurer of the public school fund, an office created by law. 3d. That the entrusting to him, "as treasurer," was an entrusting for "safe keeping or disbursement," as required by the statute. On the last point, the law creating the function of treasurer of the school funds, defines his duties to be exclusively those of "safe keeping or disbursement," and, moreover, the term treasurer, as denoting a public or private office, has a well-settled signification as "the title of an officer to whom funds are committed to be kept or disbursed."

Attention of prosecuting officers is called to the "practical hints" as to drawing of indictments, contained in Bishop on Statutory Crimes, § 386, an observance of which would obviate the frequent questions as to the validity of indictments.

State vs. Eames, p. 986.

An indictment, or information, which contains an averment negating prescription, presents a material issue of facts, which a jury can alone decide.

It is the duty of the Auditor of Public Accounts to direct *prosecutions* in the name of the State, against officers or individuals who, by any means, become possessed of public money and fail to pay the same upon due and proper demand therefor.

On the trial of such offenders as may be charged with having possessed

CRIMINAL LAW.—Continued.

themselves of a portion of the public money, by means of Auditor's warrants drawn upon the State Treasury, a transcript from his books is competent evidence. *State vs. Strong, p. 1081.*

INFORMATION.

In an information for uttering a forged order for the payment of money the pleader is not required to state the name of the person on whom the order was passed, or that of the person whom the accused intended to defraud. *State v. Adams, p. 238.*

In case of loss of the original information in a criminal cause, a duly certified copy thereof, taken from the record book, may be substituted therefor, upon which copy the trial may proceed. Act 17 of 1878. *State vs. Thomas, p. 318.*

JURISDICTION.

When a party is prosecuted for crime under a law alleged to be unconstitutional, in a case which is unappealable, and where a proper plea setting up the unconstitutionality has been overruled by the judge, a proper case is presented for the exercise of our supervisory jurisdiction in determining whether the judge is exceeding the bounds of judicial power in entertaining a prosecution for a crime not created by law.

The Civil District Court for the parish of Orleans has no control, direct or indirect, over the Criminal District Court, and no injunction or order of any kind issued by the former can have effect to curtail, restrain or suspend the jurisdiction of the latter court.

If the district attorney, joined as respondent, has violated an injunction of the Civil District Court, to the prejudice of relators, their relief lies not in an appeal to our supervisory jurisdiction, but to the punitive powers of the court which issued the injunction.

Act No. 18 of 1886, known as the Sunday law, does not violate either Act 4 of the Constitution of the State concerning religious liberty, nor the 14th Amendment of the Constitution of the United States, nor Art. 1 nor Art. 6 of the State Constitution, touching the constitutional protection of "life, liberty and property," and guarantee of equal protection of the laws.

Said act is a valid exercise of the police powers of government, the nature, extent and grounds of which are discussed and expounded, and therefore subject to none of the constitutional inhibitions urged. *State ex rel. Walker and Merz vs. Judge, p. 132.*

This Court has no jurisdiction of a criminal case wherein a fine of

CRIMINAL LAW.—Continued.

three hundred dollars has not been actually imposed; and when the crime charged is not punishable with imprisonment at hard labor in the penitentiary. *State vs. J. Mack Smith*, recently decided, is affirmed. *State vs. Smith*, p. 320.

JURY.

The rule that the right of peremptory challenge is waived when the juror is passed over to the opposite party, cannot be maintained without qualification; but it must be exercised before the juror is accepted by the opposite party and commenced to be sworn.

Neither the prosecution nor the accused, though he be one of two, or more, jointly indicted and on trial, can be heard to complain of peremptory challenges tendered by the other.

State vs. Durr, p. 751.

An order made by the judge, in course of a trial, in anticipation of the exhaustion of the regular jury panel, directing the sheriff to summon *tales* jurors and hold them to serve, if necessary, for the purpose of saving time and avoiding delay, is not illegal, and will not invalidate a jury formed from such *talesmen* tendered only after exhaustion of the regular panel.

When immediately after the swearing in of the complete jury, and before any further proceeding is taken, one of the jurors is incapacitated by illness from serving, the judge may excuse him and fill his place from the panel, particularly when the bill of exception exhibits no denial of any rights accruing to accused on account of such action.

State vs. Moncla, p. 868.

In all criminal trials the State is entitled to six peremptory challenges for each of the parties who are jointly on trial.

The discretion of the trial judge to discharge jurors on the panel for reasons satisfactory to him will not be reviewed on appeal.

State vs. Waggoner et al., p. 919.

Notwithstanding the defendant's challenges have been exhausted, at a time when one made by the counsel for the State is sustained, no ground of complaint is afforded the former.

The right is that of selection and not that of rejection by the State.

State vs. Carriés, p. 931.

NEW TRIAL.

A new trial will not be granted for matters which the accused, not having availed himself thereof at the proper time, is presumed to have waived.

CRIMINAL LAW.—Continued.

Counsel for accused having withdrawn from his case on the day of the trial and the case having been subsequently called for trial and proceeded with without request for counsel or application for continuance or any objection of any kind by accused, he cannot, after conviction, require a new trial on the ground that he was taken by surprise and was ignorant of his rights. The judge committed no error in allowing the trial to proceed, and defendant's application for new trial, having no basis of legal error, is addressed simply to the discretion of the judge.

The latter being better qualified than this Court to determine whether the interests of justice required a new trial, the exercise of his discretion will not be interfered with.

The State of Louisiana vs. Ellick Walker, p. 19.

Refusal of new trial will not be disturbed when the grounds assailed consist of alleged irregularities in the course of the trial to which no exception was taken at the time of their occurrence.

State vs. Boyce, p. 229.

The refusal of a new trial on the ground of newly-discovered evidence will not be overruled, when the evidence is cumulative only, and not supported otheswise than by the affidavit of accused; or when the evidence, which is supported by the affidavit of the proposed witness, must necessarily have been known to accused before his trial.

State vs. Hanks, p. 234.

Applications for new trial on the grounds of newly discovered evidence are entitled to no consideration when the affidavit of the party convicted is uncorroborated.

State vs. Adams, p. 238.

An application for a new trial, for the purpose of proving the insanity of the accused, must be supported by evidence tending to substantiate the mental aberration of the accused, else the trial judge may decline to grant it.

State vs. Hebert, p. 319.

A motion for a new trial, unaccompanied by any bill of exceptions to the ruling thereon, will not be examined. Unless the record contains either a bill of exceptions, motion in arrest of judgment, assignment of errors, or error patent on its face, the judgment will not be disturbed.

State vs. Darrow, p. 677.

The refusal of a new trial in a criminal case cannot be reviewed on appeal if no bill of exceptions was reserved from the ruling of the district judge on the motion for a new trial. Numerous previous decisions reaffirmed.

CRIMINAL LAW.—Continued.

A complaint involving a matter of fact not patent on the face of the record cannot be presented in a motion in arrest of judgment.

State vs. Pete, p. 1095.

An application for a new trial, predicated on newly discovered testimony, is properly refused if it appears from the judge's assignment of reasons in the bill of exceptions reserved, that it was cumulative only.

The judge has the right to direct that proper corrections be made in the minutes, so as to conform same to the facts within his personal knowledge, even after the trial and verdict has been rendered.

State vs. Harris, p. 1105.

RAPE.

The conclusive presumption of the English common law that a male infant under the age of fourteen years is physically incapable of committing the crime of rape, was based entirely on the physiological fact that, under the climate and other conditions prevailing in England, puberty is very rarely attained under that age.

The contrary being unquestionably the fact in Louisiana, the rule has no application; following 2 Pick, 30; 2 Parker, 174; 14 Ohio, 222; 17 id. 515, 521.

State vs. Jones, p. 935.

STATUTES.

Sections 790 and 791 R. S. are designed to punish a generic offense—shooting with a dangerous weapon, with intent to commit murder, and they define its grades.

In certain circumstances death is the penalty; in others hard labor is inflicted.

The sections may be regarded as one law justifying a verdict under either.

State vs. Wilson, p. 203.

Section 1047 Rev. Stat. authorizes the judge to allow amendment of the information or indictment for larceny, for the purpose of correcting the allegation thereof as to the ownership of the property stolen, when satisfied that such amendment will not prejudice the defense. The ownership of a particular person is not an essential ingredient of the crime of larceny, and when the thing charged to have been stolen is otherwise fully identified, thus putting the accused properly on his defense as to the substantial fact, the error as to the person alleged to be the owner is immaterial and properly subject to correction by timely amendment. The statute is not repugnant to Art. 8 of the Constitution. The decision in *Morgau's* case, 35 Ann. 1139, is not applicable. *State vs. Hanks*, p. 234.

CRIMINAL LAW.—Continued.

Act No. 8 of the Extra Session of 1870, entitled an act relating to crimes and offenses, is not unconstitutional. Reaffirming *State vs. Taylor*, 34 Ann. 798. *State vs. Dubois*, p. 676.

Although a *pocket-knife* be not *eo nomine* a dangerous weapon within sec. 932 of R. S., it may, *by its use*, be considered such, under sec. 794 R. S., which provides punishment for the infliction, with a dangerous weapon, of a wound less than mayhem.

A count, charging that the accused "with a certain dangerous weapon, commonly called a *pocket-knife*, did feloniously inflict a severe wound less than mayhem on the body of," when proved, justifies a verdict of guilty.

The ruling in 38 Ann. 942 has no bearing here.

State vs. Scott, p. 943.

TRIAL.

Where the case shows lack of diligence, and where the motion for continuance exhibits no reasonable certainty of being able to procure the attendance of the absent witness at a future day, the ruling of the court refusing continuance will not be disturbed.

State vs. Morgan, p. 214.

A motion for a continuance, made at the *first* trial of a prosecution for a capital offense, charged to have been committed *nine* days before, ought to be granted, when it appears that it is only on the preceding day that accused could and did secure counsel, and that such counsel had no reasonable time to prepare the defense. Precipitancy, instead of accelerating at times procrastinates the trial of offenders.

State vs. Brooks, p. 239.

The absence of the accused, in a case of larceny, from the court-room at the hearing of a motion of the State's attorney for the amendment of his information, with a view to an alteration of the name or surname of the owner of the stolen property will not vitiate the proceedings. His presence in court is required only at the trial of his guilt or innocence, and not during all other preliminary or secondary proceedings, involving matters connected with the form or conduct of his trial.

State vs. Dominique, p. 323.

In the trial of a criminal case, neither party should be allowed to introduce new or additional testimony after the evidence has been closed, after the argument has been made, after the judge has given his general charge to the jury, and when he is about to give a special charge requested by counsel for the accused, on a point

CRIMINAL LAW.—Continued.

which the district attorney had omitted to support by evidence, and for the introduction of which he seeks to re-open the case.

There must be an end to the examination of witnesses in all trials.

State vs. Paul, p. 329.

Continuance on the ground of absence of witnesses, who are out of the State and beyond the process of the Court, will only be enforced in strong and clear cases in which three elements must concur: (1) Materiality and admissibility of the evidence; (2) due diligence; (3) affirmative showing that the absent witnesses can and will be produced at the future term.

The judge *a quo*, having exhibited strong reasons, showing that these requirements have not been complied with, and having concluded that the application was made for delay, his ruling will not be interfered with.

State vs. Duffy, p. 419.

This Court has frequently signalized its indisposition to interfere with the large discretion necessarily confided to trial judges in matters of continuances, except in cases manifestly arbitrary and unjust.

A continuance is properly refused, when the accused fails to comply with the rule of court requiring the address and locality where witnesses can be found and served, and otherwise fails to use due diligence; also where the facts intended to be proved by the absent witness, can be and is testified to by a witness present, or even the defendant, availing himself of the provisions of Act 29 of 1886, and the testimony would be cumulative only.

State vs. Primeaux, p. 673.

Under the laws of Louisiana the accused in a criminal prosecution has no right to exact a list of the State witnesses. Hence the District Attorney cannot be required by the court to furnish such a list as a condition precedent to a trial of the cause.

An order to that effect by a District Judge cannot be justified as resting on his judicial discretion, and not being sanctioned in law it must be rescinded.

State ex rel. Wickliffe vs. Judge, p. 847.

A motion for a continuance, based on an *affidavit* which is insufficient, cannot be allowed.

A motion to compel the State to elect between two counts, which does not set forth the grounds upon which it rests, cannot be granted. The overruling of it cannot be reviewed on appeal, when the bill taken to the refusal of the court to order the election, does not set

CRIMINAL LAW.—Continued.

forth either those grounds or those on which the action of the trial judge was predicted. *State vs. Bassenger*, p. 918.

VERDICT.

It is not every error in the ruling of a judge during the progress of the trial that will justify the setting aside of the verdict.

To warrant such action on the part of the court it must be so grave an error as to induce the belief that but for its commission a verdict favorable to the occasion might have been returned.

State vs. Hill et al., p. 927.

In case a jury returns into court a verdict which, in the opinion of the trial judge, does not conform to the charge in the indictment, or to any lesser offense of the same kind, he may remand the jury, under proper instructions, to correct it.

In this manner the delay and expense of a new trial may be avoided and same object attained. *State vs. Harris*, p. 1105.

DAMAGES.

The owner of lands, who allows a railroad company to occupy and use the same for the construction of its road and other appurtenances necessary to the operation of a railroad, without remonstrance or complaint, will be held to have acquiesced therein, and such a waiver will bar his action to dispossess the company.

But such a waiver will not defeat his right of action for damages or for the value of the lands taken by him. Affirming *St. Julien vs. Railroad*, 35 Ann. 924.

Lawrence vs. Railroad Company, p. 427.

If the *interference* of the employer in the work, or any of its details, results in the doing of anything, as a part of the work, from which damage ensues to another, the employer is liable.

If one permits the establishment of a public nuisance upon property *under his control*, though incidental to a work otherwise lawful, he will be liable.

When an obstruction or defect, caused or created in a public street, is purely *collateral* to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the employer is not liable. *Davie vs. Levy & Sons*, p. 551.

It is the legal duty of railroad companies, as carriers of passengers, to provide platforms and other accommodations for passengers who desire to take these trains at stations where passengers are usually taken on or put out; to furnish safe and proper means of ingress

DAMAGES.—Continued.

and egress to and from trains, platforms, station approaches, etc., and to furnish at night sufficient lights to securely guide the way and the steps of their passengers, as well as servants necessary to inform them and instruct them as to the location of the trains and as to the usual and the safest mode of reaching them.

This rule which courts must rigidly enforce, is violated by a railroad company which, for any reason, leaves one or more coaches of a passenger train outside of the depot yard or station grounds at which the train stops to take on and put out passengers, and which thus obstructs at night the lights so placed by the city as to lighten both sides of the track on which the train stands.

Hence, a railroad company is responsible for injuries received by a passenger seeking to board one of its trains at night, who finds no one to inform him how to reach the sleeping car attached to the train, which is left standing outside of the yards, and to which a sidewalk, erected by the company under a contract with the city, leads in a direct route, which the passenger follows, and from which he falls by reason of defective or insufficient lights at that part of the station approach.

It is not contributory negligence in a passenger who goes outside of the station yard to enter the coach which he desires, when that coach is left standing outside of such yard, and when a sidewalk, erected by the company and under its control, leads directly to such coach.

Damages allowed by a jury will not be increased on appeal unless manifestly inadequate. *Moses vs. Railroad Company, p. 649.*

Suits against railroad companies for damages may be brought in the parish where the damage was done or the injury received.

Where the speed of railway trains is not regulated by statute, unless in exceptional cases, the existence of a high rate of speed does not argue a fault on the part of the company.

The reasonable rule is that the highest rate of speed is proper and legitimate consistent with the safety of the passengers.

A person cannot recover for an injury to which he has contributed by his own want of ordinary care.

Houston vs. Railroad Company, p. 796.

Plaintiff, walking on an elevated plank-walk, constructed alongside of its track at a station by defendant for the use of passengers and the public, heard a train approaching behind him, and moved to the middle of the walk, where he would have been safe from be-

DAMAGES.—Continued.

ing struck by any passing car of the ordinary width. The approaching train, however, was a construction train of peculiar build, having its brakes attached to the side of the cars instead of at the ends, and thus causing the break-wheels to project some fourteen inches beyond the edge of the car. This wheel being of the height of plaintiff's head, struck him as the train passed and knocked him senseless, inflicting severe injuries.

Held, that plaintiff had the right to be on the walk, and to suppose himself in safety while occupying it at a point beyond the projection of all ordinary trains, and that he was guilty of no negligence.

Held, that defendant's employee seeing him there, and knowing the extraordinary projection of his brakes, was bound to recognize his danger, and guard against it; and hence, was guilty of negligence.

The court is averse to increasing the verdicts of juries, who rarely underestimate damages; but when the jury has failed to do justice, the court, in the exercise of its jurisdiction, must do it.

The verdict in this case is manifestly insufficient, and is increased from \$100 to \$600. *Sullivan vs. Railroad Company*, p. 800.

Plaintiffs, having sold a locomotive to defendant at a price of \$2000, subject to latter's right to reject it after trial, defendant did reject it. Agreement then made that defendant should further use the locomotive for twelve days, at end of which he was either to deliver it or pay the price. He afterwards refused to do either and held and used the locomotive. Plaintiffs claim damages for tortious conversion in the value of the locomotive fixed at a higher amount than the price originally agreed. Case was tried by jury on this issue, plaintiffs asserting value to be greater and defendant asserting it to be less than the price. Jury found for greater sum. Held: that defendant having abandoned the sale and sought to reduce his liability below the price, cannot now set up the price as the measure of his debt. Had the jury found a less amount, the plea would not have been heard.

Plaintiffs are not entitled to special damages for attorney's fees in this suit and amendment to that effect refused.

The verdict of the jury, being based on their estimate of conflicting evidence and being expressly approved by the judge, will not be disturbed. *Fox & Co. vs. Jones*, p. 929.

DAMAGES.—Continued.

There is no authority in any one to treat as a nuisance that which is not so, and whoever assumes to abate, as a nuisance, that which is not so, acts at his risks and perils.

A company which undertakes, under a contract with a municipal corporation, to do a work of public improvement, such as laying a fire alarm telegraph, has no right to invade the premises of an abutting proprietor and cut off limbs of trees overhanging the sidewalk, and which do not obstruct the use of the sidewalk, or when the posts and wires could have been, with less or no inconvenience, located elsewhere.

Even then, it has not the right to cut off branches so as to leave in the foliage an open space ranging in circumference from 25 to 40 feet, for the purpose of passing an almost imperceptible wire.

The city with whom the contract was made did not grant to the company the right of committing the acts complained. While the rights of corporations will be recognized, the obligations under which they are to respect those of others must be enforced.

The damage done can not be said to be irreparable. Time will surely restore the original condition of things.

Tissot et al. vs. Telegraph Company, p. 996.

Under a written contract by which the contractor agrees to demolish a building, but containing a clause that "the work of demolition is to be carried out according to the directions of the supervising architect, whose decisions on all points I agree to accept as final," held: that this operated such a reservation of control over the work as prevented the contractor from being independent, and created the relation of master and servant.

Held: That even if the relation of contractor and contractee existed, yet, if the latter personally interferes in the work, or some part of it, he is responsible for any injury to a servant of the contractor occasioned by such interference.

Held: If an injury results to a servant from the combined negligence of the master and fellow-servant, the master is responsible notwithstanding the contributory negligence of the fellow-servant.

The master is responsible for the negligence of a servant who stands as his vice principal and direct representative, invested with his own authority over inferior servants, and the latter, when injured by such negligence, are not barred by the doctrine of fellow-servant.

A servant is only bound to see patent, not latent, defects; mere

DAMAGES.—Continued.

knowledge of defects will not bar recovery for resultant injury unless accompanied by knowledge that they are necessarily dangerous, and he has a right to rely on the superior knowledge and judgment of his master, and to act on the assumption that the latter will not expose him to evitable risk, and has taken proper precaution to guard him from danger.

When the master has created the danger, he is bound to guard against it, and if he himself does not know or believe that the danger exists, he cannot require superior knowledge and judgment from the servant. *Tutrix vs. Sellers & Co.*, p. 1011.

DIVORCE.

The charges of abandonment, defamation and attempt on plaintiff's life, on which the claim of separation from bed and board is claimed, are not proved.

The charge of adultery on which immediate divorce is claimed, is supported by no sufficient evidence after the incident of March, 1884, which was fully condoned by plaintiff.

Where the conduct of the husband indicates a real intention to have his wife transgress or, at least an intention to allow her to do so undisturbed and unprevented, this constitutes connivance, and operates as a bar to the suit.

Bourgeois vs. Chauvin, p., 216.

A demand for divorce, on the charge of adultery, may be cumulated with a demand for a separation from bed and board.

The simple confession, by one of the spouses, of adultery, is, of itself, insufficient to authorize the dissolution of the marriage. Additional facts must be shown to justify the decree.

Possession by the accused party, of suspicious mixtures, which were taken by physicians and druggists to have been remedies for some venereal disease, is circumstantial evidence, that may be considered in connection with other facts that are proven in the case; but not sufficient to establish his guilt.

Proof of intemperance *since* the filing of the suit may be administered, not to prove a substantive cause, but to show a continuing habit.

Proof of gambling is admissible in support of the charges of squandering money and debauchery.

What are habitual intemperance and excesses which render it *insupportable* for a complaining wife to longer continue marital relations with her husband, is a question for the court, and *not* the party, to decide.

DIVORCE.—Continued.

Habitual intemperance is the constant indulgence in such stimulants as wine, whisky, or brandy, whereby intoxication is produced.

It is not their ordinary *use* whereby drunkenness *may be* occasionally produced; but the *abuse* of them, so long continued that the habit becomes fixed and confirmed.

The evident object of the separation of husband and wife from bed and board was to afford the offending party ample time and opportunity for reformation; and to the party complaining, to understand the situation and determine the propriety of making a reconciliation.

The patience and forbearance of the wife during her long endurance of the cruel treatment of her husband, while entertaining hope of his reformation, should not be mistaken for condonation or reconciliation. It serves rather to strengthen than to weaken her cause of action.
Mack vs. Handy, p. 491.

DONATIONS.

The rights and obligations arising under acts passed in one State to be executed in another, respecting the transfer of *real estate* in the latter, are regulated in point of *form, substance* and *validity* by the laws of the State in which such acts are to have effect.

An act of donation drawn up in Louisiana, in the form in which such acts are required to be put in Georgia, to convey real estate in that State, is valid, although not passed before a notary and two witnesses, as the laws of this State prescribe, under pain of nullity.

Under the law of Georgia, a donation is presumed to be accepted unless the contrary is shown.

Although, in general, a case will not be remanded for the reception of evidence which could have been and was not offered, parties, in exceptional instances, may be allowed a remanding where the rulings of the trial judge during the proceeding are at variance with his finding on the merits, and the party asking the remanding abstained from offering evidence which the judge would have ruled out as superfluous.
Succession of Larendon, p. 952.

ESTOPPEL.

A party is not estopped by judicial declarations made for the purpose of simplifying proceedings and for the common interest and convenience of all parties concerned, and which have neither misled nor damaged anyone.
Succession of Harris, p. 443.

ESTOPPEL.—Continued.

Notwithstanding the exclusion of *parol* testimony for the purpose of correcting, amending or supplementing the return of the sheriff upon a citation, the party urging it as an objection will be estopped, if he has previously introduced *parol* testimony on the subject.

Mohr, Hanneman & Co. vs. Marks, p. 575.

EVIDENCE.

The best evidence must be produced.

A copy of a copy is not admissible in evidence unless the original is alleged and proven to be lost, and that a copy thereof cannot be obtained. C. C. 2268, 2269, 2270, 2279, 2280; 6 N. S. 208; 2 Ann. 998; 6 Ann. 683; 7 N. S. 550; 5 N. S. 175; 13 L. 536.

Mercier et al. vs. Haman, p. 94.

Positive testimony on a given point always predominates over negative testimony on the same point.

Socola vs. Chess-Carley Company, p. 344.

A stale demand long withheld from presentation or prosecution, until he, against whom it is preferred, has died, is regarded with disfavor. It must be established, when no hinderance was in the way, with *more* than reasonable certainty. The unfavorable presumption, created by the delay, can be removed only by peculiarly strong and exceptionally conclusive testimony.

Wood vs. Egan, p. 684.

The law does not permit an attorney-at-law to give in evidence anything that has been confided to him by his client without his client's consent. The privilege is not that of the attorney but of the client. Such testimony is incompetent. It does not matter that the relations of client and counsel have ceased, or that the client be dead.

Morris vs. Cain et als., p. 712.

Acts acknowledged before a Louisiana commissioner have no effect as authentic acts unless the acknowledgement takes place also before two witnesses, legally competent.

Otherwise, they remain acts under private signature, which are inadmissible in evidence, until the signature is proved. 15 Ann. 392; 22 Ann. 457, affirmed.

Admission in evidence to prove *rem ipsam*, of a document which is not authentic and the signature to which is not proved is irregular. The document ought not to have been received at all.

The judgment of *non-suit*, rendered by the lower court, is justified.

Leibe vs. Hebersmith, p. 1050.

EVIDENCE.—Continued.

The rule of evidence is well recognized and well settled: that, where a litigant resorts to the declarations of another, he must take the whole or none. They are a unit. He cannot use the portions favorable and repudiate the rest.

It has, accordingly been held that, where such party introduces in evidence, without qualification, an instrument of writing, in which the other party has an interest, he cannot be permitted to impeach or gainsay the verity of its statements.

Kallman vs. His Creditors, p. 1089.

EXECUTORY PROCESS.

Executory process can issue on the pledged note, although the plaintiff annexes unauthentic evidence of the debt due him and secured by the pledge.

Insurance Company vs. Lozano, p. 321.

An order of seizure and sale must be supported by authentic evidence *exclusively*.

Such an order is improperly granted without authentic evidence of the transfer of notes by indorsement.

In executory proceedings the judge cannot entertain as evidence matters *in pais*.

Van Raalte vs. Congregation, p. 617.

EXPROPRIATION.

In an expropriation proceeding for a right of way the verdict of a jury of the vicinage, composed of land owners, and presumed to be familiar with the value of the land sought to be expropriated, will not be disturbed by this Court unless it is found to be inconsistent with the proof in the record, or entirely unsupported by evidence.

Railroad Company vs. Frank, p. 707.

FEEES.

Act 33 of 1870, fixing fees of appraisers in succession cases, does not apply to fees of experts in insolvencies, which are to be allowed on the basis of *quantum meruit*. Where the allowance is fair and reasonable, it will not be increased.

Mullan vs. His Creditors, p. 397.

Attorneys' fees, stipulated in a mortgage act in case of non-payment of the debt at maturity, are due when the mortgagee is bound to employ counsel to collect his claim, and such counsel represents him in the insolvency proceedings.

Ibid.

FORCED HEIRS.

Since the amendment to article 2239 C. C., forced heirs are not restricted in their right to annul simulated contracts of those from whom they inherit by parol evidence, to their legitime. The right of action in such case is now unlimited.

Such an action is not barred by prescription of one, five or even ten years.

Where a party dies holding property under a simulated title, and devises his estate to a universal legatee, such universal legatee succeeds to the testator's rights with their defects and is charged with his author's defects, infirmities and bad faith.

Spencer et al. vs. Lewis et al., p. 316.

By the act 5 of 1884 the right of forced heirs to establish by parol the simulation or acts or conveyances executed by those from whom they claim to inherit extends to the entire estate, and the restriction of such right to the *legitime* is removed.

Cole and Husband et al. vs. Cole et al., p. 878.

In the absence of proof that an act of sale, under private signature, attacked by forced heirs, as designed to serve as disguised donation, was such in the intendment of the parties the court will not pass upon the sufficiency of the act *sous seign privé*, as translatif of the property.

The sales of immovable property made by parents to their children may be attacked by the forced heirs as containing a donation in disguise, if the latter can prove that no price was paid, or that the price was below *one-fourth* of the real value of the immovable sold, at the time of the sale. R. C. C. 2444.

The law does not favor actions by forced heirs to undo transactions of their ancestors as done in fraud of their rights. The burden is upon them, and, in the absence of convincing proof, and in the presence of evidence which merely cast a suspicion, the court will not take the property of one man to give it to another. (Act of 1884 not applicable here.) The law does not, in proper cases, leave the heirs without relief.

If it be true that forced heirs can be likened to creditors, and may resort to the revocatory action, their right to sue would be barred by *one* year from the death of the parent.

A partition cannot be ordered of property which cannot be described, so as to give bidders an exact knowledge of what is to be offered for sale.

Moore et al. vs. Wartelle et al., p. 1067.

FOREIGN GUARDIANS.

Under the effect of C. C. 415, the rules laid down in articles 363 and 364, relative to tutors and guardians of minors residing out of the State, apply equally to guardians of insane or interdicted persons residing out of the State.

Such guardians, when duly appointed and qualified according to the law of the State where the insane person resides, are entitled to recognition as such by our courts, to be vested with the power and authority defined in said articles. But to support a decree to that effect, it is essential that they should not only have been appointed, but that they should have qualified in conformity with the laws of the State where they have been appointed.

Interdiction of Parker, p. 333.

FRANCHISES.

The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the beds of its road, or water for its engines, and the like. *Morgan vs. Louisiana, 93 U. S. 217.*

Such franchise include the right of appropriating lands for the construction of necessary appurtenances, without which the road could not be successfully operated.

Such a franchise is transferred in a marshal's sale of a railroad and all its franchises to the purchaser, even if he is a natural person.

Lawrence vs. Railroad Company p. 427.

The original grantee from the city of New Orleans of a franchise or privilege of a right of way over certain streets for railroads, for a term of twenty years, cannot, after the expiration of said term, enjoin the city from advertising and selling the same franchise, on the ground that the city has failed to comply with its alleged contract obligation to take and pay for its "railroads, rolling-stock, equipments and fixtures."

Such failure, even if the obligation existed, could not operate to prolong the franchise, or to restrain the city in the exercise of its sovereign authority over its streets for the benefit of the people to whom they belong in common.

The specifications of the proposed sale cover only the franchise of the right of way, and do not propose to sell any property of plaintiff, all of whose legal rights are expressly reserved under a clause requiring the purchaser to respect and equitably settle for them; and under the same clause plaintiff may compete at the sale without waiving any rights.

Railroad Company vs. City et al., p. 709.

FUNDING.

The *bona fide* holder of bonds issued under acts 69 of 1870 and 35 of 1865, are entitled to have been funded, under act 3 of 1874.

The legality of the first is not attacked by act 5 of 1875, which reflected on the second.

The validity of the last has been recognized judicially, twice, by the Supreme Court.

If it be true, that more bonds have been *funded* than were *issued*, the plaintiff cannot be made the victim of that circumstance.

Manning vs. Board of Liquidation, p. 327.

The *bona fide* holder of State bonds, the genuineness and legality of which is not at issue, issued under act 69 of 1870, E. S., is entitled to have them funded under act 3 of 1874, although the books of the Auditor show that more bonds have been funded than were issued.

The plaintiff cannot be made to suffer from the error or fraud committed.

Buckingham vs. Board of Liquidation, p. 343.

The Constitutional ordinance for the relief of delinquent taxpayers, which authorizes the funding of Auditor's warrant in baby bonds, only grants to the warrant holder the *option* of having his warrants exchanged for bonds to be exercised prior to the date therein fixed for their maturity.

The power conferred upon the Funding Board continues subsequent to that date for the sole purpose of examining, auditing and funding *nunc pro tunc* such warrants as shall have been presented to them or to some officer of the board antecedent to that date.

State ex rel. Newman vs. Funding Board, p. 395.

It is the obvious purpose of the State funding law No. 11 of 1875 that the *status* of each issue of State bonds or warrants, the legality of which is questioned, should be settled in a single suit by any holder of such securities; and, for this purpose, the law authorizes all other holders of like bonds or warrants to intervene in such suit and assert their rights.

Whatever relaxation might be made in favor of a bondholder who had been ignorant of the pendency of such a suit, it would be inequitable to permit one affected with full knowledge thereof to take the chances of a favorable judgment which would settle his rights, and then, after an adverse decision, raise, in a new suit, issues contradictory of those presented in the first. In any event, even if not estopped by *res judicata*, the plaintiff in such new suit, would certainly be compelled to overthrow, by conclusive proof,

FUNDING.—Continued.

the case which had been made in the former one and on which the decision as to the *status* of the bonds rested; and the defendant was authorized to offer and have received the whole record of such former case, including the evidence.

Weighing the whole evidence as thus made up, the facts on which the former decision was based are not disproved, and plaintiff's bonds must be denied the privilege of being funded for the same reasons for which like bonds were rejected in the case of *Sage vs. Board of Liquidation*, 37 Ann. 412.

Moreover, these bonds were not included in the Auditor's Report of 1874, which this Court held in the *Pacific R. R.* case, 30 Ann. 980, was the basis of the funding scheme, within which, consequently, they were not embraced.

The case is not affected by any equities which plaintiffs, as transferees before maturity, may have under the law of negotiable instruments. The Court determines, not all their legal rights, but only their right to *fund*, which right must submit to the conditions imposed by the funding law, applicable to all obligations of whatever nature and by whomsoever held.

Adams & Co. vs. Board of Liquidation, p. 689.

The suit being upon certificates of appropriation evidencing claims for current municipal expenses during years from 1874 to 1877 exclusive, the judgment should have been restricted to payment out of the revenues of the several years in which the claims arose.

The certificates declared upon carrying on their face an express stipulation they "bear no interest," none can be recovered except from judicial demand.

The right to fund under acts 133 of 1880 and 67 of 1884, cannot be determined judicially except contradictorily with the Board of Liquidation.

Fire Engine Company vs. City of New Orleans, p. 981.

GARNISHEE.

Article 246 C. P. is applicable to the City Courts of New Orleans, and when the garnishee under *fi. fa.* has confessed that he is indebted to the judgment-debtor in a sum of money, the judge is authorized to order him forthwith to pay such amount into the hands of the constable.

Where such order is made after three days from service of notice of the seizure on the judgment-debtor, who has made no opposition

GARNISHEE.—Continued.

thereto, he cannot, under *certiorari* in this Court, have such orders annulled on the ground that the money seized was due for wages and, therefore, exempt. He had the opportunity to raise this issue in the lower court, and, having failed to do so, the judge was not bound to raise it for him. The order was regular and authorized by the law.

State ex rel. Madison vs. Judge, p. 622.

Garnishment process is a method of seizure and not a bill of discovery.

Interrogatories should be confined to matters tending to disclose indebtedness to, or possession, or control of property belonging to the debtor.

Garnishees have the right to except to impertinent questions and to withhold answers thereto until such exception has been ruled on.

When such exceptions have been taken, failure to answer before ruling thereon cannot be ground for judgment *pro confesso*.

When answers to proper interrogatories unequivocally disclose that the garnishees have owed nothing and had no possession or control of any property of the debtor, since the garnishment proceeding, and such answers have not been traversed, garnishees cannot be required to answer other interrogatories touching the disposition and whereabouts of property which may have been in their possession at some time prior to the garnishment. Such inquiries could be proper only under a traverse.

Bank vs. Boatner, p. 843.

HOMESTEAD.

The homestead legislation of 1865 required no registration of exemptions claimed under it, and such a requirement cannot be now exacted.

In construing exemptions under the law of 1865 reference must be had to the condition of things existing at the date of seizure.

The *proviso* incorporated into the act of 1865, which declares that "no debtor shall be entitled to the exemption provided for in this section, whose wife shall own, in her own right, and be in the *actual enjoyment* of property worth more than one thousand dollars," was evidently intended to operate as a restraint upon its exercise, under the conditions imposed, and has reference to the time of its assertion judicially, and to a *wife* then in being.

Garnier vs Sheriff et. al., p. 884.

HUSBAND AND WIFE.

The rule of our jurisprudence, which denies the interference of courts in suits for separation between spouses, in cases in which there are mutual wrongs, will not apply to the case of a wife who may be shown to be of a quarrelsome disposition, but whose husband is shown to have been guilty of cruel and outrageous excesses towards her, including the frequent infliction of blows on her, and an attempt to take her life.

To condemn a woman to live under the authority of a brutal husband, whose excesses and cruelty render her life with him, absolutely unbearable, simply because such conduct has driven her to desparation, culminating in endless quarrells with him and in violent explosions, would be a denial of justice.

Machado. vs Bonet, p. 475.

Where a man conveys an immovable to a woman and subsequently marries her, there being no marriage contract respecting the property conveyed, he cannot, during the marriage, though living apart from his wife, maintain an action against her to have said conveyance declared a simulation, nor can he by passing a simulated title to another person, enable such person to have the conveyance to the wife annulled on the ground of simulation of other cause.

Hawthorne vs. Clark et. al., p. 678.

A general mandate to the husband by a wife seperate in property to manage her plantation and administer her property, does not authorize him to bind her by the drawing of bills of exchange, the power to draw which must be express and special.

When bills are so drawn by such an agent in the name of his principal, payable in the future, and are accepted by the drawees and by them passed off to third persons, the latter cannot recover on them against the principal without proof of express and special authority in the agent to draw them.

Folger & Co. vs. Peterkin, p. 815.

INJUNCTION.

An injunction can lawfully issue to prevent a water works company from cutting off its water supply where the consumer has offered to pay in advance the proper amount for the use of such water during the year, and the company claims a higher rate than is truly due and exigible.

Under the terms of its charter, the company is bound to supply water at the rate charged by the city of New Orleans previous to the

INJUNCTION.—Continued.

date of said charter, which was fifteen cents for a thousand gallons to large consumers.

Ernst & Co. vs. Water Works Company, p. 550.

The Constitution guarantees to every person the right to seek redress through the courts for any injury to his person or property, or to enforce any legal demand therein.

So a court is without power to prevent, by an injunction, a person from bringing a suit before another court of competent jurisdiction, to enforce a right claimed or redress a grievance.

State ex rel. Sweeney vs. Judge, p. 619.

The principal and the security on an injunction bond and on a forthcoming bond, by means of which the principal arrested the sale and obtained the possession and enjoyed the use of working animals seized by a party, will be held in solido for the depreciation in value of said animals as a result of bad treatment while in the possession of the principal on such bonds.

Lallande vs. Trezevant et als. p. 830.

Where the co-proprietor and editor of a newspaper has, under contract with his co-partner, the absolute right to have full editorial control and to dictate its policy and formulate its utterances upon any and all topics and subjects without hindrance or interference from his partner or any other source, the deprivation and denial of such right by the acts of his co-partner constitutes an injury for which pecuniary damages would be an inadequate compensation, and, therefore, in the sense of the law, irreparable.

If an injunction, restraining the party from violating and depriving the other of the exercise of such right, be dissolved on bond, such order of dissolution is an interlocutory decree which may cause an irreparable injury, and is, therefore, subject to a suspensive appeal.

Puckette vs. Judge, p. 901.

INSOLVENCY.

The judgment of court awarding an insolvent discharge from his debts has no other or further effect than one homologating the *proces verbal* of the proceedings of the meeting of his creditors granting the discharge.

The creditors are called before a notary by summonses issued pursuant to an order of court. This is not a technical citation.

Proceedings in matters of insolvency are of a *summary* character.

Mohr, Hanneman & Co. vs. Marks, p. 575.

INSOLVENCY — Continued.

An attorney employed by a person in insolvent circumstances and in contemplation of declaring his insolvency and of making a *cession*, is entitled to compensation for advice and services rendered in the preparation of his petition and schedule; and that compensation must be fixed by the court having jurisdiction of the insolvent's estate according to the proof.

The provisions of Rev. Stats., Sec. 1817, exclusively apply to the "fees of the counselor who shall be appointed to represent the absent creditors," and same must be deducted from the amount awarded to them. *Dunbar vs. Creditors*, p. 589.

Creditors who, pending a proceeding in insolvency, elect a syndic who sells under judicial sanction the property mentioned in the bilan, cannot be held in damages, though the proceeding be subsequently annulled and dismissed, when the petition is barren of the charge of malice and want of probable cause.

Forced into court by the debtor, they had a right to protect themselves. If any injury has been sustained in consequence by such debtor, it is *damnum absque injuria*, for which no recovery can be had. *Philips vs. Lehman & Co. et als.* p. 631.

An opposition charging fraud and undue preference against an insolvent, and seeking to have him debarred from the benefit of the insolvent laws, cannot be maintained, when the act complained of was undone *before* the cession and matters restored to their previous condition, the less so where the transactions appear to have taken place in good faith, and no injury resulted therefrom to the complainants. *Kallman vs. His Creditors*, p. 1089.

INTEREST.

Where mercantile accounts have been closed by rendition and acceptance without objection, the debtor cannot thereafter object to charges of 8 per cent interest and to compounding interest by capitulation of succession balances.

Such settlement of accounts being equivalent to payment, the debtor can only recover usurious charges less than one year old.

Allen, West & Bush vs. Nettles, p. 788.

JUDGMENT.

When a judgment is rendered, interpreting a former appealable judgment by incorporating in it a feature which, if it had been expressly contained therein, would have supported an appeal to this Court, such latter judgment will also be appealable.

Other grounds of motion untenable.

JUDGMENT.—Continued.

The judgment of a district court which has been signed can only be revised or altered in the modes provided by law. Under the guise of interpreting the judgment, the judge cannot, after signature, make a substantial change in the judgment itself on a mere rule for that purpose.

Interest cannot be collected on a judgment for money which is silent as to interest.

Insurance Company vs. Harbor Protection Company et als., p. 583.

All final judgments rendered by the Supreme Court are liable to be revised, on application for a rehearing, made within the delay prescribed by law.

The rule applies to judgments making a final disposition of applications for mandamus, certiorari and other remedial writs. State ex rel. Gerson vs. Judge, 37 Ann. 261, affirmed.

Hence, a final judgment disposing of an application for a *certiorari* is not executory before the expiration of six judicial days, or before a final disposition of an application for a rehearing in the case.

But this rule cannot be construed as an absolute prohibition on the party in whose favor the judgment has been rendered in the Supreme Court from proceeding to an execution thereof before the expiration of legal delay.

A premature execution of such a judgment is a mere irregularity which may be corrected by an application for a rehearing timely made, and which becomes valid after the expiration of the delay, and for having recourse to such an execution the party cannot be held responsible in damages. *Regan vs. Washburn*, p. 1071.

A judgment that has been rendered in an attachment suit against an absentee, represented by a curator *ad hoc*, is one *in rem*; and not *in personam*. It affects the property attached only.

In such case the jurisdiction of the court is derived from the seizure of the property, and its judgment has no validity except against the thing thus subjected to its control.

The registry of such a judgment does not result in a judicial mortgage, and a subsequent lease of the property is unaffected thereby.

Herber vs. Abbott, p. 1112.

JUDICIAL SALES.

A purchaser of mortgaged property at judicial sale, under proceedings taken for the collection of one of a series of mortgage notes, is entitled to *retain* in his hands the surplus of the price beyond the amount taken under the writ of sale, until it is demanded by the

JUDICIAL SALES.—Continued.

holders of the remainder of the series ; but he owes interest at the rate of five per cent per annum until same is paid over, or deposited, according to law.

The decisions of this Court, which exonerate the purchaser from the payment of interest, were rendered under the Code of 1808, which did not contain the provisions of Art. 2553 of the present Code, and which establish a rule different from that contained in the Code of 1808.

Morris vs. Cain et als., p. 712.

A real tender is condition precedent, *sine qua non*, to authorize a suit to rescind a judicial sale. When it is alleged, denied and not proved, the plaintiff's action must be dismissed.

Farquhar vs. Iles, et al., p. 874.

JURISDICTION.

State courts have the right to examine collaterally into the alleged defects of judgment rendered by United States courts of original and limited jurisdiction, when such judgments are made the basis of litigants' titles. But the inquiry must be restricted to an examination to ascertain whether the court which rendered the judgment had jurisdiction and whether it exercised that jurisdiction according to the forms of proceeding established by law.

The inquiry into the facts must be restricted to test the verity of allegations as to domicile or citizenship, necessary to give jurisdiction. Want of jurisdiction may be shown either as to the subject matter or the person, or in proceedings *in rem* as to the thing. 18 Wallace, 457, *Thompson vs. Whitman*.

No inquiry can be made as to the correctness of the judgment upon the merits.

In dealing with such questions, arising out of proceedings instituted under the Act of Congress, providing for the confiscation of property used for insurrectionary purposes, State courts must be guided by the rules of common law as expounded by the Supreme Court of the United States, and not by local laws, unless the latter harmonize with Federal jurisprudence.

In a common law proceeding *in rem* for the condemnation of property seized under the statute, the monition published is a citation on all interested persons, who are thus made parties to the action—and after a default there is no necessity for a jury trial. 11 Wallace, 303 ; 20 Wallace, 110. Alien enemies have the right to appear and defend their rights in a court of justice when cited therein. 93 U. S. 283. *Pasteur et al. vs. Lewis and Lynd*, p. 5.

JURISDICTION.—Continued.

This Court has no jurisdiction of a suit instituted to have an attorney's privilege for his fee for less than \$2000 recognized on a judgment exceeding that sum. *Young vs. Duncan et al.*, p. 86.

The Supreme Court, under Article 90 of the Constitution, has *exclusive* control and general supervision over all inferior courts. It *alone* can issue the remedial writs mentioned in that article.

Other appellate courts may issue similar writs, but *only* in aid of their appellate jurisdiction.

A prohibition issued otherwise by a district court to a justice of the peace is an absolute nullity. It ought to have been ignored and the justice ought to have proceeded notwithstanding.

A *mandamus* cannot issue to a justice who is willing to proceed, but who thinks himself prevented by superior authority from doing so. The prohibition having been annulled, the justice must proceed with the case. *State ex rel. Hirsch vs. Judge*, p. 97.

The Supreme Court cannot and will not exercise jurisdiction in all cases not excepted by the Constitution, unless it appears affirmatively from the pleadings that the matter in dispute involves an amount exceeding two thousand dollars.

The burden of proof is not on the appellee to show want of jurisdiction, but on the appellant to prove the existence of jurisdiction, as defined in the Constitution.

In an action looking to the fixing of boundary lines, it is incumbent on the appellant to show that an amount is therein contested exceeding two thousand dollars, in order to maintain his appeal here. *Hite et al. vs. Hinsel & Talbieu et als.*, p. 113.

The Supreme Court has no jurisdiction over a tax suit, in which a sum not exceeding \$2000 is claimed, where the constitutionality or legality of the tax sued for is not put at issue and where the question presented is one of *procedure* only.

If the amount sued for exceeded \$2000, the court would, as in ordinary similar cases, in which money is claimed, have jurisdiction over the question of *procedure*. *New Orleans vs. Schoenhausen*, p. 237.

The pendency of a suit in the Circuit Court of the United States, involving the alleged unconstitutionality and illegality of a city ordinance, adopted on the 12th of May, 1885, is not a bar to the right of a State court to entertain jurisdiction of a controversy involving another and a subsequent ordinance of the same Council

JURISDICTION.—Continued.

on the same subject, passed at a date posterior to the institution of the suit in the Federal Court.

Villavaso et al. vs. Bartlett et als., p. 247.

The Supreme Court has no jurisdiction over a controversy for the distribution of the proceeds of a judicial sale made to satisfy the judgment creditor, where the claim of the latter does not exceed \$2,000, the amount of the sale is less than that sum and the aggregate of the sum claimed by the third opponents is inferior to the proceeds of the sale.

Consent cannot confer jurisdiction *ratione materæ*.

Heirs of Gee vs. Thompson, p. 310.

A State court can entertain jurisdiction of a suit *in personam* against the master and owners of a vessel, coupled with a sequestration, to enforce a money claim secured by lien, by a State statute and not created by the maritime law.

There can be no more objection to the *mesne* process, the purpose of which is to secure the property to respond to the personal judgment when rendered, than there can be to subject it to execution after judgment.

A decision holding that a proceeding is *in personam* against one who is the master of a vessel, does not determine that the suit has that character against the *owners*, where the owners are not before the court on an application for a prohibition.

State ex rel. Raymond vs. Judge, p. 499.

In an action to recover property real and personal with rents and revenues, and damages for injury and waste, the whole amounting to only \$1,710, the addition of a roving claim for \$500 additional damages for illegal possession, without any specification of the nature thereof, will be treated as fictitious and not entitled to consideration as part of the amount in dispute giving this Court jurisdiction.

Hall et al. vs. Ourtis, p. 504.

In a proceeding involving a question of jurisdiction *ratione materæ*, a party will not be allowed to cumulate several judgments so as to create an appealable amount, which is not disclosed by any one of the judgments in question.

In a contest between two parties for priority of execution on the same property, against the same defendant, the value of the property seized is not the test of jurisdiction, if neither party claims any privilege thereon.

State ex rel. MacKensie, p. 508.

JURISDICTION.—Continued.

A court of this State vested with general equity powers, having jurisdiction of the *person* of a defendant, is competent to decree a conveyance by him of land in another State and to enforce the decree by process against him.

In an action by a syndic, based on charges of simulation and fraud, to annul transactions made by the insolvent, anterior and posterior to the *cessio bonorum*, the transferee (though the latter's wife) has an interest at stake and is a necessary party.

In the absence of such party, an exception of no cause of action filed, the defendant brought into court will not be considered.

A suit will not be dismissed for want of a necessary party, when it would serve no useful purpose to do so. The Court will remand.

Seixas, syndic, vs. King, p. 510.

Where the proceeds of a sale of succession property exceed \$2,000 and the surviving widow claims \$1,000 out of this fund on account of the privilege in favor of a widow in necessitous circumstances, which claim is contested by mortgage creditors, this Court has jurisdiction.

Succession of Gousley, p. 570.

Notwithstanding a plea of *res judicata* is sustained, and a portion of plaintiffs' demands are dismissed, leaving others in controversy, involving less than \$2,000, this Court is not necessarily divested of jurisdiction thereby.

Mehle et al. vs. Bensel, p. 680.

In a garnishment proceeding involving an appeal, an issue restricted between plaintiff and several garnishees, against each of whom plaintiff had prayed for judgment in separate and distinct amounts, the test of jurisdiction is in the respective amounts prayed for against each of the garnishees, and not by the original demand against the defendant, or in the cumulated amount of all the claims against garnishees respectively and separately.

State National Bank vs. Allen, p. 806.

In a suit for the liquidation of a partnership, to which the suing partner engrafts a demand against a third party, for the ownership of certain property, as an alleged asset of the partnership, the test of jurisdiction is the value of the property in dispute.

In such a case there is no demand for any portion of a fund to be distributed.

The Supreme Court can allow no damages in an appeal not within its jurisdiction. The only judgment it can render is one of dismissal.

McLeod vs. Simonton et al., p. 853.

JURISDICTION.—Continued.

A contestation as to the constitutionality or legality of a tax does not arise in a proceeding directed solely against the assessing officers of the State and attacking only the assessment of property.

In such cases, this Court only has jurisdiction when the amount in dispute exceeds \$2,000; and the amount in dispute is the difference between the taxes due on the assessment assailed and those which would be due under the reduction asked.

Bush & Levert vs. Police Jury, p. 899.

A District Court is incompetent to enforce the execution of a judgment rendered by a Justice of the Peace, the more so where the existence and validity thereof are put at issue.

Objections to the jurisdiction of that court, in such a case, ought not to have been overruled.

A prohibition lies to such court to prevent the execution of the judgment rendered by it to enforce the judgment thus assailed.

State ex rel. Police Jury vs. Judge et al., p. 984.

The provision of article 165, No. 9 C. P., making corporations committing trespass or doing damage "liable to be sued in the parish where such damage is done or trespass committed," does not confer jurisdiction of such action upon justices of the peace away from the corporate domicile. The article 165 is found under a particular title of the C. P., the first article of which restricts the application of the provisions under said title to district courts, and declares that "special rules are hereafter established for justices of the peace." Such special rules are found in the following Title IV. of said code, articles 1069 and 1070, of which expressly forbid them from exercising jurisdiction over defendants domiciled in the State outside of their territorial limits.

The case is not affected by the fact that the provision of article 165, No. 9, is also embodied in section 725 R. S. The same Legislature adopted both the Revised Statutes and the Code of Practice, and in cases of conflict, gave precedence to the latter. By embodying the provision as an amendment to article 165, and by leaving articles 1069 and 1070 unchanged, the legislative intent was fully indicated to maintain the latter in full force. Moreover said articles are in direct conflict with section 725 R. S., and under article 3990 R. S. the code must be "held and taken as the law governing."

State et al. Railroad Company vs. Justice of the Peace, p. 990.

JURISDICTION.—Continued.

The Legislature, in granting to the defendant company immunity from suit elsewhere than at its domicile, for causes of action other than trespass, designed to restrict the character of suits *not* brought at the place of domicile, to actions of tort, for wrongs committed, and its *unlawful* entry upon the lands of citizens *vi et armis*.

Trespass is an unlawful act committed with violence on the property or rights of another. An action of trespass is that which is instituted for the recovery of damages for a wrong committed with immediate force.

In case the owner of land permits its use and occupancy by a railroad corporation, and the construction thereon of a *quasi* public work, without resistance or complaint, he cannot, therefore, require the demolition thereof, nor prevent its use by such corporation.

Such owner is not debarred of his action for *compensatory* damages, if instituted at the domicile of the company; but he cannot affect to treat such entry as tortious, and sue it, as a trespasser, at the place where the injury is alleged to have been sustained.

St. Julien vs. Railroad Company, p. 1063.

JURY.

The party who applied for a jury cannot waive the jury at the moment of trial, unless the other party consents.

Lewis et al. vs. Klotz, p. 259.

LAWS.

A particular is not repealed by a general law, unless they are so repugnant that they can not stand together under any circumstances.

A grant of power conferred by the Legislature in the charter of a municipal corporation to pass and enforce ordinances to suppress and punish the sale of adulterated drinks, is not recalled by a subsequent general statute providing for the prosecution of the same offense throughout the State. Hence, an ordinance of the city of New Orleans, adopted under a power to punish the sale of adulterated drinks, and which punishes the adulteration of milk for sale, is not abrogated by Act No. 82 of 1882, which defines and punishes the adulteration of drugs, food and drinks.

State vs. Labatut, p. 513.

Act 18, of 1886, commonly known as the *Sunday Law*, operates uniformly throughout the State, and cannot be construed so as to authorize to be done, in one place, on Sundays, that which it forbids to be done, on that day, in *all other* places.

LAWS.—Continued.

Whoever claims an immunity from the operation of a general law, must prove it with certainty. Exemption laws must be strictly construed. In such cases, *doubt is fatal*.

Grocery stores, required to be closed on those days, outside of a public market, cannot be allowed to be open, as stands, on those days in such markets, in the absence of express legislation authorizing the same.

The exemptions from the operation of the law, enumerated in Section 3 of the act, cannot be extended so as to include cases not within legislative contemplation. *State vs. Fernandez, p. 538.*

LEASE.

A judgment for possession of premises leased can be extinguished by agreement. The agreement is a new obligation. The obligation to deliver the premises resulting from the judgment is extinguished by the substitution of an obligation to pay the rent due and remain in the premises to the end of the lease.

When a lessor sues for possession of premises, and a dissolution of the lease, and a judgment is rendered in his favor, the covenant of the lessee to pay rent ceases to exist. Rent is the compensation for the occupancy of the property. The lessor is not entitled to his property and the rent for the same.

When a lessor, after he has obtained a judgment cancelling the lease, voluntarily receives from the tenant all the rent due according to the terms of the lease and waives his right to issue a writ of ejectment, his act in receiving the rent recognizes the lease as still in force, and in lieu of possession accepts a specific performance of the contract of lease. One may have a legal right, yet waive it by becoming reconciled to his debtor.

When a judgment cancelling the lease is rendered, the parties thereto are placed in the same position they occupied before the lease was signed. By voluntarily accepting all the rent due, and rent in advance, the old lease was either reinstated, or there was a new lease from month to month.

When a writ of ejectment illegally issues without probable cause, malice will be inferred.

When a lessor, in illegally issuing a writ of ejectment was actuated by malice, he is liable to a lessee for damages, as a recompense for an outrage upon his rights and feelings as a citizen and a man.

Deslonde vs. O'Hern, p. 15.

The seizure and sale of one-third interest in a plantation under lease

LEASE.—Continued.

and before its expiration, does not dissolve the lease as to entire plantation.

When the term of the lease was two years, and the lessees bound themselves to leave on the leased premises, at the end of the last year of the term, a certain quantity of the products of the place, the purchaser at judicial sale of an undivided third of the plantation, made at the end of the first year of the lease, could not take possession of the entire plantation and convert to his own use the crops thereon, under the plea that, the lease being dissolved by the said sale and the crops thereon converted, not exceeding what the lessees were bound to leave there, under the contract, at the expiration of the term of lease, he had a right to take said crops. The crops belonged to the lessees, and they were entitled to recover their value.

When the contract of lease is deposited in the recorder's office for registry, and an indorsement made thereon by the recorder, showing its deposit for record, but the contract is not recorded in the book of conveyances, but in another book kept for the recording of leases, etc., such registry will protect the parties whether the contract was recorded in the proper book or not. Arts. C. C. 2266, 2245, 2254; *Payne vs. Pavey*, 29 Ann. 116 reaffirmed.

Lewis et al. vs. Klots, p. 259.

The sale of the unexpired term of a lease involves the sale of the obligations as well as the rights. But nothing prevents the severance of the right of occupancy from the obligation to pay the rent and the sale of the former alone. The purchaser, in such case, would, of course, assume the risk of his right being defeated by failure of the principal lessee to pay his rent; but he would, by no means, become personally bound for the rent.

The sale in this case being of the right of occupancy alone, and not of the lease, the defendant cannot be held for the rent.

Walker and McVean vs. Dohan, p. 743.

When a lease is silent as to the use which is to be made of the leased premises, it does not follow that the lessee may make what use of them he pleases; but he is still bound to enjoy the thing "according to the use for which it was intended by the lease." C. C. 2710.

In ascertaining the use so intended, resort is to be had to surrounding circumstances, such as the nature and situation of the premises,

LEASE.—Continued.

the use to which they had been previously applied, the occupation and character of the person applying for the lease, etc.

In aid of such circumstances, parol evidence may also be received to show that during the negotiations the lessee had been expressly notified that a particular use, foreign to the destination of the premises, would not be permitted. Such evidence does not violate the general rule prohibiting parol to vary or contradict a written contract, but falls under the exception admitting parol in order to ascertain the nature and qualities of the subject matter of the contract. Under the facts of this case, an injunction to prohibit the establishment of a bar-room on the premises leased is perpetuated.

No injury having resulted to the lessor and his right to dissolution under C. C. 2711 being not absolute, but subject to judicial discretion, the dissolution of the lease is denied.

Railroad Company vs. Darms, p. 766.

LEGACIES.

Bequests for pious uses are highly favored by law.

An unincorporated institution, organized, administered and maintained by a municipal corporation, and known as "*The Insane Asylum*," may be the object of a charitable bequest.

A legacy to such an establishment is intended for the relief of the indigent insane of the city, and vests, at the testator's death, in the municipal corporation for the use and benefit of the unfortunate cared for by it.

An unconditional legacy, once vested, cannot be divested. After it has passed, it cannot revert.

The municipal corporation may subsequently discontinue such institution as a *locus*. It may confine and keep such persons in another local and special institution.

By such discontinuance the legacy does not lapse and revert.

Succession of Vance, p. 371.

A legacy to the incorporated churches of a particular Christian denomination in the city of New Orleans "to the end that the poor of said respective churches may be cared for," is a donation to pious uses expressly recognized in the Civil Code and highly favored by our jurisprudence.

It contains no element of a *fidei commissum* or prohibited substitution.

The uncertainty in such a designation of the beneficiaries of the be-

LEGACIES.—Continued.

quest is a characteristic of donations to pious uses, and is no obstacle to their validity.

There is no uncertainty as to the legatees described in the will.

Charity is not foreign to the objects and purposes of incorporated Christian churches, but, on the contrary, is an essential function in their economy, and they are competent to receive and administer donations for charitable purposes.

Succession of Auch, p. 1043.

LEEVE DISTRICTS.

The State of Louisiana has the inherent right to regulate her finances and to use her revenue according to her own judgment, unless restrained by any contract, obligation or verbal right created by the Legislature in favor of creditors, as to any portion of the same.

Any balance remaining to the credit of one or more of the separate funds created by law, after the satisfaction of all warrants drawn against the same, is the property of the State, with full power in the Legislature to apply the same to any lawful purpose under the Constitution.

Holders of warrants drawn against the general fund of 1884 have no contract or vested right to any balances for taxes due in 1883 and previous years, which were destined by Act 107 of 1884 to the general fund of 1884, sufficient to defeat the legislative will as expressed in Act 79 of 1886, ordering certain described taxes for said years to be placed to the credit of a special levee fund, and adopted before the collection of such taxes had been effected.

Act No. 79 of 1886 is not a special or local law within the intendment of Article 48 of the State Constitution; hence, it is not affected by the omission of the notice prescribed in that article.

Levee districts are not corporations within the scope of the prohibition contained in Article 56 of the Constitution. They are State functionaries exercising delegated powers as parts of the government. An act of the Legislature authorizing one of the levee boards to build a levee in the State of Arkansas, if necessary, to protect a portion of the State from overflow is not violative of any article, prohibition or provision of the State Constitution.

Act 79 of 1886 is not an appropriation of money within the meaning of the Constitution, as it does not purport to draw any money out of the treasury. It merely directs a transfer of a contemplated revenue, from a separate fund, to which it was destined under a general act, to a special fund, and thus moves money within the

LEEVE DISTRICTS.—Continued.

treasury, but not out of it. A statute of Louisiana authorizing the construction of a levee within the State of Arkansas, with its consent, for the protection of Louisiana lands, is not amenable to the prohibition of the second paragraph of Section 10 of Article 1 of the Constitution of the United States, forbidding any State, without the consent of Congress, to enter into any agreement or compact with another State. It is an exercise of no greater power than the requisition of the Governor of one State on the Governor of another, for the arrest of a fugitive from justice.

Fisher vs. Auditor and Treasurer, p. 447.

Act No. 44 of 1886 does not violate Art. 29 of the Constitution, that "Every law shall embrace but one object, which shall be expressed in the title." The act embraces but one broad and comprehensive object, and its various provisions embrace means for its accomplishment, appropriate and referable to the object, and all of which are expressed in the title.

The act does not violate Art. 48 of the Constitution, prohibiting local or special laws without previous published notice having been given of the intention to apply for them. This law is removed from the operation of Art. 48 by Arts. 213 and 214 of the Constitution, the first of which provides that "a levee system shall be maintained in the State," and the other authorizes the establishment of levee districts, etc. The power granted by Art. 213 is ancillary to the duty imposed by Art. 214. The power and duty so expressly conferred by these articles passed to the Legislature untrammelled by the restrictions of Art. 48, affirming 33 Ann. 568; 35 Ann. 492; 35 Ann. 1142.

The power conferred by Art. 214 of the Constitution to levy a tax of five mills on all the property of the district, was not exclusive of the power of local assessments for the same purpose. The intention was to grant a new and additional power, which but for such express grant, would have been prohibited by other articles of the Constitution, not to destroy powers already possessed.

Arts. 35, 43, 53 and 55 of the Constitution have no application, because this is not an *appropriation* or a *revenue* bill within the meaning of those articles.

Arts. 44 and 56 do not apply, because this act does not "contract or authorize the contracting of any debt or liability on behalf of the State;" and the bonds authorized are for the benefit of the levee district corporation itself, and not for any other person or corporation, as intended by Art. 56.

LEVEE DISTRICTS.—Continued.

The assessments levied by the act are not violative of Arts. 203, 209, 214 and 242, on the subject of taxation, affirming, after discussion, former decisions, holding that "local assessments for public works, levied, not on taxable property generally for common public benefit, but only on particular property specially benefited by the works as an equivalent for the direct benefit conferred, although an exercise of the taxing power are not considered as taxes within the scope and meaning of constitutional restrictions on the general power of taxation."

Although the legislative power to levy local assessments is thus recognized, yet it does not follow that every exaction may be supported by simply calling it a local assessment. Three elements must concur to make a valid local assessment: 1st. The work must be public, and of a character to confer special benefit on the district assessed, as distinct from the general benefit to the State at large. 2d. The assessment must be supported by benefits, actually or presumptively received by the persons or property subjected to it. 3d. The contribution must not manifestly exceed the benefit conferred.

Any pretended assessment wanting in these elements would cease to be taxation, and become a taking of property without process of law and without adequate compensation.

When, however, the Legislature, in the exercise of legislative power, has levied local assessments which are not clearly wanting in the foregoing elements, it is not the province of the judiciary to annul and set them aside.

Local assessments are, as a general rule, levied on land alone; but this is only because land is the kind of property which is usually benefited; but there exists no such constitutional or other restriction on the legislative power; and when particular personal property has enjoyed a benefit from the works to which it owes its existence and preservation, nothing prevents the Legislature from assessing it.

Under this act the cotton is assessed, not simply as a bale of cotton, but as a bale of cotton which has been produced on lands protected by the levees, and has, during the period of its cultivation and growth, enjoyed the benefit of its protection. No one dealing with such cotton can be prejudiced, because all are advised by the law, from the moment when the cotton is planted, that, when it reaches the condition of a ginned bale, it must pay this tax.

LEVEE DISTRICTS.—Continued.

The provisions of the fourteenth amendment to the Constitution of the United States and of Arts. 6 and 156 of the State Constitution on the subject of taxing property, without due process of law, or without adequate compensation previously made, do not apply to local assessments, but only to exactions made under the right of eminent domain.

We have no jurisdiction over the reconventional demand.

Planting and Manufacturing Company vs. Tax Collector, et. als., p. 455.

MANDAMUS.

The Supreme Court can exercise its jurisdiction in so far only as it shall have knowledge of the matters argued and contested *below*. A *mandamus* will not lie to a recorder for refusing to allow an appeal from a judgment inflicting a fine for the violation of a municipal ordinance, when the constitutionality or legality of the ordinance authorizing the fine was not contested and put at issue before the judgment.

Mandamus does not lie to compel the granting of an appeal in a case which, on the face of the papers, is unappealable.

State ex rel. Lamarque vs. Recorder, p. 341.

Mandamus will not lie to compel a judge of the Civil District Court to rehear a cause which, in the exercise of undisputed jurisdiction, he has heard, and in which he has rendered a final judgment disposing of the whole merits of the cause, and forming *res adjudicata* between the parties, on allegations of the insufficiency and illegality of the reasons on which such judgment was based.

State ex rel. Board of Administrators vs. Judge, p. 664.

A *mandamus* will lie to compel the performance of duties *purely ministerial* in their nature, and when they are so clear and specific that no element of discretion is left in their performance, but that as to acts or duties necessarily calling for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required, *mandamus* will not lie.

State ex rel. Daboval vs. Police Jury, p. 759.

A *mandamus* made peremptory against the police jury of a division of a parish, may be enforced after a consolidation of the divisions of the same parish, against the policy jury of the parish thus formed.

State ex rel. Fisk vs. Police Jury, p. 979.

MARRIAGE.

Under the laws of Louisiana the only condition on which a null marriage can produce civil effects, is that it was contracted in good faith by the parties or by at least one of them ; in case of the latter, the civil effects can benefit only the party in good faith, and the children born of the marriage.

The good faith of the innocent party must be evidenced by circumstances which indicate a reasonable belief that both parties pretending to contract the marriage were able to marry. Good faith cannot be credited to a woman who marries a man who to her knowledge has a living wife, whom she has seen herself a few months before the pretended marriage, and by whom she had been informed that no divorce had been pronounced between the spouses, and who had been informed a few days before the projected marriage that the man was married and not divorced.

The presumption of good faith must yield to positive proof of the reverse.

Succession of Taylor, p. 823.

When a man contracts a second marriage whilst his first wife is living and undivorced, and dies leaving property acquired during the second marriage, if the second wife married in good faith, the estate will be shared equally by the two wives.

Where after the death of the husband the widow of the second marriage recovers an immovable, which had been acquired during her marriage, but from which the husband had been illegally evicted before his death, the property, together with its fruits and revenues recovered at the same time, will belong to the second community and be subject to be equally divided between the two widows.

The widow of the second marriage is only accountable for the revenues of the property in her possession received by her after the dissolution of the marriage from judicial demand. She is a possessor in good faith.

Jermann vs. Tenneas et als., p. 1021.

MARRIED WOMEN.

A married woman, separate in property, is properly authorized by the district judge to sell her paraphernal estate, when her husband is unable and fails to minister unto her necessities, and she has no other means of supporting herself.

The refusal of the husband to give his sanction to such sale being unfounded, can lawfully be supplied by that of the judge.

Le Blanc vs. Rougeau, p. 230.

MARRIED WOMEN.—Continued.

It cannot be contested that a married woman, duly authorized thereto by her husband, has the right to compromise a lawsuit pending against her, or to make a transaction relative to her separate paraphernal property or estate, for the purpose of *preventing* a lawsuit appertaining thereto.

Such a compromise and transaction have, between the interested parties, a force equal to the authority of things adjudged.

In case brother and sister, who are sole heirs-at-law to an estate fallen to them by a deceased ancestor, compose their differences, and one sells to the other his or her share, the husband of the sister is a *nominal*, though necessary party, and his appearance therein does not convert it into a community covenant.

A married woman cannot be heard to set up the defense that the debt was her husband's, in a suit upon the compromise, after she has failed to make it in the previous suit, or withdraw it in consideration of the advantages she secured by the compromise.

The cases suggesting that a married woman is *not estopped* from *attacking* her own judicial confession, are based *entirely* upon the supposition that such confession may have been induced by marital coercion.

Outside of such cases, she may, under exceptional circumstances, not existing here, be permitted to *attack* a transaction that has received the sanction of her *husband only*, upon proper averments and proof of error as to the matters transacted, fraud, violence or duress, and perhaps of her husband's indebtedness.

This class of contracts is clearly distinguishable from that in which equivalents are exchanged. By the very nature of the agreement, the intention of the parties is the avoidance of litigation, even at the expense of what belongs to them.

A force equal to the authority of things adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed; or because it has been affirmed on appeal.

If extraneous proof were required, in support of a transaction entered into by a married woman, it could not be said to have a force equal to the authority of things adjudged. It would be thereby deprived of the character of an unappealable judgment and reduced to the rank of a conventional obligation. To decide that a married woman may, with the authorization of her *husband only*, enter

MARRIED WOMEN.—Continued.

into a transaction, is to decide that no extraneous proof is required to entitle interested parties to a judgment for the enforcement of it, upon its production and proof of its execution.

Calhoun vs. Lane et al., p. 594.

- A judgment of separation of property duly rendered in favor of the wife against her husband, cannot be inquired into or attacked collaterally by a creditor of the husband, whose claim had not yet arisen when the judgment was rendered.
- A married woman separated in property from her husband has the legal right to purchase property in her own name and for her separate account, and the burden of proof is on the party assailing the validity of such sales. *Lewis vs. Peterkin et al.*, p. 780.

MINORS.

The surviving parent, holding property in common with minor children of a marriage with the deceased spouse, whether of the late community or derived by testament, may cause same to be adjudicated to him, or her, in whole or part, at an estimation of value fixed by experts appointed and sworn by the judge, after a family meeting shall have declared that such adjudication is for the minor's interest and advantage, and their undertutor shall have given his consent thereto.

- A judicial adjudication of property thus held in common will not be annulled for *informalities* anterior to the decree of adjudication. Such decree is conclusive as to the facts on which it rests, *until corrected on appeal*, or annulled in a direct action.

When, as in this case, the property sought to be adjudicated to the surviving spouse is shares of stock of a corporation, and a rule is taken on such corporation to show cause why the stock should not be transferred on the books of the corporation, in conformity with the decree of adjudication, the answer of the corporation thereto, presents an issue that must be decided as a necessary step to the completion of the adjudication. On appeal taken from the decision of the judge *a quo*, on the rule, we may decide upon the regularity of the anterior proceedings, and whether the consummation of same would be to the best interest and evident advantage of the minors. *Succession of Boulemet*, p. 1046.

MORTGAGE.

- A judicial mortgage takes effect from the date of the recordation of the judgment in the mortgage book of the parish where the immovables of the debtor are situated, and this rule applies to cases

MORTGAGE.—Continued.

where the judgments are rendered in a country parish at the same term of court.

Article 555, C. P. has no bearing on the question, and does not conflict with the articles of the Civil Code on the subject of judicial mortgages. *Chaffe & Sons et al. vs. Walker*, p. 35.

The eviction of a purchaser under a voidable tax sale, who, at the time of the purchase, held a mortgage on the property, renews the mortgage, and relieves it from all effects of the extinguishment resulting from the mortgage creditor's having acquired the ownership of the thing mortgaged.

But this renewal is ineffective if the creditor has, in the meantime, permitted the principal debt, to secure which the mortgage was given, to become prescribed.

The purchase by the mortgage creditor, while extinguishing the mortgage, did not destroy the debt or affect the creditor's right and power to enforce payment of it and to prevent its prescription. Having suffered the debt to become extinguished, his mortgage is necessarily destroyed, and he has no more right to enforce it when the debt has been extinguished by prescription than if it had been extinguished by payment. *Dawson et al. vs. Thorpe*, p. 366.

A conventional mortgage, under our law, can result only from contract. Where such a mortgage is claimed, under the terms of an ambiguous writing, two things are essential, viz: (1) The intention to create a mortgage on the part of the parties thereto; (2) in order to have effect with regard to third persons, the expression of that intention with sufficient clearness to serve as notice to them, when the instrument is recorded.

Finding both these essentials wanting in the instrument under which the mortgage is claimed, the right is denied.

Succession of Benjamin, p. 612.

The terms and stipulations contained in act of mortgage consented, as a collateral security for an *anticipated* indebtedness for advances to be made in aid of the cultivation of the crop of cotton, must control the destination of the proceeds thereof; and same cannot be otherwise imputed or applied without the consent of the debtor and mortgagor. *Mix vs Creditors*, p. 624.

A contract of mortgage, like that of sale, the object of which was to give preference to one creditor over another, in securing the payment of a just debt cannot be set aside as fraudulent, unless suit be instituted within one year from the date it was entered into.

MORTGAGE.—Continued.

A mortgage note may be reissued to a third and innocent holder, for value before maturity, without impairing the security of the mortgage, provided it is only a collateral security.

Morris vs. Oain et als., p. 712.

A mortgage may be consented to secure an obligation which has not yet risen into existence; but in such case the mortgage can only be enforced in so far as the future obligation shall have been created. It is not necessary that a mortgage should express upon its face that it was executed to secure a future debt. *Ibid.*

An ancient debt, secured by mortgage, always kept alive, and finally acknowledged formally in a notarial act, whereby it is declared to be secured by mortgage on the same property, specially described, and which is duly and seasonably recorded in the parish in which the real estate encumbered lies, is entitled to be paid with a first rank, in preference to a debt acknowledged subsequently and secured by an act afterwards executed and next recorded.

In such a case it is immaterial whether the ancient act of mortgage was or not reinscribed within the ten years following its inscription.

The second act accomplishes the purposes of a reinscription and secures the debt as effectually as if the previous act had been reinscribed, at least as concerns the first subsequent mortgage creditor.

Hart vs. Caffery, p. 894.

A judicial mortgage attaches to real property of the debtor and affects third persons on registry of the judgment.

A voluntary transfer subsequently made by the debtor to one who was then a creditor for the unpaid price of sale of such property to such debtor, in consideration of the return of the note, and who had not acquired, from the original vendor, the right to demand the nullity of the sale, in case of non-payment of the price, does not discharge the judicial mortgage.

The property thus transferred passed *cum onere* and is liable to be subjected to the payment of the judgment.

Hamilton et al. vs. Bank, p. 932.

The sale or transfer of a note secured by a special mortgage and vendor's privilege carries with it both the mortgage and privilege. This right accrues to the purchaser by mere operation of law, and is not dependent upon the articles of the Civil Code, which treat of payment with subrogation, legal or conventional.

The right is acquired by the purchaser, even if the payment of the

MORTGAGE.—Continued.

note, which is in suit by executory process, is made to the sheriff; provided, the contract be shown to be one of purchase between the seizing creditor and the transferees of the note.

In a sale of an immovable, burdened with a mortgage and vendor's privilege, belonging to a succession, no other claim or charge can be preferred to the vendor's privilege out of the proceeds of the sale, but the expenses incurred for making the sale.

In the case of a sale of succession property, burdened with mortgages, by executory process, the purchaser at such sale cannot be compelled to turn over to the succession representative the amount of ranking special mortgages, which he is entitled to retain, after satisfying the junior mortgage of the seizing creditor. *Morris vs. Cain*, 34 Ann. 657.

But if the unsatisfied mortgages are general, the residue of the purchase price cannot be retained by the purchaser, and the same must be paid over to the succession representative to be administered upon. *Teissier vs. Bourgeois*, 38 Ann. 256.

Succession of Forstall, p. 1052.

MUNICIPAL CORPORATIONS.

Tax-payers have a standing in court to contest upon proper charges, the validity of a municipal ordinance and contract executed under it, whenever its enforcement may increase the burden of taxation.

A district court, the lower limit of whose jurisdiction is fixed, has jurisdiction to pass upon such controversy, when the matter in dispute, which is the value of the contract, exceeds that limit, and the Supreme Court has jurisdiction, on appeal, when that value exceeds two thousand dollars.

A petition of taxpayers discloses a cause of action, which charges that a municipal corporation has, in excess of its powers and in violation of prohibitory provisions in its charter, passed an ordinance under which a contract of lease was entered into.

Courts of justice have the right to sanction and to determine such controversies, but in the exercise of that power ought to act with great caution and have due regard for the legal discretion with which the Legislature may have clothed such corporations, which are in reality, State functionaries, whose acts must be respected whenever they are done in furtherance of delegated authority.

Handy et al. vs. New Orleans et als. p. 107.

An injunction *in limine* does not lie to prevent the mayor of a municipi-

MUNICIPAL CORPORATIONS.—Continued.

pal corporation from signing an ordinance passed by the council, purporting to repeal a previous ordinance and contract under it.

Non constat, that the mayor will sign the ordinance, or that the council will pass it over his veto if returned unsigned, or that it will become executory.

It is not until after such ordinance has been signed, or become executory, that its validity can be judicially contested and determined.

Otherwise, the court would be exposed to adjudicate on the legality of an ordinance merely *in embryo*, which may never be signed or acquire vitality.

Courts of justice have enough to do in dealing with real, existing and actual wrongs, without anticipating and combatting hypothetical evils of the future which may or not arise.

A decree dissolving an injunction *in limine*, issued to prevent the signature by a mayor of an ordinance passed by the council, and a judgment sustaining an exception of "no cause of action," under insufficient averments of the petition, are correct and will not be disturbed on appeal.

Railway Company vs. Mayor and Council, p. 127.

Article 248 of the State Constitution of 1879 contains a delegation of a complete and exclusive power to the city of New Orleans, to regulate the slaughtering of animals for food within its corporate limits. It embraces a delegation of the police power inherent in every sovereign government, which cannot be the subject of a contract, and which is not exhausted when once exercised on any subject falling within its scope.

In the exercise of its police power the city of New Orleans has the unquestioned right to restrict the slaughtering of animals for food to certain designated districts or localities.

It has also the right to change the designated districts for such business, if the slaughter-houses established under its previous authority should become nuisances to the surrounding neighborhood. But that discretion is not arbitrary, it must be exercised with wisdom and caution.

An unconstitutional provision in a city ordinance does not vitiate the whole ordinance, unless the two provisions are so closely connected in object and meaning, that the one cannot exist without the other. When a municipal corporation passes an ordinance, legislative in its character, importing no private contract or rights, the members of the corporation enjoy the same prerogatives

MUNICIPAL CORPORATIONS.—Continued.

as members of a State Legislature, and their conduct or motives in passing the ordinance can not be questioned.

Villavaso et al. vs. Barthet et als. p. 247.

The Act No. 38 of 1856 provided a peculiar system of government for the parish of Jefferson, under which the various corporations composing the parish, and not therein named, were to be represented on a parish committee which were to apportion the general parish expenses between the several corporations, and the latter were to pay the same out of the funds raised by the exercise of their own powers of taxation.

When, subsequently, the city of Kenner was incorporated and vested with taxing and other municipal powers, it became one of the "corporations composing the parish of Jefferson," and fell under the operation of the Act of 1856, by the effect whereof she was entitled to representation in the parish committee, and to pay her share of general expenses through the assessment of that committee and without direct parochial taxation.

Such has been the construction of the law after its passage. The city of Kenner has never been awarded representation on the police jury, but has been excluded therefrom; and has been always recognized as entitled to representation on the parish committee and subject to its assessments, which have been annually made

Acts No. 58 of 1874 and No. 119 of 1884, exhibit a similar interpretation of the law.

The power assumed by the police jury, on which Kenner was not represented, in 1878 and subsequent years to levy direct taxes on Kenner, while she was, at the same time, subjected to assessments by the parish committee, cannot be supported. It would involve taxation without representation and the imposition of double burden, besides contravening the law of the State as interpreted by the parochial authorities, by the Legislature of the State and by the local judge of the district.

This case does not fall within the general rule that incorporated towns, in absence of special legislative exemption, are subject to police jury taxation, which is not abraded.

Felix vs. Wagner et als., p. 391.

A change in the charter of a municipal corporation or a substitution of a new charter to the old one, will not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation.

MUNICIPAL CORPORATIONS.—Continued.

The City of New Orleans, founded by Bienville in 1718, is identically the City of New Orleans in 1887.

Its present charter, 1882, repeals all laws in conflict or inconsistent with, or contrary to its provisions, and by irresistible implication maintains all special laws, not at such variance with them.

Act 100 of 1878, relative to private markets, in furtherance of which ordinance No. 4798 A. S. has been adopted, forbidding private markets within six quares of a public market, is a special law and is not in conflict with the charter of 1882 and has not been repealed, neither has been said ordinance, which being legal, justifies the infliction of fine, etc, in cases of violation of its prohibitions. *State vs. Natal et als., p. 43.*

NEGOTIABLE PAPER.

A bank which has received from a depositor, as collateral security for an account there overdrawn, or which may be overdrawn subsequently, certain certificates or bonds payable to bearer at a future day for value, is entitled to hold the same as against one claiming ownership thereof and alleging that *one whom he had constituted* the depositary of same had misappropriated them—unless the claimant shall allege and prove that the bank's acquisition was *mala fide*.

A vendor of real estate that is charged with a general mortgage, who deposits with the notary passing the title, a sum of money or valuable securities as a guarantee that he will procure the erasure of same, incurs the risk of the deposit. *Saloy vs. Bank, p. 92.*

PARTITION.

In a partition of lands between two joint proprietors, a plantation falls to the share of one of them, burdened with a special mortgage in favor of the Citizens' Bank. In the act of partition there is an acknowledgement of this debt, and a stipulation that each shall be equally responsible for it, and also of mutual warranty. Such stipulations do not entitle the survivor of the contracting parties (or his heirs) to claim from the succession of the other the payment of one-half of the mortgage debt, when no eviction or disturbances has been suffered on account of the encumbrance; and where the debt is only payable through a long series of years, and no part of it has been paid by the party asserting the claim against the succession.

A judgment directing a payment to an heir out of the succession funds in the hands of an administrator, on account of the heirs'

PARTITION.—Continued.

interest in the succession is erroneous, where in the same judgment the credits claimed by the administrator in his account for payments made to the other heirs are stricken therefrom and remitted for adjustment to the partition. The claims of all the heirs should have been thus dealt with.

Where there is a conflict of testimony touching attorney's fees, and the testimony and the record do not afford sufficient information to enable the court to estimate them, the judgment of the lower court thereon will not be disturbed.

In the Matter of the Estate of Labauve, p. 388.

In case a partition cannot be effected in kind without serious inconvenience to one of the co-proprietors of the property held in indivision, it must be sold at public auction in order that the partition be effected by licitation. *Blakemore vs. Blakemore, p. 804.*

PARTNERSHIP.

A partnership once formed and put into action becomes, in contemplation of law, a moral being, distinct from the persons who compose it.

It is a civil person which has peculiar rights and attributes. The partners are not the owners of partnership property.

It belongs to the ideal being, which has the control and administration thereof, to enable it to fulfill its legal duties and obligations. The partners own the *residuum*.

Partnership property—whether ordinary or commercial—is liable to creditors of the partnership in preference to those of the individual partners.

Notwithstanding the interest of the deceased member of an ordinary partnership is subjected to administration as his other property, funds realized from the sale thereof cannot be withdrawn from partnership creditors and applied to minors' claim to \$1000.

Succession of Pilcher, p. 362.

Taxes levied on the business of a partnership form part of the expenses of the business, and, when recovered back from the government, are to be distributed among the partners according to the terms by which the expenses were shared.

Succession of Harris, p. 443.

A surviving partner, bound by the articles to liquidate the concern within six months after the dissolution of the partnership by death, and who has no rights, after the expiration of that term, to

PARTNERSHIP.—Continued.

prolong the liquidation, is liable for the value of all the assets at the termination of the delay, when they cannot be returned *in integrum*.

Such partner cannot shield himself from responsibility by showing that those assets have been sold by judicial authority, when it is shown that the property apparently adjudicated to outsiders, and which never left his possession, has been transferred to him for the same prices, on the same day, or shortly after, conformably to a previous understanding.

Where part of such assets is not thus transferred, in consequence of a deception, the partner will nevertheless be responsible, when it appears that bidders were deterred from bidding for his benefit.

The succession of the deceased partner is entitled to recover after deducting the liabilities from the assets, the share to which the deceased is, by the articles of partnership, authorized to claim in the residue, with legal interest from the expiration of the delay allowed for the liquidation of the concern.

Klotz vs. Macready, et al., p. 638.

Parties, though not partners *inter se*, may be such as to third persons. When persons occupying relations to others as partners, have obtained undue advantages of the latter, by means of false representations and unlawful acts, they are answerable *in solido* for whatever loss has been incurred thereby, irrespective of their obligations as partners.

Baldey & Lightner vs. Brackenridge, p. 660.

In an action by one partner against another praying for a full and final settlement of the partnership affairs, a demand that the defendant, who had been left in charge as liquidator after the dissolution, file an account of his gestion, is only incidental to, and not inconsistent with, the main demand.

Neither is a prayer to recover *at least* a certain amount, and such further amount as may be found due on settlement, inconsistent with the action of settlement.

A plea of full and final settlement is not sustained by evidence of only a partial settlement.

Thompson vs. Walker, p. 692.

The books of a commercial partnership are receivable in evidence, and are entitled to great weight and consideration when they bear upon the disputed questions of fact and with reference to which the testimony of witnesses is conflicting.

In case the business of the partnership has been almost exclusively

PARTNERSHIP.—Continued.

conducted by one member of the firm, and the books have been kept by him, the other is entitled to introduce evidence of the incorrectness of the entries contained therein, and also to show that others, not entered, should be made; but this is subject to overthrow by countervailing testimony.

Carpenter vs. Camp et als., p. 1024.

PLEADINGS AND PRACTICE.

As a general rule amendments to the pleadings should always be allowed in promotion of justice, where they do not change the issues nor cause delay. *Carter et al. vs. Farrell et al.*, p. 102.

A ruling refusing a continuance to procure an absent witness to establish other defenses and striking out of the answer to the rule impertinent issue, is correct and will not be disturbed.

Fusz & Backer vs. Trager & Noble, p. 292.

The plea of *lis pendens* is a declinatory exception, and cannot be permitted in an answer to the merits; and if incorporated in an answer, it is thereby waived and loses its efficacy as an exception.

An exception to the jurisdiction of the court *ratione personæ* is likewise a delinatory exception, and must be pleaded *in limine litis* and before answering the merits. *Mix vs. Creditors*, p. 624.

The plea of no cause of action must be judged by the averments of plaintiff's petition.

When a rule, taken from the adverse party to show cause why certain depositions should not be read, has been made absolute, as shown by the minutes of the court, it is too late to urge objection to the service of the rule after the trial has begun and the evidence has been offered. Rule should have been taken to have the minutes corrected so as to conform to the facts.

Baldehy & Lightner vs. Breckenridge, p. 660.

When suit is brought on a note in names of three members of dissolved firm, and is excepted to on ground that one is dead, plaintiffs may amend by striking out name on proof that his interest had been fully transferred to one of the others.

A judgment rendered on the verdict of a jury defective in being for plaintiff without specifying amount, cannot be sustained; but in reversing it this Court, when satisfied that the record presents all the facts and evidence necessary to a decision of the cause, will not remand it, but will render such judgment—following 13 La. 109, and 14 La. 343.

PLEADINGS AND PRACTICE.—Continued.

Where the judgment maintaining exception to an intervention declares that it was rendered by reason of the law and the evidence taken thereon, and the record presents no such evidence, the judgment will be affirmed. *Miller, Lyon & Co. vs. Cappel et al.*, p. 881.

When the defendant in a suit for damages on account of an alleged tort, dies pending the litigation, after citation and before issue joined, the suit may be prosecuted against the heirs of the deceased who have accepted his succession. C. P. art. 25.

But, if besides lawful heirs, the deceased has left a surviving wife, the widow cannot be sued as an heir, but only as a widow in community, as she thus becomes liable for one-half of the damages which may be recovered, and the heirs are then liable for the other half, each for his virile portion.

If the widow is cited as an heir she is not properly brought into court in her legal capacity, and in such an event the succession being only in part represented, no valid judgment can be rendered in the case.

A trial held under such pleadings is illegal, null and void, and the judgment rendered therein must be set aside, and the cause remanded to the lower court for further proceedings.

Dirmeyer vs. O'Hern, p. 961.

Defendants have a right to object to a cumulation of several distinct causes of action against them, where these have no cognate origin, and where they have no common interest to be adjudicated upon in one judgment.

They may sever, but are not bound to do so.

In a suit in damages for the wrongful obtention of an injunction, the plaintiffs in injunction the sureties on the bond and an alleged instigator or fomentor of the proceeding, though sued, some *ex contractu* and others *ex delicto*, may be joined as defendants in the same suit, reserving their right of severance in their defenses.

Consent cannot give jurisdiction; and when our attention is called to a defect of jurisdiction *ratione materiae*, we are bound to rectify it, whatever the laches of the parties.

Riggs & Bro. vs. Bell et als., p. 1031.

PLEDGE.

The pledgee of a note, secured by mortgage, has the right to take measures, that is: to sue for payment in his own name, or for the use of the pledger, to satisfy the debt to secure which the pledge was made, subject to the obligation of accounting to his debtor.

Insurance Company vs. Lozano, p. 321.

PLEDGE.—Continued.

A railroad constructed on soil not belonging to the owner of, or to the corporation which built the road, is movable property and as such liable to the law regulating pledges on moveables.

The pledgee of a railroad may take legal possession, as required by the law on pledges through a third person chosen by him and the pledgor.

A party who is bound as endorser with others for the payment of a note, secured by pledge, is legally subrogated to all the rights of the pledgee by the payment of the note.

A party whose materials, sold to another, were used in the construction of a work, has no privilege on such work, because his materials were not sold to the owner or his agent, or his sub-contractor.

Woodward vs. Railroad Company, p. 566.

Under the 3d section of Act 44 of 1882, the consignee from the date of consignment under bill of lading, acquires a perfect pledge with right to sell and pay his debt with the proceeds. The death of the consignor, after the consignment, could not affect such rights.

But no consignment made after the death of the owner by an unauthorized person could operate to create a pledge in favor of the consignee. The death fixed the rights of all creditors as to the succession property and no one could acquire any new privilege thereon.

Allen, West & Bush vs. Nettles, p. 788.

PRESCRIPTION.

An action under R. S. 301, to enforce against the directors of a bank liability for having furnished false statements of the affairs of the bank to the State Treasurer, is *ex delicto* and prescribed by one year.

An action, under R. S., Secs. 300 and 301, to enforce the liability of the directors of a banking corporation for the debts of the bank, on the ground that they had participated in, or assented to, the bank making loans and discounts, whilst in an insolvent condition, is one *ex quasi delicto*, and prescribed by one year.

The act which gives use to a *quasi* contract, is a lawful one, and is permitted. That which gives use to a *quasi* offense is unlawful, and is prohibited.

Prescription cannot be eked out by inference, nor extended from one cause to another by analogy; neither can the legal interruption of prescription be so extended.

Knoop, Hanneman & Co. et al. vs. Blaffer et als., p. 23.

PRESCRIPTION.—Continued.

Against an action for the resolution of a sale, based exclusively on the failure of the vendee to pay the last five of a series of seven instalments of the purchase price, and when the first two have been extinguished by voluntary remission by the heirs of the vendor to the heirs of the vendee, prescription commences its course on the day of the debtor's default in payment of the last instalment that is covered by the suit. *Edwards vs. White*, 34 Ann. 989, affirmed.

Heirs of Pike vs. Heirs of Charlotte, p. 300.

Emancipation by marriage does not terminate the suspension of prescription as to minors, which continues until the actual majority of such minor. Plea of prescription of ten years overruled.

As to the property purchased at tax sale, the prescription of three years is pleaded under section 5 of Act 105 of 1874, which declares: "Any action to invalidate the titles to any property purchased at tax sale under and by virtue of any law of this State, shall be prescribed by the lapse of three years from the date of such sale."

This statute has never been repealed. Being a statute of prescription it is legitimately retrospective, and operates on tax sales made prior to its passage, at least from the date of the law.

Section 62 of Act 42 of 1861, under which this sale was made, providing for obtaining an Auditor's deed of sale, does not impair the effectiveness of the tax collector's deed as a title.

The section 5 of the Act 105 of 1874 is distinctly a prescription of an action. It does not purport to cure defects in titles; nor does it concern itself with the rights of parties. It simply says, whatever be the rights, they must be asserted within three years or else the action is barred.

The power of the Legislature to pass such laws is undisputed and the courts are bound to enforce them.

In this case, defendants have a title derived from a tax sale made under a law of the State, under which they have held open, public and notorious possession for thirteen years and for more than three years since plaintiffs reached the age of majority, before this action to invalidate their title was instituted.

The statute is a bar to the action. The question fully considered under numerous authorities: *Lague vs. Boagni*, 32 Ann. 912, distinguished from the case at bar. *Person vs. O'Neal*, 32 Ann. 237 overruled.

Barrow et al. vs. Wilson et al., p. 403.

A citation judicially held to be absolutely null is not sufficient to interrupt prescription running in favor of a defendant.

PRESCRIPTION.—Continued.

Hence, the citation served on a married woman, under a petition in which she is sued as a single woman, cannot subsequently, after the defendant is sued as a married woman and duly cited, be invoked as a citation sufficient to interrupt prescription.

Through such a citation the married woman was not made a party to the suit, and if the service of the legal citation is made after prescription has acquired, the defendant having been cited too late, the plea of prescription is good, and it will defeat the action.

Bertrand vs. Knox et als, p. 431.

The petition in this case exhibits an action by a former minor arrived at the age of majority against the succession of a deceased tutor, to recover an amount alleged to be due by him in virtue of his gestion as tutor.

As such, it stands in the same position as if the tutor were alive and the action were directed against him.

More than four years having elapsed after the majority of plaintiff before the suit was brought, the plea of prescription of four years is sustained.

Gallion et al. vs. Keegan, p. 468.

An executor is a judicial depositary of property of the estate he represents; and his possession is that of the creditors for whom he is a *quasi* mandatary. Hence, his custody of succession effects, continued by the assent and acquiescence of the heirs, suspends prescription in favor of the creditors whose claims have been acknowledged.

Their acknowledgment by placing them on account or tableau of debts, or appending them to a petition for an order of sale to pay debts, will suffice.

Morris vs. Cain et als., p. 712.

Possession "under the title of owner" is one of the essential conditions in the prescription of thirty years by which the ownership of immovables can be acquired without any need of title or possession in good faith. C. C. Art. 3500.

If it appears that the party who pleads the prescription of thirty years acknowledged at any time before his possession covers a space of thirty years that the title of ownership was in his opponent, his plea is defeated and his alleged ownership is destroyed.

The prescription of ten years, established by Art. 853 of the Civil Code, by which a possession under an erroneous fixing of boundary lines prescribes the title of his opponent who sues for a recti-

PRESCRIPTION.—Continued.

fication of an erroneous boundary line, applies only in an action of boundary, and not in a petitory action, in which the prescription of thirty years alone can be invoked in support of ownership without a title or possession in good faith.

City vs. Shakespeare et als., p. 1033.

PRIVILEGES.

Persons engaged to do the current manual or menial work to keep the grounds and the buildings on the same in proper order have no privilege for the payment of wages which may be due them, which outranks that of the vendor for the discharge of the price of sale due him.

The appropriation of a sum of money, the proceeds of the judicial sale of effects, on which such persons have no privilege, is unauthorized, and is error in the judgment passing on the third oppositions of such claimants.

The World's Exposition vs. American Exposition, p. 1.

Where the surviving widow assumes the payment of all the debts owing by the deceased and takes possession of all the property left by him, and continues a mercantile business, in which the deceased was engaged, in the same manner as when conducted by him, and applies the proceeds of all sales to the payment of the ordinary debts, sufficient to satisfy her privilege, she cannot afterward demand that a mortgage creditor holding in his hands the proceeds of the sale of the mortgaged property, should contribute from that fund enough to satisfy her privilege.

Succession of Cousley, p. 570.

The privilege granted by law in section 128 of the Revised Statutes, in favor of attorneys-at-law for the amount of their professional fees on all judgments obtained by them, cannot be extended so as to affect property which the creditor may have acquired in execution or in satisfaction of the judgment.

When the judgment has been satisfied it ceases to have a legal existence, and hence it cannot be applied to any privilege or other legal purpose.

Luneau vs. Edwards, p. 876.

RECUSATION.

A district judge who has recused himself and appointed a lawyer or judge *ad hoc* to try the recused case, is the only one who has the jurisdiction or authority to appoint some one to fill a vacancy caused by the removal, death, or resignation of the latter.

State ex rel., Ludsling vs. Judge, p. 793.

RECUSATION.—Continued.

When a district judge recuses himself and calls the judge of an adjoining district to come into his court to try the case, the latter may try and determine the cause *after nine months have elapsed*. The law accords to either party in interest the right to have the cause transferred to an adjoining district, if it has not been disposed of within nine months from the date of the recusation; but same is directory only, and does not confer such a right as will become prescribed, if not exercised within time indicated.

McKinzie vs. Tax Collector et al., p. 944.

A judge, who has been recused has no right to take any judicial action in the case in which the recusation has been made.

It does not appertain to him to say that the recusation is not well founded.

He must, immediately, where he does not acknowledge, *proprio motu*, that the recusation rests on good reason, call in another judge, or lawyer, as the case may be, to determine the question on that issue.

It is not until *after* the question has been decided adversely to the party raising it, that the judge can resume and exercise jurisdiction over the controversy.

It ought to be well known that, under article 90 of the Constitution, this court has a general supervision and control over inferior courts, *regardless of amount*, in *all* cases, otherwise proper.

State ex' rel., Nolan et al. vs. Judge et als., p. 994.

REMOVAL FROM OFFICE.

Suit instituted under the original jurisdiction of the Supreme Court, by virtue of Article 200 of the Constitution of this State, by the Attorney General, on the information of fifty citizens and taxpayers, for the removal of the defendant from office, for non-feasance and mal-feasance, favoritism and oppression in office, gross misconduct and incompetency.

Held by the Court :

That the charges of malfeasance and gross misconduct have been fully established against the defendant by the evidence.

That a district judge has no right or authority whatever to employ experts at the expense of litigants, or of a succession, or of a minor, to examine and report on the pleadings or evidence in any record, when such examination is to be made by the judge himself.

That the allowance of the fees to such experts made by this defendant, in the matter of the succession of Quiazzaro, was not only an

REMOVAL FROM OFFICE.—Continued.

act of malfeasance on the part of the judge, but it was also an act of spoliation.

That the minutes of all courts of record throughout the civilized world are uniformly recognized as evidence of the very highest rank, and never allowed to be contradicted by parol testimony, unless perhaps under an allegation of fraud or forgery. In our jurisprudence the minutes of courts have always been clothed with an authenticity which borders an sanctity.

That the minutes of a court are in the nature of a citation and need not be offered in evidence, as they make proof of themselves.

That it is unlawful and unwarranted for a judge to assume the personal administration of a fund belonging to litigants, or to a succession, or to a minor.

That this defendant, having assumed such personal administration of the funds of the Quiazaro Succession, has also assumed, in consequence, the burden of proving clearly that a proper and lawful use has been made of those funds; that he has completely failed in such proof and accounting; that his acts in the premises show glaring malfeasance on his part.

Duties of the minute clerk examined and defined.

Strong condemnation by the Court of the customary omission of defendant to cause the minutes of his court to be read aloud by the clerk, and to be signed by himself.

That it is not necessary, under Article 200 of the Constitution of this State, for the purpose of the removal of a district judge, that the nonfeasance, or malfeasance, or gross misconduct charged, should, as a condition precedent, be proved to be criminal or corrupt.

Malfeasance defined.

That it was the intention of the framers of the present Constitution of this State to leave the application of Article 200 to the sound and legal discretion of the Supreme Court; and that, by the decree of the latter, none but able, conscientious and irreproachable judges should be retained on the Bench in the State of Louisiana.

Difference between the provisions of the Constitution of the United States and the present Constitution of the State of Louisiana, for the punishment of impeachable offences.

State ex rel., Attorney General vs. Lazarus, p. 142.

A sheriff is responsible for all loss or damage resulting from the malfeasance or gross misconduct of his deputy, but such malfeasance misconduct of the deputy does not subject the sheriff to the pun-

REMOVAL FROM OFFICE.—Continued.

ishment of removal or suspension from office unless he has encouraged or sanctioned the delinquency of his deputy.

The deputy himself can be punished for his delinquencies by fine and imprisonment, and prohibited from acting in said capacity.

State ex rel., Attorney General vs. Budd, p. 232.

RES JUDICATA.

In a proceeding by rule to enforce the provisions of a judgment rendered in a partition proceeding, and to compel the completion of an adjudication of property which entered into the partition proceeding and judgment, which judgment has become final, this judgment cannot be changed, altered or amended by the judgment on the rule. It constitutes *res adjudicata*.

Gerrish vs. Pope, p. 517.

The principle that, in an action of nullity, the judgment attacked as null cannot be pleaded as *res adjudicata*, does not apply where the grounds of nullity asserted had been considered and validly determined by that judgment itself.

In this case, not only were the grounds of nullity now charged considered and determined in the original judgment, but the same grounds were afterwards presented on an exception of nullity on which issue was joined, and which was again determined adversely to the exception. This operates *res adjudicata* against the present action, which is brought by the same parties (in law), against the same judgment, and on the same grounds.

Heirs of Hoggatt vs. Administrator et al., p. 976.

REVIVAL OF JUDGMENTS.

The ten years within which a suit to revive a judgment must be brought, begin to run from the *rendition* of such judgment.

This means: Its *signature* by the lower judge, or its finality on appeal, whether when the last judicial day allowed for asking a rehearing expires, or when such rehearing is refused.

Particularly is such the initial point for prescription, when the judgment sought to be revived, is the first rendered by the appellant's court, in place of that rendered by the lower court.

The finality of such judgment on appeal is not to be computed from the date of the signature of the reversed judgment in the lower court.

When ten calendar years appear to have run from the finality of the

REVIVAL OF JUDGMENTS.—Continued.

judgment, the burden is on the plaintiff to show that the suit to revive was instituted within the delay.

A mere omission to do so does not justify a judgment declaring the action prescribed.

Where it is clearly in the power of a plaintiff thus omitting or failing, to adduce proper proof, it would serve no useful purpose to dismiss his suit. The case ought to be remanded.

Scott & Co. vs. Seelye, p. 749.

REVOCATORY ACTION.

The effect of a judgment in favor of the complaining creditor in a revocatory action, is to annul the contract assailed in so far as its effects concern him. C. C. Art. 1977.

In case the contract thus avoided be a sale, the effect of a judgment is to subject the property thereby transferred to the execution of the judgment held by the creditor against the vendor. But beyond that, the title of the vendee is not affected or impaired, and it does not revert to the original vendor.

Hence the succession of the vender, whose sale to another has been avoided in a revocatory action, is not thereby reinvested with title to such property, and the adjudicatee at a succession sale of property thus situated cannot be compelled to accept such title.

Succession of Schultz, p. 505.

In a suit by a creditor for the nullity of a transfer by his debtor to the latter's wife, of property, as a *dation en paiement* of her paraphernal funds, on the grounds that such transfer is simulated and fraudulent, proof on the part of the wife that there was actual consideration, although inadequate, is conclusive against the allegation of simulation.

The attack of the transfer as a fraudulent preference over the husband's creditors is the revocatory action of our code, and is barred by the prescription of one year. *Renshaw vs. Dowty, p. 608.*

A contract by which an insolvent debtor, in fraud of creditors, transferred to a creditor in satisfaction of his debt, a number of notes and accounts, and paid the difference in cash, if subjected to revocation, must be revoked as a whole, and the payment made, though of a "just debt in money," being part and parcel of the illegal contract must fall with it.

The evidence establishes that part of the money delivered consisted of the identical bank notes and cash which the debtor, in his capacity as treasurer of a corporation, had received from stockholders

REVOCATORY ACTION.—Continued.

thereof, and which he had set aside in a particular drawer by itself as the property of the corporation. Held, as to such moneys that they were the property of the corporation, which the treasurer was bound to deliver, and the corporation had the right to receive, and that such delivery is not subject to revocation.

Under Article 1977, C. C., a creditor cannot, by the simple fact of being the first to bring a revocatory action, exclude other creditors from joining in the attack and participating with him in the benefits of the judgment.

Bank vs. Cotton Press Company et als., p. 834.

SALE.

A simulated sale is no sale. It is an absolute nullity. So where such pretended sale is even in the form of an authentic act or of a judicial sale, if it is accompanied by a counter-letter, or the possession of the alleged purchaser is precarious or not continuous and complete, a judgment creditor of the vendor may disregard the apparent title and seize directly, and if enjoined may, under proper pleadings, show by written or oral evidence the simulation charged.

Carter et al. vs. Farrell et al., p. 102.

A dealer in paints of a particular quality who sells the same with the formal condition that they shall be used as they come from the manufacturers and be properly put on, and who subsequently discovers that one to whom he has sold such paints has put in the same foreign ingredients—oil and turpentine—is not, as a rule, liable in damages for refusing to sell further to such purchaser and for stating that he had not kept his agreement.

Particularly is such the law, when the statements are made without malice, under the firm belief that they are true and for self-protection, to the party himself, or to parties interested entitled to an information.

Lynch vs. Febiger, p. 336.

A dealer in petroleum fluids, who fills an order for a barrel of "Puroline" by delivering a barrel of "Gasoline" of 74° gravity, and brands the package as "Puroline," is not guilty of deception, as the difference in the dangerous character and in the use of the two fluids is hardly measurable or perceptible; and the package containing the stamp "explosive and dangerous," placed thereon by the inspector under the provisions of Act No. 37 of 1877, regulating the mode of inspecting coal and petroleum oils or fluids.

In a case of a fire originating from a package of such goods from which

SALE.—Continued.

oil is drawn in the night by persons who enter the room with a burning lantern, the dealer will not be held responsible for the damages resulting from such fire.

Socola vs. Chess-Carley Company, p. 344.

One who sells an immovable to another, with full warranty and afterward has conveyed to him an outstanding interest in the property, thereby cures the defect in his original title, which enures to the benefit of his vendee.

If such outstanding interest is conveyed to the wife of the vendor, in community with him, it is the same as if conveyed to himself. Neither the wife or any vendee of his acquires any title to this outstanding interest in the property.

Jacobs vs. Yale & Bowling, p. 359.

A *bona fide* sale, with the pact of redemption, ostensibly valid and duly recorded, passes title of ownership, and cannot be attacked collaterally by a creditor of the vendor, who must be relegated to a direct action.

Under the charge of simulation, such creditor cannot be permitted to show that the transaction ought to be avoided on other grounds.

Evidence adduced and received only as going to the effect must be restricted to the issue of simulation.

Lawler & Huck vs. Cosgrove, p. 488.

If, prior to a judicial sale, in enforcement of a first mortgage and vendor's privilege ranking all others on the property, an agreement is made between the seizing creditor and debtor, that the former will bid off the property if not run up above the amount of his debt; and that, in such case, he will resell to the debtor, or any one named by him, at an agreed price, within a delay fixed, such an agreement is lawful and does not prevent the title under such sale from actually passing to the purchaser, subject to the right of redemption, and it extinguishes all mortgages on the property; and judicial mortgages will not reattach to the property unless it is returned to the ownership of the debtor.

When, in such case, the property is resold to a third person named by the debtor, for a price actually paid by such purchaser, the fact that, in a contemporaneous writing, it had been agreed between this purchaser and the original owner that the former would resell to the latter or any person designated by him, on terms and conditions therein stipulated, does not prevent the purchaser from be-

SALE.—Continued.

coming the real owner, subject only to the right of redemption on the terms agreed. Therefore, judicial mortgages against the original owner did not attach to the property in the ownership of such purchaser.

When, subsequently, the original owner ceded his right of redemption to another, and the purchaser, with the consent of such former owner, sells the property outright to the person so designated, for a price partly paid in cash and the balance in a note secured by mortgage, without reserve of any right of redemption expressed in the deed or in any writing whatever, neither the original owner nor his creditors can attack such title or mortgage except on grounds of fraud, which are not established in this case.

Davis vs. Citizens' Bank et al., p. 523.

In a contract of sale on terms of credit, breach of the resolutory condition on the part of the buyer does not arise till the term of credit has expired, before which time an action to annul on this ground will not lie.

Fraud, however, when established, vitiates the contract *ab initio* and is not dependent, for its assertion, upon the expiration of the term of credit.

A representation of solvency on the part of the buyer is ordinarily implied in every application to purchase goods on credit; but it requires a wilfully false statement to that effect, as a *fact* and not as a mere *opinion*, to vitiate the contract; or else it must appear that, at the date of the purchase, the buyer contemplated a swindle and did not intend or expect to pay for the goods.

In this case no fraud is established such as to vitiate the sale, and the action of plaintiff to annul the sale before expiration of the terms of credit and sequestering the goods was premature.

The sequestration having been wrongfully issued, defendant was entitled to actual damages which are assessed according to the peculiar circumstances of the case.

Milling Company vs. Lawler, p. 572.

Where an act of sale is attacked as simulated the attacking party is not debarred from proving its simulation, and committed to the truth of its stipulations, by the offering of the act in evidence without reservation. Where the vendor remains in possession and control of the property after the execution and date of the written transfer the sale will be presumed to be simulated.

Cole and Husband et al. vs. Cole et al., p. 878.

SALE.—Continued.

In an action to annul a sale on the ground of lesion beyond moiety of property previously donated by the seller to the vendee, the plaintiff puts himself out of court by alleging that the price mentioned in the act, though one-eleventh of the value of the real estate at the time, was not paid, and by not alleging error, imposition or fraud on the part of the vendee in withholding the amount.

In such cases, the parties must be left in the condition in which they voluntarily placed themselves at the date of the last conveyance. The transfer was not prohibited by law. The parties had a right to enter into the contract by whatever name they may have designated it.

The act was translatif of real estate, and has served as a vehicle to pass the title from the one to the other.

Mc Williams vs. Mc Williams, p. 924.

SEQUESTRATION.

A writ of sequestration is issuable by a creditor having a special mortgage when he apprehends that the mortgaged property will be moved out of the State before he can reap the benefit of his mortgage, and therefore the propinquity of the property to the border of another State is an element to be considered in estimating the strength and reality of his apprehension.

It is not what a debtor really intended to do that is to be considered in determining whether a sequestration has been lawfully sued out, but whether he was doing and saying that from which his creditor might apprehend the existence of an intention to do the hurtful thing that a sequestration would prevent.

A mortgage creditor who has waited longer for payment than he stipulated to wait, whose debtor has defaulted on the payment of several of the notes, and who proceeds to a foreclosure only on the eve of the last-maturing note, is not liable in damages when he has used conservatory process to detain the property in the custody of the law under circumstances justifying it.

Duncan vs. Wise, p. 74.

Mandamus does not lie to compel a district judge to dissolve a sequestration unconditionally, on bond by plaintiff, where the property sequestered has already been attached.

Coupling the dissolving order on bond with the provision that it shall not be construed as a release of the property from the attachments previously levied upon it, was a wise and judicious reserve.

An *ex parte* dissolution of a sequestration on bond does not affect at-

SEQUESTRATION.—Continued.

taching creditors who are not parties either to the suit in which the writs issued or to the motion to dissolve.

A restraining order will not issue where the party seeking it may obtain relief by other adequate remedy in the lower court.

State ex rel. Jaffray & Co. vs. Judge, p. 1108.

SERVITUDES.

The servitude of drain through a canal is continuous and apparent and may be acquired by possession of ten years.

When such a servitude is established in favor of an estate owned by a partnership over a contiguous estate belonging to one member of the partnership, the possession by the firm for ten years will sustain the ownership. In absence of any stipulation to that effect, such right will be presumed to be a real servitude.

Levet vs. Lapeyrollerie, p. 210.

There is no division of ownership of a wall in common; the whole belongs jointly and in indivision to the neighboring proprietors without reference to the dividing line between the lots.

In absence of evidence to the contrary, the whole wall, with its flues and appurtenances, as originally constructed, is presumed to have been so constructed by common consent, at the common expense and for the common benefit of both proprietors.

The circumstance of a flue being constructed in the lower stories of the wall in that half of it which is on the side of one property, does not establish exclusive ownership in the flues, or destroy the presumption that it was intended for the common use and benefit of both, particularly when the extension of the flues in the upper story, without which it would be useless, lies in the centre of the wall.

Nothing in the facts and conditions established by plaintiffs in this case suffices to destroy the legal presumption of the common right of his co-proprietor to use the flue in question, especially when reinforced by the fact that the latter has actually used it from a period whereof the memory of no witness in the case runneth to the contrary.

Weill vs. Baker, Sloo & Co., p. 1102.

SUCCESSIONS.

If an universal legatee shall marry a second time, having children of a preceding marriage, he or she cannot, in any manner dispose of the property given or bequeathed to him or her by the deceased spouse.

The property becomes, by the second marriage, the property of the

SUCCESSIONS.—Continued.

children of the preceeding marriage and such legatee only retains its usufruct.

The rulings of this Court in *Bird vs. Succession of Jones*, 5 Ann. 644; *Wells vs. Wells*, 30 Ann. 936; *Succession of Frazier*, 35 Ann. 382; *Succession of Townsend*, 37 Ann. 408, and *Succession of Townsend vs. Sykes*, 38 Ann. 859, are unreservedly affirmed.

Mere illegality in the appointment of an administrator, executrix or undertutor will not vitiate the acts done under it. The *acts* of an officer, in such case, are valid, although he should have been illegally appointed.

It was discretionary with the probate judge, on the application of the executrix to cause the property ordered to be sold to be re-examined and re-appraised; as it may well be that a former appraisal was excessive, or the value of it had diminished since it was made.

The purchaser at a sale, made at public auction, under an order made by a judge having jurisdiction of the succession, is not bound to look beyond such decree, in order to ascertain its necessity.

He is bound only to ascertain that the judge had jurisdiction; and finding that he had, the *truth* of the record, in other respects, may be assumed.

Informalities in the appointment of an undertutor, in the composition of a family meeting recommending a sale of succession property to pay the ancestor's debts, and in which minors have a residuary interest; in the method of proving the existence of debts of deceased to the judge granting the order of sale—and all other irregularities in proceedings antecedent to and resulting in the probate sale, are prescribed by five years. R. C. C. 3543.

Webb et al. vs. Keller et al., p. 55.

When in a contested provisional account, the amount and rank of various charges and privileged claims have been settled by final decrees of court, the same claims cannot be again contested when presented in a final account of distribution.

The administrator of an insolvent succession, left in possession of a fractional part of a sugar plantation with a growing crop on it, which has been sold to a person who fails to comply with his bid, and against whom he has taken proceedings for a sale *a la folle enchere*, is sustained, under the particular circumstances of this case, in making an arrangement with the purchaser of the rest of the plantation, including the stock, implements and sugar-house,

SUCCESSIONS.—Continued.

by which the latter takes charge for his own account of the crop and property under the obligations to pay the taxes, keep the land, fences, ditches and improvements in order and repair, and to so plant and cultivate the land as to keep it, at all times, as nearly as possible in the condition in which it was at date of sale, and in rediness to respond to a decree for a sale *a la folle enchere*.

Under the circumstances of the case, the administrator will not be held liable for the crop or for the rents and revenues.

Succession of Triche, p. 289.

The appointment of a dative executor on the filing of a petition for the same and before any advertisement and expiration of the delay for opposition, is unwarranted. It can be made only *after* publication and in the absence of opposition.

An order of sale obtained by a dative executor thus appointed, is procured by one having no authority to ask it and must be rescinded. A plaintiff must make his case legally certain. It is not sufficient to make it morally probable.

The Court does not pass on the capacity of plaintiffs to sue at the present stage for recovery of debts due the succession.

The contingent appointment of a dative executor, on the condition that public notices shall be given and that it be not opposed, is of no avail, where, after the advertisements have been published, though the application has not been opposed, the appointment is not confirmed by a subsequent formal decree conferring it on the petitioner.

Pfarr & Kullman et al. vs. Belmont, p. 294.

As a rule, a universal heir or legatee, who accepts unconditionally a succession which he inherits, is bound personally for the debts thereof; but not for the special legacies, the discharge of which is restricted to the *residue* of the estate.

The suit for the nullity is the foundation for the payment of the legacy. The judge of the division to which suit is transferred cannot maintain jurisdiction over the demand in nullity, and relegate that for the payment of the legacy to the division whence the suit came; the less so, when the plaintiff acquiesces in the transfer and invokes the jurisdiction of the court, in the last division, for a determination of the *merits*.

An action for the nullity of succession proceedings and for the payment of a legacy involves demands intimately connected and blended. It is properly brought against the duly recognized uni-

SUCCESSIONS.—Continued.

versal legatee alone, when the executor is dead; where there is none; where there is no need of appointing one, and when the executor would have no interest in maintaining the proceeding attacked. The judgment to be rendered will bind all parties and constitute *res judicata*.

The executor is not a necessary defendant. The universal legatee duly recognized being the only one concerned in upholding the proceedings levelled against, is properly made the *sole* defendant.

Pironi vs. Riley, p. 302.

When two beneficiary heirs are contestants for the administratorship of the ancestor's succession, in the choice of the administrator a large discretion is vested in the judge who makes the appointment and, unless manifestly wrong, his conclusion will not be disturbed.

Under article 1043, he must select the "most solid."

To determine this question of "solidity," the judge should look to the business capacity, experience, property and integrity of the respective applicants.

If the succession is insolvent or its solvency questionable to the heir who is a creditor, the preference should be given—other things being equal—to the one who is the debtor.

As a general rule, the judge should be guided to some extent in making his appointment by the preferences of the other heirs and creditors.

Where an inventory has been taken under an order of the court, and it is filed therein, there is no warrant for the clerk on an *ex parte* application of one of the heirs to order the taking of another inventory.

The inventory first taken and filed was properly recognized in the true inventory of the succession. *Succession of Chaler, p. 308.*

In a rule taken by an heir to be put in possession of an estate, and for other purposes, any irregularity in such proceeding, though urged in oral and written argument, will not be considered in the absence of pleadings raising such issues, save in exceptional cases.

An heir is not entitled to be put into possession of certain funds in the hands of an administrator, when it appears that this fund is in litigation between the succession and another claimant. The heir cannot receive it until the litigation is terminated, though otherwise he might be entitled to it. *Calhoun vs. McKnight, p. 325.*

SUCCESSIONS.--Continued.

The widow of a deceased party by second marriage will not be allowed to claim, as administratrix, either in her own right, or on behalf of creditors, money expended by the husband for the maintenance and education of his children by a first marriage, when it appears that he made no such charge when living, and had never intended to make it; that the first community was solvent, that he was solvent during the existence of the second community, and at the moment of his death, and that the creditors whose rights are championed by the administratrix, were not creditors of the first community, and only became creditors of the deceased in due course of commercial dealings, immediately preceding his death. Affirming decision in the succession of Boyer, 36 Ann. 506.

Succession of Applegate, p. 400.

Heirs who intervene in a succession proceeding as opponents to an account filed by the executor and ask therein for an order directing the executor to pay over the money to them, thereby recognize the existence and validity of the succession proceeding and cannot set up its nullity as a ground for relief.

Succession of Harris, p. 443.

The executors of a will who deliver possession of an immovable to the usufructuary under the will, legally lose seisin of the property, which does not revert to the succession if the usufruct expires before the functions of the executors have expired; the usufruct then becomes incorporated with the ownership. Hence, in such a case the legatee of the naked ownership of the immovable cannot demand delivery of his legacy of the executors.

Succession of Piffet, p. 466.

An opposition which charges that a claim placed on the tableau was extinguished, is equivalent to a plea in compensation, which admits the debt and throws the burden of proof on the opponent.

When an account allows no interest on a claim and the account is not opposed to ask the same, the party in whose favor the *item* was tabulated cannot demand such interest, on appeal.

This Court will not pass on issue presented in argument only, and which were not formed by the pleadings below.

Succession of Rhodes, p. 473.

In a contest over the claim of a survivor for the marital portion out of the succession of the surviving husband or wife, the plea of prematurity is not good if the judicial demand for the portion is made

SUCCESSIONS.—Continued.

after the presentation of a final account of administration by the executor, although circumstances subsequently occurring may prevent an absolute decree fixing the precise amount of the marital portion.

If the survivor is in necessitous circumstances independently of the legacies which the deceased has left him, he is not debarred of his right to claim the marital portion, but in such a case he is bound to include in this portion what has been left to him as a legacy by the deceased. C. C. Art. 2382.

The indebtedness which the survivor owed to the deceased, and from which he has been released and discharged by the will, is not a legacy within the meaning of Art. 2382, to be deducted from the portion accruing to the survivor.

The right to claim and receive the marital portion is transmissible by inheritance, if the surviving spouse, who had made judicial demand therefor, dies before rendition of judgment on his demand.

Succession of Piffet, p. 556.

A commission merchant holding funds as the proceeds of products owned by a deceased person, holds the same in trust, and cannot legally pay them to any other but the duly qualified representative of the succession.

A payment to any other will not discharge him from his legal responsibility therefor.

The opposition of one of these heirs to an account of administration is sufficient to submit the whole account to judicial test, although the other two heirs may have approved of the same. In such a case parties in interest, whose claims may be rejected, have their recourse against the heirs who have recognized their claim in due course of administration. It is no longer an open question in our jurisprudence that an executor or administrator cannot, at the risk of the succession, carry on planting operations and contract, in so doing, debts so as to bind the estate.

In such cases the administrator, who has not tried to lease the succession property, will be held liable for the rental value of the same.

Errors of judgment, not amounting to malfeasance, are not sufficient causes for the removal of an administrator, or to authorize one of his securities to withdraw from his bond.

Succession of Sparrow, p. 696.

The fees of an attorney for services rendered in the defense of suits

SUCCESSIONS.—Continued.

against a tutor, on account of debts of a minor's parents, are a legitimate charge against the succession of the parents.

When the proof shows that an administrator has used an honest endeavor to protect the interest of the succession and the heirs, the maxim *contra spoliatores omnia presumuntur* does not apply.

Unless it has been shown that a succession representative has neglected his duty and has not used an honest effort to collect rents, he cannot be mulcted in damages thereof, but he *must* account for *all* he has received.

Curator vs. Succession of McIntosh, p. 836.

A proceeding taken by an interested party, under the provisions of R. S., sections 10 and 3698, on an administrator to show cause why he should not furnish additional security upon his bond, may be by rule.

But with the demand for this *specific* relief, that for the destitution of such fiduciary cannot be cumulated. The latter can only be accomplished by means of suit in the ordinary form.

Block vs. Bordelon, p. 872.

Though an heir accept a succession that has fallen to him, with the benefit of inventory, yet, if he treats the property as his own, and offer it for sale, or make sale thereof, he makes himself an unconditional heir, and binds himself for the payment of the debts of the deceased.

An heir, having only a residuary interest in the succession of an ancestor, has no just cause of objection to a probate sale made to pay debts, if the same is insolvent. He should have paid the debts before making complaint.

If heirs and creditors remain silent and inactive, and permit the property to pass by a public sale into the hands of strangers, purchasers and third persons accepting title from them are fully protected.

Benedict vs. Bonnot et al., p. 972.

A natural tutrix, administering in that capacity the succession of her husband, is entitled to administrator's commissions.

Succession of Forstall, p. 1052.

SURETYSHIP.

A surety on a release bond in an attachment proceeding against a resident, is concluded by the judgment against the defendant, if regularly rendered.

SURETYSHIP.—Continued.

Such surety, on a rule to hold him liable for such judgment after return of an unsatisfied execution, has no right to set up defenses which do not avail the judgment itself.

Fusz & Backer vs. Trager & Noble, p. 292.

One signing his name on the back of a piece of commercial paper as the cashier of a bank cannot be held as surety thereon in case of its non-payment, if he was at the time of signing duly authorized to sign as such.

State National Bank vs. Singer, p. 813.

Principal cannot urge that he has not taken the oath of office, neither can his sureties; and the law will presume that he did take the oath when he has performed other requirements of the law.

Persons signing an official bond admit the capacity of the principal, and cannot afterward deny his capacity.

Persons signing an official bond as sureties waive defects of form. As they bind themselves so shall they be bound. Where no separate book is kept, registry in the mortgage book is sufficient.

Sureties cannot complain of any act of omission or commission, which does not affect their rights as against the principal.

Sureties cannot set up ineligibility of their principal when he has acted in the official capacity mentioned in the bond.

School Directors vs. Judice et als., p. 896.

TAXES.

In all judicial partitions by licitation, or in kind, the liens, privileges and mortgages, such as are established by the Civil Code, which are recorded against the share of one of the co-proprietors or co-heirs, by the mere fact of the partition, attach to the share of property or proceeds allotted to him, and are of right dissolved as to the shares of the other heirs or co-proprietors.

The foregoing rule is inapplicable to a licitation of property held in joint ownership when it is adjudicated to a party having previously no interest in it. Such an adjudication is not in legal intentment a partition, but a sale, and does not affect the rights of the mortgage creditors.

Taxes are not debts in the ordinary acceptation of the term, but contributions required of the citizen for the support of the government, and their assessment does not constitute a technical judgment, against which set off can be pleaded; nor are they contracts between party and party, either express or implied. The assessment and collection of taxes is a legal proceeding, but not judicial process.

TAXES.—Continued.

All licenses or taxes assessed in the years 1870 and 1877 inclusive are a lien and privilege on the property of the person assessed, "any alienation thereof or incumbrance thereon notwithstanding," until some are paid; and shall be paid "by preference to all mortgages and incumbrances."

A sale of property, against which liens, privileges and mortgages exist and are recorded in favor of the State for taxes or licenses, remain undisturbed thereby, and are not extinguished against the property, and not transferred to the proceeds of sale. This is true, whether it be a judicial sale or extra-judicial.

Morris et al. vs. Lalaurie et als., p. 47.

In case property subject to liens, privileges and mortgages in favor of the State for taxes, has been surrendered and sold by the insolvent, and said liens, privileges and mortgages canceled by judgment of court, and the same referred to the proceeds, the tax collector has authority to direct claim for the proceeds, and to assert it judicially, if not allowed otherwise.

A tax collector has the right and capacity to stand in judgment in injunction suits, and even to institute suits, in the name of the State, whenever the taxes cannot be collected otherwise, or when it is evident a seizure would occasion an injunction, or other unnecessary delay.

The provisions of the Civil Code under the title of prescription do not apply to the limitation prescribed by statute in respect to the collection of the revenue.

Laws fixing the term within which actions must be brought upon pecuniary obligations, do not affect the rights of the State, unless she, in terms, includes herself.

Revenue laws are *sui generis*, and are not to be assimilated to those on any other subject. State ex rel. Jackson vs. Recorder, 34 Ann. 178, and Davidson vs. Lindoff, 36 Ann. 765, affirmed.

Tax statutes have no retrospective effect or operation unless this purpose is announced specifically in the act.

The imprescriptibility of city taxes assessed prior to 1877, as recognized in Davidson vs. Lindoff, is also applicable to State taxes assessed during the same year.

Taxes assessed under the revenue law of 1877 are barred by the lapse of three years; and the lien and privilege securing same cannot, therefore, be enforced against the property assessed in the hands of third persons.

Reed vs. Creditors, p. 115.

TAXES.--Continued.

Tax bills in the usual forms are presumptive evidence of the assessment and of the claim.

A taxpayer cannot complain of the disparity between the bills and the assessor's certificate, where the amount on which the tax is claimed is less than that mentioned in the certificate.

Payment by preference out of the proceeds of an insolvent's moveable property, of taxes on personal property, is rightfully ordered when the proceeds of such property does not include those of his real estate.

Article 177 of the Constitution dispenses from the registration of liens on moveable property. The payment of taxes on personal property is secured without registry.

Mullan vs. His Creditors, p. 397.

Property used exclusively for a commercial college, such as "Blackman's Commercial College," in New Orleans, is exempt from taxation under Act 207 of the Constitution. The character of such property as used exclusively for school purposes, is not affected or impaired by the fact that the owner thereof, who is the principal of the school and one of the teachers therein, resides in the building with his family.

Teachers and necessary servants who occupy rooms in a college building on the premises, are necessary adjuncts to such an institution, and the property does not thereby cease to be used exclusively for a college, within the meaning of the Constitution.

Blackman vs. Tax Collector et als., p. 562.

A law of a State cannot impose license taxes upon persons passing through, or coming into it merely for a temporary purpose, especially if connected with interstate commerce; nor can it impose such taxes upon property imported into it from abroad, or from another State, and not yet become part of the common mass of property therein.

A State cannot enact any law or establish any regulation affecting interstate commerce. Same would be an unauthorized interference with the power given to Congress over the subject.

Interstate commerce cannot be taxed at all by a State statute, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State.

TAXES.—Continued.

The negotiation of sales of goods, which are in *another State*, for the purpose of introducing them into the State, into which said negotiation is made, is interstate commerce.

That part of Sec. 12 of act 101, of 1886, which declares that "all traveling agents offering any species of merchandise in this State for sale, or selling same by sample, or otherwise, shall pay . . . a license of \$50," is repugnant to paragraph three, section 8, article 1, of the United States Constitution, which declares that Congress shall have power to regulate commerce among the several States, and same is unconstitutional, and in so far as such traveling agents may represent principals domiciled in other States are concerned, the tax is null and void.

Simmons' Hardware Company et al. vs. Sheriff, p. 848.

A party resisting the enforcement of a special tax as illegal, cannot avail himself of the time that has elapsed during the pendency of the suit to prescribe against it.

Notwithstanding a private corporation is *organized* for the double purpose of building a railway and erecting a cotton compress, the former a *public improvement* and the latter a *private enterprise*, a special tax voted in its behalf, in aid of the construction of the former *alone*, is valid.

In the contemplation of Article 242 of the Constitution, and Act 84 of 1880, the property tax payers who are entitled to vote on the levy of a special tax for the purposes therein mentioned, are only those who are entitled to vote at a general election under the election laws of the State.

An ordinance of a municipal corporation that has been actually passed by the council, in the exercise of its authority, and in accordance with all legal requirements, and has been duly promulgated and passed into execution, is not invalid because it is not signed by the mayor or president of the council.

An ordinance ordering a vote of the taxpayers on the question of a special tax, though supplemented by an amendment after it is advertised, will not be vitiated thereby; provided, the amendment does not materially affect its essential parts.

If the *rate* of taxation be specified in the petition and ordinance, explicitly enough to fully advise the taxpayers of the object aimed at, it is sufficient. *McKenzie vs. Tax Collector et al.*, p. 944.

TAX COLLECTORS.

The costs of advertising real estate for sale to pay taxes due thereon, under the provisions of Act 82 of 1884, are entitled to be paid with preference by the tax collector out of the first collections realized in the enforcement of the act, unless where the State has failed to give an absolute title, or, that given has been duly annulled.

Tax collectors have no right to refuse such payment, when the State has not made default, or the title given has not been annulled.

Tax collectors cannot be subjected to responsibility for carrying out the positive mandates of valid laws.

State ex rel. Daily States vs. Tax Collector, p. 33.

TAX SALES.

A tax sale is not necessarily cancelled and annulled by a certificate of redemption issued under the provisions of section 69 of Act 42 of 1871, as such certificate is intended merely to redeem immovable property from a previous forfeiture to the State.

Under that section the privilege of redemption is extended to any person interested, and this includes the purchaser at the tax sale.

If the certificate is made in favor of the original owner, it is competent for the purchaser to show that he made the payment out of his own funds with the intention to retransfer the property to the former owner, on condition of reimbursement within a given time by the latter.

An action to invalidate a tax sale made under a law of the State is barred by the prescription of three years. *Barrows vs. Wilson*, 39 Ann. 403, affirmed. *McDougall vs. Monlezun et al.*, p. 1005.

USUFRUCT.

The usufructuary is bound to keep the things of which he has the usufruct, and take the same care of them as a prudent owner would; and he is answerable for such losses as are produced from his default or neglect.

He is liable for all the expenses for the preservation of the property and the payment of taxes. *Mehle et al. vs. Bensei*, p. 680.

WILL.

A nuncupative will under private signature need not be shown to have been dictated by the testator, when written out of the presence of the witnesses.

The affirmative answer of a testator to a question: Whether the paper contains his last will? amounts to the presentation prescribed by law. The presentation need not be manual, or more formally made.

WILL.—Continued.

Witnesses who declare that they saw the testator sign the paper purporting to be his will, and that they themselves signed it; and who further declare that they recognize their signatures to the same instrument, virtually testifying that they recognize the signature of the testator to it.

The law which provides for the drawing up of a *procès verbal* of probate of a will, is not mandatory, but merely directory. Apparent deficiency in its recitals cannot have the effect to vitiate the probate, but may be supplied by legal presumption or by additional proof in a suit contesting the will.

Pfarr & Kullman et al. vs. Belmont, p. 294.

A will executed in the country, and purporting to be a nuncupative testament, under private signature, in the presence of *three* witnesses only, one of whom did not understand the language in which the testator expressed himself and the will was drawn up, is invalid.

The circumstance that, while it was being dictated, what was then said had been translated to that witness, does not supply the want of knowledge of the language in the latter.

The law disqualifies as a witness to a testament a person who is deaf. A witness who does not understand the language in which a will is dictated and written down is intellectually deaf, and practically, is as though he had not attended at all.

A nuncupative will, under private signature, executed before two competent witnesses only is invalid.

Succession of Dauterive, p. 1092.

